

Inter-American Court of Human Rights

Case of Gutiérrez-Soler v. Colombia

Judgment of September 12, 2005

(Merits, Reparations and Costs)

In the case of *Gutiérrez Soler*,

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

Sergio García Ramírez, President;
Alirio Abreu Burelli, Vice President;
Oliver Jackman, Judge;
Antônio A. Cançado Trindade, Judge;
Manuel E. Ventura Robles, Judge;
Diego García Sayán, Judge; and
Ernesto Rey Cantor, Judge *ad hoc*;

also present,**

Emilia Segares Rodríguez, Deputy Secretary,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 29, 31, 53(2), 55, 56, 57 and 58 of its Rules of Procedure (hereinafter "the Rules of Procedure"), delivers the following judgment.

I

INTRODUCTION OF THE CASE

1. On March 26, 2004, pursuant to the provisions of Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights

* Judge Cecilia Medina-Quiroga informed the Court that, for reasons beyond her control, she would be unable to be present at the deliberations and sign this judgment.

** The Secretary of the Court Pablo Saavedra-Alessandri informed the Court that, for reasons beyond his control, he would be unable to be present at the deliberations and sign this judgment.

(hereinafter "the Commission" or "the Inter-American Commission") filed before the Court an application against the Republic of Colombia (hereinafter "the State" or "Colombia") originating in petition No. 12.291, received at the Secretariat of the Commission on November 5, 1997.

2. The Commission filed the application, for the Court to determine whether the State had violated the rights in Articles 5(1), 5(2) and 5(4) (Right to Humane Treatment); 7(1), 7(2), 7(3), 7(4), 7(5) and 7(6) (Right to Personal Liberty); 8(1), 8(2)(d), 8(2)(e), 8(2)(g) and 8(3) (Right to a Fair Trial); and 25 (Right to Judicial Protection) of the Convention, in relation to the obligation set forth in Article 1(1) (Obligation to Respect Rights) of said treaty, to the detriment of Wilson Gutiérrez-Soler. In the application, the Commission pointed out that "the [alleged] deprivation of personal liberty and inhumane treatment of Wilson Gutiérrez-Soler was perpetrated by a State agent and a private individual (a former State agent himself) who[,] with the sufferance of government officers[,] used the means available to the Public Force to arrest the [alleged] victim and to try and exact from him a confession using torture, for the alleged commission of a crime – in relation of which the domestic courts eventually found him innocent." With respect to local action, Mr. Gutiérrez-Soler "[allegedly] exhausted all domestic legal remedies in his pursuit of justice and relief;" nevertheless, his complaints were dismissed. To this respect, the Commission stated that "[t]he [alleged] impunity of the those responsible and the lack of reparation ten years after the facts, have not only destroyed Gutiérrez-Soler's life project and that of his family, but have also adversely impacted on their safety and, in some cases, forced them into exile."

3. Furthermore, the Commission asked the Inter-American Court to order the State, under Article 63(1) of the Convention, to take the measures of reparation detailed in the application. Lastly, the Commission requested that the Order of the Court the State to pay the costs and expenses arising from the domestic legal proceedings and from the proceedings under the Inter-American System.

II COMPETENCE

4. The Court has jurisdiction to hear the instant case pursuant to Article 62(3) of the Convention as Colombia has been a State Party to the American Convention since July 31, 1973 and accepted the contentious jurisdiction of the Court on June 21, 1985.

III PROCEEDING BEFORE THE COMMISSION

5. On November 5, 1999, the Inter-American Commission received a petition filed by the *Corporación Colectivo de Abogados "José Alvear Restrepo"* (Lawyers' Institutional Group "José Alvear Restrepo") (hereinafter "the petitioners"), which was processed under number 12.291.

6. On November 14, 2001, during its 113th Session, the Commission adopted Admissibility Report No. 76/01, by which it concluded that it had "jurisdiction to hear the petition filed by the petitioners for an alleged violation of Articles 5, 8 and 25, and Article 1(1) of the Convention," and decided to "declare the admissibility of

the instant case in relation to the alleged violation of Articles 5, 8, 25 and 1(1) of the American Convention.”

7. On May 29, 2003, the Inter-American Commission, at the petitioners’ request, adopted precautionary measures in favor of Ricardo Gutiérrez-Soler, brother of the alleged victim, “who [would have] endured a series of threats and harassments, and an attempted bomb attack, allegedly aimed at silencing the complaints filed by his next of kin against certain individuals, including Government officers, [allegedly] associated with the commission of the acts of the instant case.”

8. On October 9, 2003 the Commission, according to Article 50 of the Convention, adopted Report No. 45/03, by which it concluded that:

the Colombian State has violated Articles 5(1)(2) and (4), 7(1) (2) (3) (4) (5) and (6), 8(1), 8(2), 8(2)(d) and (e), 8(2)(g) and 8(3) and 25, in relation to Article 1(1) of the American Convention, to the detriment of Wilson Gutiérrez-Soler, by reason of the tortures and the cruel, inhuman and degrading treatment inflicted on him while held in custody by the State and on account of the failure by the State to satisfy the requirements of due process of law and right to judicial protection while investigating the violations and prosecuting the responsible parties. The State is also responsible for failure to comply with its fair trial obligations in relation to the violations endured by the victim while held in custody and for failure to compensate the damage caused, including the right to justice.

With respect to the above, the Commission recommended that the State should:

1. adopt such measures as may be necessary to investigate and prosecute the parties responsible for the violation of Article 5 of the American Convention, before the ordinary courts, including the measures needed to reopen precluded proceedings or reexamine cases decided by military justice, as allowed by Constitutional Court precedent;
2. adopt such measures as may be necessary for Wilson Gutiérrez-Soler to receive adequate reparation for the pecuniary and non pecuniary damages caused as a result of the violation of Articles 5, 8 and 25; [and]
3. adopt such measures as may be necessary to prevent the occurrence of renewed acts of the same nature.

9. On December 26, 2003, the Commission issued Report No. 45/03 granting the State two months to notify the Commission of the measures adopted in compliance with the recommendations.

10. On January 23, 2004, the Commission, pursuant to Article 43(3) of the Rules of Procedure, notified the petitioners that it had adopted the report and submitted it to the State, and requested them to notify the Commission of their position regarding submission of the case to the Inter-American Court. The petitioners forwarded such information on February 26, 2004.

11. On March 17, 2004, after a time extension had been granted, the term for the State to submit the Report No. 45/03-related information became due, without the State having forwarded any information on the matter.

12. On March 26, 2004, the Inter-American Commission decided to submit the instant case to the Court.

**IV
PROCEEDING BEFORE THE COURT**

13. On March 26, 2004, the Commission filed an application with the Court regarding the instant case.

14. The Commission appointed officer Susana Villarán de la Puente and Executive Secretary Santiago A. Canton as delegates, and Ariel Dulitzky, Verónica Gómez, Norma Colledani and Lilly Ching as legal counsels.

15. On April 21, 2004, the Secretariat, once the application had been examined by the President of the Court (hereinafter "the President"), served the application and its annexes on the State, and notified it of the term within which it was to answer the same and appoint its agents in the proceedings. Furthermore, the Secretariat, following instructions by the President, informed the State that it had the right to appoint an *ad hoc* Judge to participate in determining the case.

16. On that same day, in compliance with Article 35(1)(d) of the Rules of Procedure, the Secretariat served the application on the *Centro por la Justicia y el Derecho Internacional* and on the *Colectivo de Abogados "José Alvear Restrepo"* (Lawyers' Group "José Alvear Restrepo") (hereinafter "the Representatives"), appointed in the application as representatives of the alleged victim and his next of kin, and informed them that they had two months to file a brief with their requests, their arguments and their evidence.

17. On June 18, 2004, the State appointed Luz Marina Gil García and Luis Alfonso Novoa Díaz as agent and deputy agent, respectively, and Ernesto Rey Cantor as *ad hoc* Judge to participate in hearing the case.

18. On June 28, 2004, the Representatives filed their brief of requests, arguments and evidence (hereinafter "the brief of requests and arguments").

19. On August 31, 2004, the State filed a brief with its preliminary objections, its answer to the application and its comments on the brief of requests and arguments. The preliminary objections raised by Colombia consisted of: 1) impairment of the State's right to defend itself; and 2) failure to comply with the requirements for the exhaustion of domestic remedies.

20. On October 27, 2004, the Commission and the Representatives filed written arguments regarding the preliminary objections.

21. On February 1, 2005, the President issued an Order in which he required Kevin Daniel Gutiérrez-Niño, Yaqueline Reyes,¹ Luisa Fernanda Gutiérrez-Reyes, Paula Camila Gutiérrez-Reyes, Leonardo Gutiérrez-Rubiano, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano, Carlos Andrés Gutiérrez-Rubiano and María Elena Soler de Gutiérrez, witnesses proposed by the Representatives, to render testimony by affidavit. He also ordered Iván González Amado, expert witness proposed by the Representatives, to file his opinion

¹ In the application, this name appears as "Yaqueline Gutiérrez-Reyes". However, as the birth certificate issued by the Registrar of Life Statistics reads "Yaqueline Reyes", the Commission stated in its closing written arguments that it had incurred in a "material mistake" when identifying this person by the first-mentioned name. Thereafter, the Court used the second-mentioned name.

by affidavit. Furthermore, in said Order, the President summoned the Inter-American Commission, the Representatives and the State to a public hearing which would be held at the seat of the Inter-American Court on March 19, 2005, to hear their closing oral arguments on the preliminary objections and possibly on the merits, reparations and indemnities in the instant case, as well as the witnesses and expert witnesses proposed by the Inter-American Commission and the Representatives (*infra* para. 27). By means of said Resolution, the President also informed the parties that they were entitled to submit their closing written arguments regarding preliminary objections and possibly regarding the merits, reparations and indemnities up to April 11, 2005.

22. On February 15, 2005, the Representatives filed the statements by Kevin Daniel Gutiérrez-Niño, Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano and Carlos Andrés Gutiérrez-Rubiano. They also pointed out that the statements by Luisa Fernanda Gutiérrez-Reyes and Leonardo Gutiérrez-Rubiano, on account of their status as minors, could not be taken under the form of an affidavit in view of the domestic legislation regarding minors. Finally, they stated that, for reasons beyond their control, María Elena Soler de Gutiérrez, Ricardo Alberto Gutiérrez and Paula Camila Gutiérrez-Reyes could not render testimony. Nevertheless, on February 16, 2005, the Representatives submitted the statements by Ricardo Alberto Gutiérrez and Leonardo Gutiérrez-Rubiano.

23. On February 16, 2005, the State forwarded a copy of "the case file of the proceedings brought before the Criminal Military Court System against Colonel Luis Gonzaga Enciso Baron for the crime of Bodily Injuries against Wilson Gutiérrez-Soler."

24. On February 17, 2005, the Representatives filed the statement by Iván González Amado.

25. On March 4, 2005, the State submitted in writing its comments on the statements filed by the Representatives (*supra* paras. 22 and 24).

26. On March 9, 2005, the State filed a brief wherein it stated that:

The Republic of Colombia, in its capacity as State Party of, and in accordance with, the American Convention on Human Rights, considering the domestic proceedings and the facts stated in the application filed by the Inter-American Commission on Human Rights and in compliance with its international obligations and its policy of promotion, protection and respect of human rights hereby expressly and publicly:

1. Withdraws the two preliminary objections raised by the State, which consist of impairment of the State's right to defend itself and failure to comply with the requirements for the exhaustion of domestic remedies.

2. Acknowledges its international liability for the violation of Articles 5(1), (2) and (4); 7(1) (2) (3) (4) (5) and (6); 8(1) (2)(d) (2)(e) (2)(g) and (3) and 25 of the American Convention on Human Rights, in relation to the facts asserted in the application.

3. Derives said acknowledgment from the acts or omissions of certain government officials who, acted individually in breach of their legal duties.

4. Reaffirms as its State policy the promotion and protection of human rights and expresses its respect and consideration for the victim and his next of kin and asks forgiveness for the occurrences.

5. Understands that this acknowledgment of liability is in itself an act of satisfaction towards the victim and his next of kin.

6. Requests to the Honorable Court that, would it be deemed appropriate, the State, the Representatives of the victim and his next of kin be granted the opportunity to reach, with facilitation by the Commission on Human Rights, a friendly settlement on reparations and indemnities, for which the State proposes a maximum delay of six months.

7. In the event the foregoing request is not granted, the State [p]rays to the Honorable Court that the foregoing acknowledgment of liability be taken into consideration and deemed effective to all legal purposes, so that action on the merits of the case be deemed concluded and the hearing be directed to discuss reparations and indemnities.

8. The State points out that this statement does not imply an estimation or assessment of individual criminal liabilities.

27. On March 10 and 11, 2005, the Court held a public hearing, at which there appeared: a) For the Inter-American Commission: Juan Pablo Albán, Counsel; Lilly Ching, Counsel; Verónica Gómez, Counsel; and Víctor H. Madrigal Borloz, Counsel; b) For the Representatives: Viviana Krsticevic, Executive Director of the *Centro por la Justicia y el Derecho Internacional* (hereinafter "CEJIL"); Roxana Altholz, attorney-at-law for CEJIL; Rafael Barrios, attorney-at-law for the *Corporación Colectivo de Abogados "José Alvear Restrepo"* (Lawyers' Institutional Group "José Alvear Restrepo"); Eduardo Carreño, attorney-at-law for the *Corporación Colectivo de Abogados "José Alvear Restrepo"* (Lawyers' Institutional Group "José Alvear Restrepo"); and Jomary Ortegón, attorney-at-law for the *Corporación Colectivo de Abogados "José Alvear Restrepo"* (Lawyers' Institutional Group "José Alvear Restrepo"); and c) For the State: Julio Aníbal Riaño, Ambassador, Luz Marina Gil García, Counsel; Luis Alfonso Novoa, Deputy Counsel; Janneth Mabel Lozano Olave, Counsel; Dionisio Araujo, Counsel; Priscila Gutiérrez Cortés, Counsel; and Margarita Manjarrez Herrera, Counsel. Also present were Wilson Gutiérrez-Soler, witness proposed by the Inter-American Commission and the Representatives; Ricardo Gutiérrez-Soler, witness proposed by the Representatives; María Cristina Nunes de Mendonça, expert witness proposed by the Inter-American Commission; and Ana Deutsch and Jaime Prieto, expert witnesses proposed by the Representatives.

28. During the public hearing, the State reiterated the statements contained in the brief dated March 9, 2005 (*supra* para. 26), to the effect that the State withdrew the preliminary objections it had raised and acknowledged its international liability in the instant case.

29. During the same public hearing, with respect to the acknowledgment of liability made by the State, the Commission stated that:

The Commission desires to greet and express its satisfaction to the Republic of Colombia for its having made public its acceptance of the claim against it and its acknowledgment of international liability for having violated the American Convention in relation to the facts asserted in the application filed in the instant case for illegal arrest, torture and violation of the right to fair trial of Mr. Wilson Gutiérrez-Soler.

The Commission wishes to highlight, in particular, the words of the declaration that express respect and consideration for the victim and his next of kin and the gesture of contrition we have just witnessed, through which apologies are made to them in the name of the State, and received as a first step along the way to reparation of the damage caused.

The Commission understands that the points in fact and in law to be included in the judgment that this Honorable Court will hand down in the instant case will be an invaluable contribution towards achieving the purpose and aim of the American Convention and the Inter-American System.

Further, the Commission also heeds with satisfaction the proposal extended by the State to reach a friendly settlement regarding reparations.

The Commission understands this alternative procedure is of great importance for settling violation of human rights cases.

In accordance with its prior practice in this matter, the decision of the victim to get involved or not in a procedure of this kind hinges on many personal factors, with the extension of which the Commission does not claim to be acquainted. For this reason, the Commission will wait to hear the victim, Mr. Gutiérrez-Soler, speak his will on this matter.

The Rapporteur of the Commission for matters related to Colombia and delegate in the instant case, Mrs. Susana Villarán, [...] transmits to this hearing, to the parties and the to the Honorable Court her sincere expression of gratitude for the willingness evidenced by the Republic of Colombia to comply with its human rights obligations through this acceptance of the claim.

It is an act that, besides reinforcing the commitment evidenced to the Inter-American System, leads the way to reparation and eradication of violations of the American Convention consisting in inflicting torture on individuals in the custody of Government officials.

In the instant case, it is worth noting that the victim, Mr. Wilson Gutiérrez-Soler, has shown an unusual courage, for more than a decade, by reporting his case. With the gesture made today, the State has lived up to the challenge of acknowledging the crime and the denial of justice by apologizing to Mr. Gutiérrez-Soler and his next of kin, and by showing its commitment to redress in full the damage caused, both on individual terms and in such a way as to contribute in the constant endeavor of watching out for events of this nature not to happen again.

30. During the above mentioned public hearing, with respect to the acknowledgment of liability made by the State, the Representatives stated that:

We hold the gesture just made by the State of Colombia, in publicly and fully accepting the facts and acknowledging the rights asserted in the application made by the Commission, to be a historical one. It is the first time we see the State of Colombia assuming such a position in a case on trial before the Inter-American System.

Not only is it extremely important for this case, after the eleven-year long fight against impunity borne by Wilson and Ricardo Gutiérrez-Soler, as pointed out by the Commission, but it also gives us hope that the State of Colombia will enter a new epoch in its policy toward the Inter-American System. Hence, we wish to express our full satisfaction and our special gratitude for the personal gesture by the Agents of the State, as well as for the efforts made by state officials to make this happen.

With regard to the friendly settlement, the instant case has a very particular background [...]. We have been deploying our efforts to reach a friendly settlement for two years and, unfortunately, such efforts have not met with success. The victims have expressed that they are not ready, at present, to reopen this phase. We also trust that a judgment of the Inter-American Court on reparations establish a precedent on these matters, not only for Colombia, [but also] for the whole region.

31. On March 10, 2005, after the closing of the first stage of the public hearing, the Court issued an Order in which it decided to deem withdrawn all the preliminary objections raised by Colombia to admit the acknowledgement of international liability made by the State, and to continue holding the public hearing convened by the President's Order dated February 1, 2005, and to restrict its subject-matter to reparations and indemnities (*infra* para. 50). In such public hearing The Court heard the statements by the witnesses and expert witnesses who had been summoned thereto (*supra* paras. 21 and 27, *infra* para. 42), as well as arguments by the Inter-American Commission and by the State.

32. On April 12, 2005, the State, the Commission and the Representatives submitted their closing written arguments.

33. On August 4, 2005, the Secretariat, in pursuance of instructions by the President, requested the State to furnish certain information as evidence to facilitate adjudication of the case.

34. On August 30, 2005, the State submitted documentary evidence to facilitate adjudication of the case, in response to the written requirement addressed by the President on August 4, 2005 (*supra* para. 33).

V

PROVISIONAL MEASURES

35. On March 11, 2005, after hearing the statements by Wilson and Ricardo Gutiérrez-Soler (*infra* para. 42), as well as the closing oral Argument by the Inter-American Commission, by the Representatives and by the State, the Court decided to order that the State adopt provisional measures in order to protect the lives, the personal integrity and the personal liberty of several individuals.²

VI

EVIDENCE

36. Before examining the evidence tendered the Court will state, in the light of the provisions set forth in Articles 44 and 45 of the Rules of Procedure, a number of points arising from precedents established in the court itself, and applicable to the instant case.

37. Evidence is governed by the adversary principle, which embodies due respect for the parties' right to defense. This principle underlies Article 44 of the Rules of Procedure, inasmuch as it refers to the time when evidence must be tendered, so that equality among the parties may prevail.³

38. In accordance with Court practice, at the beginning of each procedural stage, the parties must state, at the first opportunity granted them to do so in writing, the evidence they will tender. Furthermore, the Court or the President of the Court, exercising the discretionary authority under Article 45 of the Rules of Procedure, may ask the parties to supply additional items, as evidence to facilitate adjudication of the case, without thereby affording a fresh opportunity to expand or complement their arguments, unless by express leave of the Court.⁴

² Cf. *Case of Gutiérrez-Soler*. Provisional Measures. Order of the Inter-American Court of Human Rights of March 11, 2005, available on: www.corteidh.or.cr.

³ Cf. *Case of Acosta Calderón*. Judgment of June 24, 2005. Series C No. 129, para. 40; *Case of YATAMA*. Judgment of June 23, 2005. Series C No. 127, para. 106; and *Case of Fermín Ramírez*. Judgment of June 20, 2005. Series C No. 126, para. 43.

⁴ Cf. *Case of Acosta Calderón*, see *supra* note 3, para. 41; *Case of YATAMA*, see *supra* note 3, para. 107; and *Case of Fermín Ramírez*, see *supra* note 3, para. 44.

39. The Court has also pointed out before that, in taking and assessing evidence, the procedures observed before this Court are not subject to the same formalities as those required in domestic judicial actions and that admission of items into the body of evidence must be effected paying special attention to the circumstances of the specific case, and bearing in mind the limits set by respect for legal certainty and for the procedural equality of the parties. The Court has further taken into account international precedent, according to which international courts are deemed to have authority to appraise and assess evidence based on the rules of a reasonable credit and weight analysis, and has always avoided rigidly setting the *quantum* of evidence required to reach a decision. This criterion is valid with respect to international human rights courts, which enjoy ample authority to assess the evidence submitted to them bearing on the pertinent facts, in accordance with the rules of logic and based on experience.⁵

40. Based on the above, the Court will now examine and assess the body of evidence in the instant case, which includes documentary evidence submitted by the Commission, by the Representatives and by the State, evidence requested by the Court or the President of the Court, on their own motion, to facilitate adjudication of the case, and testimonial and expert evidence rendered before the Court at the public hearing. In doing so, the Court will follow the rules of reasonable credit and weight analysis, within the applicable legal framework.

A) DOCUMENTARY EVIDENCE

41. The Representatives submitted witness statements and an expert report in accordance with the President's Order dated February 1, 2005 (*supra* para. 21). Said statements and opinion are summarized as follows:

STATEMENTS

a) Statement by Kevin Daniel Gutiérrez-Niño, Wilson Gutiérrez-Soler's son

When he was a little boy, he lived in Colombia with his mother and grandmother and occasionally met with his father without understanding why they lived apart from each other. He has been recently revealed how much his father had suffered in Colombia. He misses his paternal aunts, uncles and cousins and has memoirs of his childhood. He has resided in the United States since he was seven years old. Between the ages of seven and twelve, he only saw his father once, in a trip to Bogotá. "It's been very hard to live apart from my father, but after a couple of years I got accustomed to it."

A few years ago, his father moved to the United States and now he feels happy to live and share moments with him. The witness believes that if nothing had occurred to his father, he would have been living in Colombia with his family.

⁵ Cf. *Case of Acosta Calderón*, see *supra* note 3, para. 42; *Case of YATAMA*, see *supra* note 3, para. 108; and *Case of Fermín Ramírez*, see *supra* note 3, para. 45.

b) Statement by Yaqueline Reyes, Ricardo Gutiérrez-Soler's common-law spouse

Mrs. Yaqueline Reyes is the common-law spouse of one of Wilson Gutiérrez-Soler's brothers, Ricardo Gutiérrez-Soler, with whom she has two daughters. The other members of her family have grown apart from them as a result of the attacks and outrages perpetrated by police officers and the army against them.

Mrs. Reyes states that she has recently acquainted with the fact that her brother-in-law, Wilson Gutiérrez-Soler, was a torture victim and that she now understands why he is under so much pain, both physical and moral.

What happened to Wilson Gutiérrez-Soler, according to Mrs. Reyes, "affected [her] marriage," because her common-law spouse Ricardo Gutiérrez-Soler was continually helping his brother out so that he could file complaints before the authorities. However, nobody seemed to take notice of them. The consequences for the family were terrible because her common-law spouse was deeply involved in Wilson Gutiérrez-Soler's case. She, her two daughters and her common-law spouse's children fell victim to attacks and searches by police officers and the army. There were times when her common-law spouse and brother-in-law wore bulletproof vests in case they were attacked. This disturbed her daughters and her common-law spouse's children.

The troubles and expenses experienced and incurred by the family prevented her daughters from regular schooling because every now and then they had to move to a new house under constant threat to their lives. On one occasion, the individuals who were posing threats to them advised them "to enjoy the little time left because soon we will all be finished" and, next, they asked about her common-law spouse and brother-in-law without even identifying themselves.

The Gutiérrez-Soler family was subject to physical abuse and moral harassment. On November 27, 2002, Wilson Gutiérrez-Soler's parents found a bomb in their house. On May 17, 2003, Mrs. Reyes and her daughters received a book-like bomb that was timely disassembled by police officers and explosive detection agents. The police accused her common-law spouse, Ricardo Gutiérrez-Soler, of "having connections with the [*Fuerzas Armadas Revolucionarias de Colombia*] or the [*Ejército de Liberación Nacional*]."

On October 4, 2003, the police arrested Ricardo Gutiérrez-Soler without any known reasons. During three hours, Mrs. Reyes ignored where the police had taken her common-law spouse. Sulma Tatiana and Leonardo, Ricardo Gutiérrez-Soler's children, were also harassed by police officers. This situation made the family grow apart little by little. Currently, some of Ricardo Gutiérrez-Soler's children do not live with him because they refuse to live in fear and under constant threat.

For Mrs. Reyes, the events have been extremely disturbing and changed their lives because "everybody knows we live under continual threat and are regularly subject to searches. To cap it all, nobody employs Ricardo." Although Wilson Gutiérrez-Soler no longer lives in Colombia, the situation is still difficult for the Gutiérrez-Reyes family.

She prays to the Court that “their human rights be recognized,” making all responsible individuals “pay for [...] what they have done” to her family and to Wilson Gutiérrez-Soler. She urged on measures to prevent “cruel action[s] like the one[s] taken” and asked the State to instruct police officers and the army in human rights and, lastly, requested the Court to “help them recover from their great pain and distress.”

c) Statements by Luisa Fernanda Gutiérrez-Reyes, daughter of Ricardo Gutiérrez-Soler and Yaqueline Reyes; Leydi Caterin Gutiérrez-Peña, daughter of Ricardo Gutiérrez-Soler and Luz Marina Peña Torres; and Leonardo Gutiérrez-Rubiano, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano and Carlos Andrés Gutiérrez-Rubiano, children of Ricardo Gutiérrez-Soler and María Anatlilde Rubiano Martínez

At present, witnesses Luisa Fernanda Gutiérrez-Reyes and Sulma Tatiana Gutiérrez-Rubiano reside in Fusagasugá (Department of Cundinamarca) with their sister Paula Camila Gutiérrez-Reyes, Ricardo Gutiérrez-Soler and Yaqueline Reyes; witnesses Leonardo Gutiérrez-Rubiano, Carlos Andrés Gutiérrez-Rubiano and Ricardo Alberto Gutiérrez-Rubiano live in Bogotá apart from their family; and witness Leydi Caterin Gutiérrez-Peña lives with her mother and has never lived with her father Ricardo Gutiérrez-Soler. The witnesses became acquainted with what had happened to their uncle Wilson Gutiérrez-Soler before they rendered statement.

Witnesses stated that the situation of their uncle Wilson Gutiérrez-Soler affected them both emotionally and economically because Wilson and Ricardo Gutiérrez-Soler separated from the family, and the family broke up. As a result of the issues that Ricardo had to attend in relation to Wilson, he had no money left for his family, so his children begun having problems at school. Likewise, they mentioned the attempted book-like bomb attack at Ricardo Gutiérrez-Soler’s house and police constant harassment on the family.

Furthermore, witness Leonardo Gutiérrez-Rubiano asserted that individuals who were unfamiliar to him tried to kidnap him; and he even blamed his father Ricardo for all his problems. Witness Sulma Tatiana Gutiérrez-Rubiano declared that on April 21, 2003 there was a search at her father’s workshop at Villavicencio Avenue during which her father and brother Leonardo were injured, as it happened in many other occasions. Luisa Fernanda Gutiérrez-Reyes and Sulma Tatiana Gutiérrez-Rubiano expressed that their sister Paula suffered great emotional distress as a result of the troublesome situation of her father Ricardo Gutiérrez-Soler and that of her family, and has not spoken ever since.

To sum up, witnesses have lived in permanent fear, undergone family separation and economic difficulties as a consequence of the events related to the instant case and they hope the Court will help them solve the problems of the family.

EXPERT EVIDENCE

a) Expert report by Iván González-Amado, criminal attorney-at-law

The expert witness explained that Colombian laws on criminal procedure provide for three main stages: preliminary investigation, pre-trial proceedings and trial. He also referred to the powers of the judicial police, which are exercised on a permanent basis by the National Police, the Technical Investigations Agency of the General Prosecutor's Office and "the civil servants of prosecuting units and the Administrative Department of Security." Colonel Luis Enciso Barón was barred under Section 103 of the Code of Criminal Procedure of 1991 "from processing the actions associated with the investigation of the crime of extortion reported by Ricardo Dalel Barón" because the Colonel is his cousin and, "therefore, he [has] an interest in the proceedings."

Wilson Gutiérrez-Soler was not seized in *flagrante delicto*, but during an illegal police search. Failure to set an accurate and express term for Wilson Gutiérrez-Soler's appearance before judicial authorities "adversely affected his rights, since it allowed judicial police officers to promptly carry out actions that ultimately impaired his rights." Domestic legislation prohibits without exceptions that public officers exercise coercion on the accused. Gutiérrez-Soler's version of the events "was not rendered freely and spontaneously," since "he was tortured and [...] the free and spontaneous statement was not given in agreement with legal rules in force." Likewise, the change in the legal qualification from crime of torture to crime of bodily injuries does not conform to international legal standards related to torture, because according to said standards "the conduct is not assessed in line with the seriousness of the injuries inflicted upon the victim."

The appointment of "an honorable person as [Wilson Gutiérrez-Soler's technical counsel] was contrary to the rule of law," for "the accused was arrested in Bogotá [...] where he could have been aided by an attorney who may have acted as legal counsel." Instead, the clergywoman who acted as counsel "failed to comply with counseling obligations" as she did not even "notice that the accused had been tortured before the examination," which took place "after the accused was brought to jail and before he rendered statement."

Article 192 of Law No. 906 of 2004 prescribes that acquittals may be reviewed if "after an acquittal is entered in a Court of law in cases of violation of human rights or serious infringement of international humanitarian laws, any international human rights review and control body, whose competence has been formally accepted by the State, finds that the State has failed to comply with its obligation to conduct a serious and impartial investigation of said violations."

B) TESTIMONIAL AND EXPERT EVIDENCE

42. On March 10 and 11, 2005 the Court held in a public hearing to receive the statements of the witnesses and the expert witnesses proposed by the Inter-American Commission and by the representatives. The court will now summarize the relevant parts of these statements and of the expert report.

TESTIMONY

a) Testimony by Mr. Wilson Gutiérrez-Soler, alleged victim

The witness, Mr. Wilson Gutiérrez-Soler, a Colombian national, currently lives in the United States of America.

At the time he was arrested, the witness drove a taxi, worked in judicial auctions, and was a mechanic. His automobile make reparations shop opened at 9 a.m. and closed at about 4 or 5 p.m. The income he derived from such activities allowed him to provide reasonably well for his family. His daily family routine was like that of any person "considered normal; a family with a wife and a child, and on weekends the theater or the movies."

The witness brought vehicles from Venezuela, for which reason he travelled a great deal; however, he was not separated or divorced from his wife. At the time the events took place, Wilson lived at his mother-in-law's with his wife and his son Kevin. However, after the events, his wife and his son continued living at Wilson's mother-in-law's, but he himself moved to his parents' house. Custody of Kevin was given to his mother "for many obvious reasons; whatever or whomever was close to me or on my side, was not going to be well, and the threats were directed at my family."

After being seized in an illegal operation, he was prosecuted for extortion, in a process that lasted 8 years, during which, according to Mr. Gutiérrez-Soler's statement, his self-esteem and his private, professional and family life were impaired. "It tore my family apart, because they obviously no longer saw me as a decent person, but what this people wanted was to make me be seen as a criminal. It definitely did away with my life—and not only my own, but that of my son and that of my wife as well."

In addition, as a result of the acts of torture, the life of the witness changed dramatically. "My family was lost; the father-to-son family bond was lost. Not only did they take away my own self-esteem, but they also took away my family and my parents." Likewise, his brother Ricardo Gutiérrez-Soler, who has always supported him, also came to harm ever since he learned about the events. Mr. Ricardo Gutiérrez-Soler cut himself off from his own family. "He is forced to live from place to place, he can't have a permanent residence or work steadily." The witness' mother is living in a village under dire conditions.

The torture suffered by the witness is "something that is not at all easy to live with; more so that the way where they were inflicted on him made them leave lifelong traces, it is one of those parts of the body where one is reminded every day of what happened, so it's not easy to live with that."

The witness felt he was under a duty to report his individual case of torture, as he knew that what had happened "was wrong". Moreover, he entertained hopes that justice would be done, which for him it meant that: "any person who performs an act that harms another person just for the fun of it [...] be prosecuted."

The witness stated that, when the investigation of Colonel Enciso Barón and Mr. Ricardo Dalel, a civilian, were discontinued, he felt great anguish by the impunity existing in his case. Similarly, the witness was most outraged when the hypothesis that the injuries had been self-inflicted was advanced. He resolved to lodge a complaint with the Inter-American Commission and have his case referred to the Inter-American Court since in Colombia "there was no possibility of justice," in spite of the fact that he had sought justice by every means allowed by the State. In his opinion, a judgment by the Court sets "a standard preventing this from happening again; this sets a precedent that no person may be given inhumane treatment." Moreover, the witness stated that, even though it is not easy for him to have private matters about himself disclosed in the court's judgment, he consents to it if it will help prevent the same from happening to other people.

The witness pointed out that, as a consequence of having reported his torture — as they let him know that expressly —, his family — particularly his brother Ricardo, his parents and himself — were subjected to persecution, harassment, threats, phone calls, attacks with explosives, searches and/or imprisonment. These acts of harassment deeply affected the private and working life of the witness: "I was never able to work steadily, they never let fulfill myself as a normal person, since wherever I went, harassment came along with me." Even his parents had to leave their home and belongings and do away with the very few possessions they had as a result of the continuous harassment they were subjected to. The witness' father died "in the most extreme poverty that can exist in the world."

The witness does not know how the State could make reparations the damage he suffered or give him back his family, the 11 years of his life he lost and his relationship with his son — who was taken to the United States by his mother almost 7 years ago —, with whom he lost practically all contact, for he only spoke with him on the telephone occasionally. A few months ago, the witness finally regained custody of his son Kevin and now lives with him.

The witness fears for the lives of his family and of his brother. Harassment started almost 11 years ago and it has not yet ceased. Even after testifying before the Commission, he suffered an attack while staying with his parents. The precautionary measures ordered by the Commission have not produced any positive results.

b) Testimony by Ricardo Gutiérrez-Soler, brother to Mr. Wilson Gutiérrez-Soler

The witness is a Colombian national and comes from a family consisting of the mother and 7 children, 4 females and 3 males. Wilson is the youngest brother and Ricardo is the one in the middle. They have a very good relationship.

The witness learned what had happened to his brother Wilson a few days after his arrest. He found Wilson in a bad condition. Wilson told him he had been tortured and even showed him photographs of the torturing. Ricardo felt Wilson had done the right thing in reporting he had been tortured.

The witness stated that ever since his brother Wilson left prison, both of them and his family have been harassed and received increasingly serious telephone threats, repeating the Spanish saying "kill the dog and it will be the end of rabies." Ricardo and Wilson realized things were not right when they learned from the police that some vehicles that had been prowling around the make reparations shop, which supposedly belonged to private individuals, actually belonged to the "*Dirección Central de Policía Judicial*" (Central Bureau of the Judicial Police).

The witness pointed out that, as part of the harassment, he and his brother Wilson were accused of "stealing vehicles" and imprisoned. Their parents were planted a bomb, and one of their children suffered a kidnapping attempt. In addition, the witness received a bomb-book and "suffered several attacks."

The witness, together with his brother Wilson, has filed complaints reporting the harassment, the searches and the telephone threats they have suffered. However, these complaints went unsuccessful. The lack of response from the courts has further undermined the witness' safety. Moreover, the precautionary measures ordered by the Inter-American Commission have not been enforced. The witness finds that having to ask the Colombian State for protective measures has been cumbersome: "to me it's embarrassing to have to turn to people I don't know [...]. But to be honest, it has been useless for me; I have been abandoned." On one occasion, the State gave him money to leave town; however, he received none of the assistance for his little daughter he had been offered.

The witness never told his own family of the events that had befallen his brother Wilson, since he felt sorry for them. As he did not know the truth, his father started saying that Wilson and himself were involved in illegal situations. He feels very sad about the fact that his father died without knowing the truth. The witness neglected his family and abandoned his oldest children because of his attempts to do something with his brother Wilson about the problem.

The harassments, the searches and other events affected the witness and his family's economic and personal situation. Firstly, his brother Wilson, who managed their business accounts "was so unfortunate as to be imprisoned," which was a hard blow for the family. His parents assisted them as much as they were able, and in the end, two or three years ago, they preferred to sell their house and leave Bogotá. Secondly, the witness' children did not complete their studies and he was not able to provide for them at all. Finally, as a result of all this, the witness has not been able to have a permanent residence where he can stay with his family, nor has he been able to work steadily. The shops he successively set up did not last more than two months.

The witness pointed out that, even though he fears for his safety for having appeared to the Court, he testified because he thinks what happened is not fair: "because it's not fair that my youngest daughter [she can not speak], and that I have never been able to afford therapy. And the other one wants to study, and I can't really take that right away from her — I must do something."

Currently, his mother is managing his father's estate, which consists of a farm and two cars.

EXPERT EVIDENCE

a) Expert report by Mrs. María Cristina Nunes de Mendonça, lecturer on Legal Medicine at the University of Coimbra, Portugal

The expert witness pointed out that, as a result of his arrest, Mr. Wilson Gutiérrez sustained physical injuries that can be grouped in two different kinds: genital injuries and anal injuries. The genital injuries may be described as second-degree burns caused by exposure to heat, specifically by contact with flames. Second-degree burns typically involve the presence of blisters with liquids inside them and affect the deepest tissues in the skin. As for anal injuries, in the instant case they have been internal injuries in the rectum caused by the introduction of a hard object.

The physical sequels in the instant case would have had to be treated properly. Timely treatment was required so that the sequels would not be so evident. In the instant case, the sequels mentioned are permanent. Likewise, there are functional-sexual sequels, described in some of the reports, such as that of September 16, 1996 at the Colombian Forensic Medicine National Institute and the urologic report made in 2000.

There is yet another set of sequels, namely psychological sequels, which are clearly set apart in three forensic psychiatry reports made by a group of psychiatrists and psychologists from the Colombian Forensic Medicine National Institute. Three of the descriptions characterize a condition called "post-traumatic stress disorder". The victim's character, irritable behavior, a fobic and elusive attitude, and the irreversible nature of such characteristics, are the typical symptoms of such disorder.

The forensic medical examinations performed in the instant case have been incomplete. No photographic records of the injuries have been made, and they are extremely important. The examinations have been confined to an external, physical description of the anatomical areas. No examination was made of the anal anatomical injury, which is a very simple one. One of the reports is missing a detailed description of the injuries, which might condition its interpretation, attempt against its results and diminish the significance of these documents in these proceedings.

The victim did not receive regular and adequate medical treatment until his imprisonment on September 14, 1994, twenty-one days after the events. The victim does not seem to have received proper treatment, nor was he provided with basic means of personal hygiene so as to prevent the infection he subsequently came to suffer.

Protocols and standards have been established to improve the treatment for victims of aggressions like those in the instant case, as the ones in existence were deficient, not only in Latin-America but worldwide. The most widely used one is the Istanbul Protocol, which appeared in 1999 thanks to the cooperation of a group of entities, physicians and lawyers in order to

establish treatment standards for this kind of victims, so that these items of evidence may be understood in the courts. The Protocol describes situations such as that suffered by Mr. Wilson Gutiérrez, the manner in which the examinations have to be conducted, the manner in which the medical opinions should be drafted, and how the follow-up on the victim must be carried out. Had the Protocol been applied in the instant case, the result of the investigation would have been different, as it would have "made it easier to understand the aggressions and the events."

In the case of persons whose physical integrity has been damaged, the medical examination must be particularly careful of the victim, as "there is a standalone fear component" that might be harmful for them. The first thing the physician must do is to establish an empathy relation with the person being examined, so that "the individual feels at ease with the physician and is able to render an account of the events" without withholding certain details for fear of making them public. In such cases, the alleged aggressors should not be present. In addition, "the physicians must not confine themselves to examining the anatomical regions [of which] the victim complains [...]; but they must conduct a thorough examination, objectively supported by graphical records, especially photographs."

In torture cases, the aggressor strives to inflict suffering on the victim in a manner that will not leave physical traces. The aggressor is aware that if he leaves traces it is easier to track him down. As regards the genital injuries sustained by Mr. Gutiérrez-Soler as a result of the burns, there are undoubted signs and they will remain for life. As to the matter of anal sexual abuse, often no physical external traces are left, as it occurred in the instant case.

The officials making arrests or who interact with those arrested should regularly undergo psychological or psychiatric examinations, as very often such officials have personalities that may turn them aggressive. In the instant case, there exists a psychiatric examination where one of the perpetrators is also examined, "from the reading of which some psychological traits within the profile of psychopathic pathology can be surmised."

People who are under arrest should undergo regular physical examinations, and the physicians must not confine themselves to "the complaints made to him by the victim, as on many occasions the victims are not up to assessing the full context of their suffering."

b) Expert report by psychologist Ana Deutsch

The expert witness stated, Mr. Wilson Gutiérrez-Soler suffers from post-traumatic stress. Such diagnosis was made based on "the criteria established in the psychiatric diagnosis manual published by the American Psychiatry Association" in 1994. In order to arrive at such a diagnosis six criteria must be met: firstly, the person must have experienced a traumatic event which affected the individual, and to which the person reacted with horror and panic. The events suffered by Mr. Wilson Gutiérrez-Soler satisfy this requirement. The second criterion is the upsetting recurrence of spontaneous flashbacks of the event that produce emotional suffering every time they

happen. Such flashbacks may arise either while awake or while sleeping, or may be brought to mind by stimuli from the environment. Mr. Gutiérrez-Soler said that he had to fight back those memories which reoccur daily when he uses the toilet, when he sees the scars, when he hears someone speak using strong tones or when he sees people fighting. "The rape profoundly affected his self-esteem, and his masculine dignity was hurt."

The third criterion is avoidance, which means that the person avoids exposure to situations that bring back the traumatic experience. Mr. Gutiérrez-Soler isolates himself socially in order to avoid being asked questions, since that would remind him of the reasons why he travelled to the United States. He has almost no relations with other Colombians there, as they make him feel uneasy and fearful that they might have some connection with the Government officials who caused him so many problems. The fourth criterion is the presence of symptoms of hyperarousal or exaggerated reactions to minimum stimuli and of irritability. Mr. Gutiérrez-Soler points out that he became very temperamental after having been tortured, and that that worsened some existing marital conflicts. At that time he was impatient and intolerant with his own son. Currently, he still has disturbances during sleep, difficulty to fall asleep and is startled out of his sleep by soft noises. The fifth criterion is that these symptoms last for over a month. Mr. Gutiérrez-Soler has had these symptoms for more than ten years and, even though they used to be more intense in the past, he still has them with varying intensity. Although his condition has improved in some aspects, he must anyway receive psychological treatment. The last criterion concerns impairment in the labor, learning and social areas. As regards work, he has mostly relied on the support of his family for years.

Mr. Gutiérrez-Soler shows other symptoms overlapping the post-traumatic stress diagnosis, which amount to a condition of depression, such as lack of energy, a pessimistic view of the world, a sad mood, reduced appetite and almost inexistent sexual desire. Moreover, impunity has intensified all the symptoms and the reactions Mr. Gutiérrez-Soler has had, and has reflected on his vision of justice.

As for Kevin Gutiérrez-Niño, the son of Mr. Wilson Gutiérrez-Soler, the expert witness pointed out that their relationship was practically inexistent up to just a few months ago, when Kevin moved in with his father. The father-son relationship was deeply affected, because Kevin only had his mother's and her family's version of the facts, according to which Mr. Gutiérrez-Soler was "irresponsible and did not fulfil his duties." This severely affected Kevin's self-esteem, as "he felt inferior for not having a normal father by his side and felt helpless to change things." Both father and son are currently working on "recover a relationship that was almost inexistent."

The expert witness states that Mr. Ricardo Gutiérrez-Soler, brother to Mr. Wilson Gutiérrez-Soler, and his family were also affected by the events. Ricardo has seven children, and the events affected his family's life. Two of his sons, who at the time the events took place were nine and thirteen 13 years old, cut themselves away from their family and went on their own prematurely, as soon as they turned fifteen and sixteen, for they felt emotionally abandoned by their father. As regards the financial aspect, there was a profound change in their lifestyle and their possibilities to continue

attending school, which were reduced. Ricardo and his wife Yaqueline's children, who remained within the family group, have suffered their share of all the harassment. They have lived for years trying to hide and escaping, something which generates instability and insecurity.

Ricardo Gutiérrez-Soler's teenage daughters have not lived the normal life of a girl because as a consequence of fear they are forced to stay at home. Ricardo did not have an explanation for his children because he did not even have one for himself. The children resented the evasive answers from their father. Owing to this, they started to develop their own explanations, which led them to distrust their father. When they learned what was really happening, it was as if they had managed to put all the pieces of their lives' puzzle together. Ricardo's children also had symptoms consistent with the events they underwent, the aftermath of which depends to a large extent on the assistance they may receive in the future. These children wish to resume studies as their great life project. The children of Wilson and Ricardo have been affected in their transition between adolescence and adulthood. Carlos, one of them, shows signs of depression and has a negative sense of himself, which makes it necessary for him to use professional help. Forbidden to go out with other girls, Ricardo's daughters feel they do not have a normal life. Leydi does not live with his father, but she has not been able to continue her studies, so she feels affected because her life project is not heading in the direction she wishes.

Yaqueline stood by Ricardo's side, suffering as much as him, like an echo of what he was going through. Presently, Yaqueline is deeply concerned about the fact that her daughter Paula Camila, who is four years old, does not speak yet and urgently needs to start treatment. Yaqueline feels hopeless because this kind of treatment is expensive, and the longer it is put off the worse the condition might be getting. Early treatment can prevent pathological developments.

The fact that Wilson and Ricardo Gutiérrez have not wanted to disclose the events to their next of kin follows a pattern similar to that of other survivors of torture. Torture victims "feel ashamed to share it with everybody else [...] this is a pattern undoubtedly found in 95% of torture survivors." The fact of having been raped also determined him to refuse to talk about the events, since "for a man, a sexual assault like that suffered by Wilson represents an attack to his dignity, to his masculinity." Mr. Wilson Gutiérrez "lost his ability to fully enjoy his sex life, which for a man of his age is quite regrettable."

The apologies by the State is "a way to restore the social status they used to have and they want to have; it is a way to reinstate the parent's authority over their children." As for the use of the events of the instant case "as an example in the professional training given to forensic physicians, to police investigators and to court officials," the victim has always expressed his desire to help prevent other people from going through the same thing as he did, for which reason it has an enormous emotional and moral value, and could be a psychologically restorative one as well. Action aimed at restoring the "family social, psychological and emotional functional levels they used to have, and the possibility of carrying out their own life project, are of the very essence." The reparations which may be ordered "will help greatly, but will not suffice; they need to work on their feelings internally."

One appropriate measure would be to establish a psychological assessment plan for persons who have to deal with persons arrested or who are in charge of dealing with arrests.

c) Expert report by Mr. Jaime Prieto-Méndez, economist and human rights expert

The expert witness stressed how important the acknowledgement of its liability effected by the State before the Inter-American Court would be if it were made public to Colombian society, since not only would it represent a way of putting an end to an international dispute, but it would also be “a very instructive exercise for the benefit of Colombian institutions and society concerning the harm done to the victims and the harm done to the society by the equivocal behavior of State officials.”

It is also important that such public recognition imply the “acknowledgment of Mr. Wilson Gutiérrez-Soler’s condition as the victim in the instant case and that reparations be provided for the harm done not only to his physical integrity, but also to his dignity, during this time, by the fact that his words, his testimony have been [...] questioned, undermining his public credibility and honor.” Such circumstance would contribute to redressing the wrongs caused to other victims of torture or violations of human rights whose honor was slighted by casting doubts on their testimony.

One measure necessary for these events not to occur again is the reopening of disciplinary and criminal investigations instituted against the parties responsible, applying the decision in judgment C-004 of 2003, issued by the Colombian Constitutional Court, which allowed the review of orders precluding or ceasing procedures and of acquittals in cases of serious human rights violations. In addition, the Colombian authorities must make a commitment to “tighten and implement the existing controls in relation with the circumstances and with the conditions in which persons deprived of liberty are kept while in prison or in provisional arrest centers.” Such controls are the responsibility of the authorities charged with enforcing the laws, such as the arresting authorities or the Ombudsman, and the General Prosecutor. It is important that the domestic laws forbidding solitary confinement be strictly applied. There must be a close vigilance of the time periods for which persons are held by the arresting authorities and surrendered to the power of the courts, since, even though the law establishes short periods, these are often extended without any reason, which may lead to coercion or torture against the persons arrested. Similarly, victims must be given access to lawyers, to controlling authorities and to their next of kin with the purpose of preventing the personal integrity of the persons arrested from being affected.

The State must take into account the recommendations of the Inter-American Commission with regard to the absolute prohibition against “persons deprived of liberty being subjected to questioning by the arresting authorities in provisional arrest centers without the presence of a judge.” It is important that the prohibition against persons arrested being questioned without a lawyer being present be rigourously applied. Medical examinations established by the Colombian laws to be conducted upon entry into and

release from arrest centers must be carried out rigourously, avoiding relying on good treatment certificates as a means of vouching that the person has not been subjected to coercion or torture.

It is also essential that the decision in judgment C-358 of 1997 issued by the Colombian Constitutional Court be fully enforced. Such judgment establishes that "military or judicial criminal jurisdiction, which pursuant to the Constitution shelters police and military authorities in criminal cases, cannot be extended to cases involving human rights violations." Even though as a result of said judgment of the Constitutional Court "a considerable number of [...] investigations of human rights violations have been removed from the military criminal courts to the ordinary courts," there are still opinions in favor of these cases being heard by the military courts.

The expert witness held that it is necessary to prevent the victims from being disparaged because of any kind of prejudice, including the prejudice that the victim is a criminal, casting doubts on their testimony and giving credit to the authorities eventually being investigated. In this regard, it is necessary to give adequate instruction to the officials responsible for judicial and disciplinary investigations, concerning the fact that, in cases of torture, the victims cannot be treated as if they were criminals, and their testimony must be taken into consideration.

C) EVIDENCE ASSESSMENT

Documentary Evidence Assessment

43. In the instant case, as in others,⁶ the Court recognizes the evidentiary value of the documents submitted by the parties at the appropriate procedural moment or as evidence to facilitate the adjudication of the case pursuant to Article 45 of the Rules of Procedure, which have not been disputed nor challenged, and whose authenticity has not been questioned.

44. The Court finds helpful for the adjudication of the instant case the copy of "the entire record of the case instituted in the Military Criminal Courts against Colonel Luis Gonzaga Enciso Baron, charged with criminal assault and battery against Mr. Wilson Gutiérrez-Soler," which has been forwarded by the State on February 16, 2005 (*supra* para. 23), as it was not disputed or challenged, nor was its authenticity or truthfulness questioned. The file is thus incorporated to the body of evidence pursuant to Article 45.1 of the Rules of Procedure.⁷

45. As for sworn statements not effected before a public official whose acts command full faith and credit by witnesses Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Leydi Caterin Gutiérrez-Peña, Leonardo Gutiérrez-Rubiano, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano and Carlos Andrés

⁶ Cf. *Case of Acosta Calderón*, *supra* note 3, para. 45; *Case of YATAMA*, *supra* note 3, para. 112; and *Case of Fermín Ramírez*, *supra* note 3, para. 48.

⁷ Cf. *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125, para. 44; *Case of the Serrano Cruz Sisters*. Judgment of March 01, 2005. Series C No. 120, para. 41; and *Case of Lori Berenson Mejía*. Judgment of November 25, 2004. Series C No. 119, para. 81.

Gutiérrez-Rubiano, as well as by expert witness Iván González Amado, all of whom were proposed by the representatives (*supra* paras. 22 and 24), the Court admits them inasmuch as they are in accordance with the object set forth by the Order issued by the President on February 1, 2005 and assesses them as a whole with the rest of the body of evidence, applying thereto the standards of reasonable credit and weight analysis, and taking into account the points made by the State. The Court on other occasions has admitted sworn statements not effected before a public official with authority to confer full faith and credit to the acts passed before him provided that legal certainty and the procedural equality between the parties are not impaired.⁸ As this Court has established, the statements of the alleged victims and their next of kin may provide useful information about the alleged violations and their consequences.⁹ In addition, the Court recognizes that, for reasons beyond their control, the representatives were not able to submit the statements of María Elena Soler de Gutiérrez and Paula Camila Gutiérrez-Reyes (*supra* para. 22).

46. The Court considers helpful for the adjudication of the instant case the documents submitted by the parties in their final written pleadings, inasmuch as they were not specifically disputed or challenged, nor was their authenticity or truthfulness questioned, thus preserving the right to an adversary procedure. Therefore, they are incorporated into the body of evidence pursuant to Article 45(1) of the Rules of Procedure.¹⁰

Testimonial and Expert Evidence Assessment

47. As regards the statements made by the witnesses and the expert witnesses proposed by the Inter-American Commission and by the representatives in the instant case (*supra* para. 42), the Court admits them inasmuch as they be in accordance with the purpose of the interrogatory established by the Court in its Order of March 10, 2005, and recognizes their evidentiary value, taking into account the observations filed by the State. In that regard, the Court will take into consideration such statements as a whole with the rest of the evidence produced by the parties. This Court considers that the statements by Wilson and Ricardo Gutiérrez-Soler cannot be assessed separately, for they are an alleged victim and his brother, both with an interest in the outcome of the instant case, but they must be assessed as a whole with the rest of the evidence within the body of the evidence in the case.

VII PROVEN FACTS

⁸ Cf. *Case of YATAMA*, *supra* note 3, para. 116; *Case of the Serrano Cruz Sisters*, *supra* note 7, para. 39; and *Case of the "Juvenile Reeducation Institute"*. Judgment of September 2, 2004. Series C No. 112, para. 84.

⁹ Cf. *Case of YATAMA*, *supra* note 3, para. 116; *Case of the Indigenous Community Yakye Axa*, *supra* note 7, para. 43; and *Case of the Moiwana Community*. Judgment of June 15, 2005. Series C No. 124, para. 84.

¹⁰ Cf. *Case of YATAMA*, *supra* note 3, para. 118; *Case of Fermín Ramírez*, *supra* note 3, para. 52; and *Case of Lori Berenson Mejía*, *supra* note 7, para. 81.

48. With respect with the acknowledgment of liability by the State, and taking into account the body of evidence in the instant case, the Court finds the following facts to be proven:

Arrest and torture of Mr. Wilson Gutiérrez-Soler

48(1) In the afternoon of August 24, 1994, National Police Colonel Luis Gonzaga Enciso-Barón, Commander of a city brigade of the National Anti-Extortion and Kidnapping Unit (hereinafter, the "UNASE") of the National Police, and his cousin, ex-Lieutenant Colonel Ricardo Dalel-Barón, made themselves present at carrera 13 and calle 63, city of Bogotá, where they had arranged to meet with Mr. Wilson Gutiérrez-Soler. Mssrs. Enciso-Barón and Dalel-Barón arrested him and took him to the basement of the UNASE facilities.¹¹

48(2) Once in the basement, Mr. Gutiérrez-Soler was hand-cuffed to the taps of a water tank and tortured and subjected to cruel, inhumane and degrading treatment, consisting of burns in his genitalia and other serious injuries.

48(3) Three hours after being tortured, Mr. Gutiérrez-Soler was interviewed by officers of the Permanent Human Rights Office, who told him that to save his life he must answer yes to every question he was asked. Therefore, Mr. Gutiérrez-Soler was coerced into making an "ad lib" statement about the events for which he was arrested.

48(4) Mr. Gutiérrez-Soler had no legal representative or public counsel present when he made his statement. To make up for the absence of counsel, members of the law enforcement force requested the presence of a nun to appear together with Mr. Gutiérrez-Soler in the abovementioned procedure. The State made no effort to contact a lawyer who could act as counsel, even though the UNASE's facilities are located in a downtown area of Colombia's capital city.

Physical and psychological sequels suffered by Mr. Wilson Gutiérrez-Soler as a consequence of the events of August 24, 1994

48(5) The harm done by the abovementioned burns was established by a forensic physician from the Colombian Forensic Medicine Nacional Institute, who examined Mr. Gutiérrez-Soler on that same August 24, 1994 at 11.45 p.m. and set on record that he had several injuries. On August 25, 1994, the Regional Prosecutor of the "UNASE Urbano" checked Mr. Gutiérrez-Soler's physical condition and also set on record such injuries. Likewise, medical certificates dated November 28, 2000 and December 14 of that same year issued by an urologist attest the persistence of the physical harm done.¹² Finally, the torture caused Mr. Gutiérrez-Soler to suffer permanent psychic disturbances that were assessed during the expert's examination

¹¹ Paragraphs 48(1) to 48(12) of this Judgment deal with non-disputed facts, which this Court deems to be established base don the State's recognition of responsibility.

¹² Cf. Clinical progress and male cystoscopy reports issued on November 28, 2000 and December 14, 2000, respectively, by Surgeon Urologist Jorge Chavarro (record of exhibits to the application, volume I, exhibit 14, folios 225 to 227; and record of exhibits to the brief with requests and arguments, volume II, folios 1016 to 1018).

carried out on August 8, 1996 by the Forensic Psychology and Psychiatry Group of the Bogotá Regional Unit.¹³

Proceedings carried out after the events occurred on August 24, 1994

48(6) On August 25, 1994, Mr. Gutiérrez-Soler reported, before the Regional Delegation of the Public Prosecution Office, the tortures he had suffered the day before. On August 26, 1994, Mr. Gutiérrez-Soler filed a complaint against Mr. Dalel Barón and Colonel Enciso Barón before a counsellor of the the Special Prosecutor for Human Rights Staff. As a result of said complaints, parallel proceedings were commenced within the ordinary jurisdiction against Mr. Dalel Barón, and within the military criminal and disciplinary jurisdictions against Colonel Enciso Barón.

48(7) On February 7, 1995, the Military Criminal Examining Judge N° 51 commenced proceedings for assault and battery against Colonel Luis Gonzaga Enciso Barón. Subsequently, the investigation was referred to the Office of Judge Advocate N° 60 , where it was decided to closing all proceedings against the above accused, on the grounds that "the allegations of Mr. Gutiérrez-Soler, besides not being confirmed by any form of evidence, appearing as meritless, being contradictory [...] said allegations do not deserve a iota of not credibility, since they are infested with specious, biased, malicious, slanderous, and base, conceived by his sick mind, arising from his characteristic mythomania. Witnesses of this kind must necessarily be suspect and be subjected to a greater control by the examining judge and the trial judge, since they are tainted with immorality."¹⁴ On September 30, 1998, the Superior Military Court confirmed the termination of the proceedings.

48(8) On June 7, 1995, on the basis of the complaint filed by Mr. Gutiérrez-Soler, the Special Prosecutor for Human Rights considered that there were enough merits to file charges against Colonel Enciso Barón before the disciplinary jurisdiction. However, the General Prosecutor's Office closed the case applying the *double jeopardy* principle in view of the decision made on February 27, 1995 by the Judicial Police Director, whereby Colonel Enciso Barón had been exonerated from any disciplinary liability.

48(9) On August 29, 1995, criminal proceedings were commenced against Mr. Dalel Barón. However, On January 15, 1998, the General Prosecutor's Office decided to preclude the investigation and to order the closing of the records, since "the testimonies of both the police officers and of those persons that, in some way (family or labor environment) were related to the accused, are of those classified by legal experts as 'questionable testimonies', since their credibility is undermined."¹⁵

¹³ Cf. report issued on August 8, 1996 by the Forensic Psychology and Psychiatry Group of the Bogotá Regional Unit (record of exhibits to the application, Volume I, exhibit 11, folios 215 to 217; and record of to the brief with requests and arguments, Volume II, exhibit 33, folios 1000 to 1002).

¹⁴ Cf. Court order of termination of proceedings issued on March 2, 1998 by the National Police Chief Inspector in his capacity as trial judge, in favor of Colonel Luis Gonzaga Enciso Barón (record of annexes to the preliminary objections, answer to the complaint and objections to the petition and allegations, book I, annex 1, folios 1342 and 1343.)

¹⁵ Cf. Examination preclusion order issued by the judge presiding the examination instituted against Mr. Ricardo Dalel Barón, issued on January 15, 1998 by the Prosecutor's Office N° 248 of the Battery First Unit of Bogota (record of annexes to the preliminary objections, answer to the complaint and comments to the petition and allegations, book I, annex 1, folios 1342 and 1343.)

On June 8, 1999, the Appellate Court of the Judicial District of Bogotá confirmed such decision. Afterwards, the Constitutional Court decided not to exercise its discretionary powers to review a petition for protective remedies filed by Mr. Gutiérrez-Soler.

48(10) Up to this date, no person has been punished for the false arrest of Mr. Wilson Gutiérrez-Soler and for the tortures that he suffered.

48(11) On the grounds of the statement made on August 24, 1994 by Mr. Gutiérrez-Soler, which was obtained under torture, proceedings were commenced against him, for the crime of extortion, by the then so called Regional Justice on September 2, 1994, and an order for him to be held in custody was issued. On January 20, 1995, the Special Prosecutor before the Appellate Court decided to revoke the said order, and to direct his release from custody, since the complaint against Mr. Gutiérrez-Soler was "infested with contradictions" and "could not be evaluated by the reasonable credit and weight analysis standards and even less, be given any credibility."¹⁶ On May 6, 1999, an accusation was formally issued against Mr. Gutiérrez-Soler, but the warrant for his arrest was revoked after an appeal lodged by his defense.

48(12) Finally, on August 26, 2002, after eight years from his initial arrest, Mr. Gutiérrez-Soler was acquitted for the crime of extortion by a decision of the Eighth Special Criminal Circuit Court of Bogotá. According to such decision, there was no certainty as regards the criminal liability of Mr. Gutiérrez-Soler because "the Police report number 1762 dated August 25, 1994, signed by Colonel Luis Gonzaga Enciso, [...] by means of which Mr. Wilson Gutiérrez-Soler, allegedly arrested *in fraganti* extortion, was placed at the disposal of the Regional Prosecutor's Office, can in no way be considered as [evidence] enough to hold [the above said Mr. Gutiérrez-Soler] liable as the perpetrator of a punishable act. This being so, since, on the one hand the person who personally appeared at the operation was Colonel Luis Gonzaga Enciso, a cousin of the informant [Ricardo Dalel], a fact which, to begin with, may show a certain tendency to favor the interests of his next of kin, in view of the fact that it is most rare that officers of such a rank be present in this kind of operations." Furthermore, the court also held that "the arrest in itself is questionable since it lead to the possible torture of the subject by the said officer in the presence of the informant, causing the subject to be laid up for 18 days, due to burns in his genitalia, according to the report issued by the National Institute of Legal Medicine and Forensic Sciences [...] In the light of the reasonable credit and weight analysis standards, [the aforesaid circumstances] allow the court to consider that this arrest should not be given much value."¹⁷

The situation of Mr. Wilson Gutiérrez-Soler and his next of kin after the events occurred on August 24, 1994

¹⁶ Cf. resolution issued on January 20, 1995 by the Special Prosecutor's Office before the National Court, by means of which the custody of Mr. Wilson Gutiérrez-Soler was revoked (Record of Annexes to the Petitions and Allegations, book I, folios 898 to 905; and Annexes filed by the State, Records of the Military Criminal Court against Colonel Luis Gonzaga Enciso Barón, Book 2, folios 1711 and 1712.)

¹⁷ Cf. Order of Acquittal issued on August 26, 2002 by the Eighth Special Criminal Circuit Court of Bogotá (Records of Annexes to the Complaint, Annex 3, Book I, folios 162-170, and Records of Annexes to the Petitions and Allegations, Book I, folios 857-866.)

48(13) The next of kin of Mr. Wilson Gutiérrez-Soler mentioned in the different submissions before the court are as follows: his son, Kevin Daniel Gutiérrez-Niño; his parents, María Elena Soler de Gutiérrez and Álvaro Gutiérrez-Hernández (deceased); his brother, Ricardo Gutiérrez-Soler; his brother's common-law spouse, Yaqueline Reyes; and his nieces and nephews Luisa Fernanda Gutiérrez-Reyes, Paula Camila Gutiérrez-Reyes, Leonardo Gutiérrez-Rubiano, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano and Carlos Andrés Gutiérrez-Rubiano. Mr. Álvaro Gutiérrez-Hernández died in October 2004.¹⁸

48(14) Due to the complaints made by Mr. Wilson Gutiérrez-Soler, his next of kin and himself have been subjected to threats, harassment, surveillance, arrests, searches and attempts against their lives and against their personal integrity, which have not been properly investigated. As a result of that situation, Mr. Wilson Gutiérrez-Soler and his son Kevin have had to go into exile and they currently reside in the United States of America.¹⁹

48(15) Mr. Ricardo Gutiérrez-Soler's family still live in Colombia. However, in view of the constant persecutions mentioned, aggravated by the support that Ricardo always provided to his brother Wilson in relation to his several complaints, the family had to split and move.²⁰

48(16) This campaign of threats, harassment and aggressions – which started in 1994 and has not finished yet – has endangered the life and personal integrity of Mr. Wilson Gutiérrez-Soler and several of his next of kin, and has deeply affected their family life as a whole. Consequently, they have suffered constant fear and psychological damage.²¹

¹⁸ Cf. Complaint filed by the Commission, petitions and allegations filed by the representatives and final written arguments of the Commission and of the representatives (Record of preliminary motions, merits of the case and reparations, Book IV, folios 40 and 181; and record of preliminary motions, merits of the case and reparations, Book IV, folios 878 and 913); and death certificate issued by the Registrar of Life Statistics evidencing the death of Mr. Álvaro Gutiérrez-Hernández (record of preliminary motions, merits of the case and reparations, Book III, folio 859.)

¹⁹ Cf. Testimonies of Messrs. Wilson and Ricardo Gutiérrez-Soler rendered before the Inter-American court on March 10, 2005; and the affidavits of the infant Kevin Gutiérrez and of Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Carlos Andrés Gutiérrez-Rubiano, Leonardo Gutiérrez-Rubiano and Ricardo Alberto Gutiérrez-Rubiano made on February 15 and 16, 2005 (Record of preliminary motion, merits of the case and reparations, Book III, folios 563 to 610.)

²⁰ Cf. Testimonies of Messrs. Wilson and Ricardo Gutiérrez-Soler rendered before the Inter-American court on March 10, 2005; and the affidavits of the infant Kevin Gutiérrez and of Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Carlos Andrés Gutiérrez-Rubiano, Leonardo Gutiérrez-Rubiano and Ricardo Alberto Gutiérrez-Rubiano made on February 15 and 16, 2005 (Record of preliminary motion, merits of the case and reparations, Book III, folios 563 to 610.)

²¹ Cf. Testimonies of Messrs. Wilson and Ricardo Gutiérrez-Soler rendered before the Inter-American court on March 10, 2005; testimony rendered by expert witness Ana Deutsch before the Inter-American Court on March 10, 2005 and the affidavits of the infant Kevin Gutiérrez and of Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Carlos Andrés Gutiérrez-Rubiano, Leonardo Gutiérrez-Rubiano and Ricardo Alberto Gutiérrez-Rubiano made on February 15 and 16, 2005 (Record of preliminary motion, merits of the case and reparations, Book III, folios 563 to 610.)

48(17) Both Mr. Wilson Gutiérrez-Soler and his brother Ricardo ran their own businesses and earned enough money to keep their respective families. However, the events were most detrimental for Messrs. Wilson and Ricardo Gutiérrez-Soler, due to their reduced chances to work and see to the financial stability of their families. Likewise, the lack of economic resources furthered broke apart their families separation and dramatically limited educational possibilities for their children.²²

48(18) Mr. Wilson Gutiérrez-Soler and his next of kin have been represented by CEJIL (Center for Justice and International Law) and by the *Colectivo de Abogados "José Alvear Restrepo"* (Lawyers' Group "José Alvear Restrepo"), in the domestic proceedings as well as before the Commission and the Court; therefore, both organizations have incurred in a number of expenses related to such proceedings.²³

VIII THE MERITS OF THE CASE

Considerations of the Court

49. Article 53(2) of the Court's Rules of Procedure sets forth the following:

If the respondent informs the Court of its acquiescence to the claims of the party that has brought the case as well as the to claims of the representatives of the alleged victims, their next of kin or representatives, the Court, after hearing the opinions of the other parties to the case whether such acquiescence and its juridical effects are acceptable. In that event, the Court shall determine the appropriate reparations and indemnities.

50. The Order issued by the Court on March 10, 2005, in its preliminary section pointed out the following:

1. That the State [...] withdrew all the preliminary objections stated in the answer to the application dated August 31, 2004.
2. That the State [...]acknowledged the facts and its international liability for the violation of Articles 5(1), 5(2) and 5(4); 7(1), 7(2), 7(3), 7(4),

²² Cf. Testimonies of Messrs. Wilson and Ricardo Gutiérrez-Soler rendered before the Inter-American court on March 10, 2005; and the affidavits of the infant Kevin Gutiérrez and of Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Carlos Andrés Gutiérrez-Rubiano, Leonardo Gutiérrez-Rubiano and Ricardo Alberto Gutiérrez-Rubiano made on February 15 and 16, 2005 (Record of preliminary motion, merits of the case and reparations, Book III, folios 563 to 610.)

²³ Cf. powers of representation before the Inter-American Court granted Wilson and Ricardo Gutiérrez-Soler, María Elena Soler de Gutiérrez, Alvaro Gutiérrez-Hernández, Yaqueline Reyes, Leydi Caterin Gutiérrez-Peña and Carlos Andrés, Ricardo Alberto and Sulma Tatiana Gutiérrez-Rubiano to the Lawyers' Association called "José Alvear Restrepo" and to CEJIL (Record of annexes to the petitions and allegations, Book I, Annex 1 folios 630 to 641); power of representation before the Inter-American Court granted by Ricardo Gutiérrez-Soler on behalf of the minor children Paula Camila and Luisa Fernanda Gutiérrez-Reyes and Leonardo Gutiérrez-Rubiano (Record of Annexes to the petitions and arguments, Book I, Annex 1, folio 636); and invoices and receipts submitted as evidence of the expenses incurred by the Lawyers' Association called "José Alvear Restrepo" and CEJIL (Record of Annexes to the petitions and allegations, Book II, Annexes 79, 80 y 81, folios 1210 to 1318; and final arguments drafted by the representatives, Book IV, Annexes 1 to 4 folios 926 to 965).

7(5) and 7(6); 8(1), 8(2)(d), 8(2)(e), 8(2)(g) and 8(3) and 25 of the American Convention on Human Rights.

3. That said acknowledgement made by the State [...] does not interrupt the procedures aimed at receiving the evidence ordered to be produced on the matter of reparations and indemnities, notwithstanding which the Court may decide on the merits of the case and on the request made by the State for time period during which to attempt reaching a friendly settlement on the matter of the said indemnities

Subsequently, the Court made the following decisions:

1. To admit the withdrawal of all the preliminary objections filed by the State.
2. To admit the acknowledgement of its international liability made by the State within the scope of the first and second paragraphs of the considerations contained in the [...] Order of the Court.
3. That there is no longer a dispute as to the facts and therefore, the Court would render, in due time, judgment on the merits of the case.
4. To continue holding the public hearing convened under the Order of the President of the Court dated February 1, 2005, and to restrict its subject-matter to reparations and indemnities in the instant case [...].

51. The Court considers the facts stated in paragraph 48 of this Judgment to have been proved and on the basis of such proven facts, and having weighed the circumstances of the case, the Court proceeds to specify the different violations of the Articles mentioned it has found.

52. Firstly, as Colombia acknowledged, this Court considers that the State internationally liable for the violation of the rights embodied in Articles 5(1), 5(2) and 5(4); 7(1), 7(2), 7(3), 7(4), 7(5) and 7(6); 8(1), 8(2)(d), 8(2)(e), 8(2)(g) and 8(3) and 25 of the American Convention, regarding Article 1(1) of the same, against Mr. Wilson Gutiérrez-Soler. As to his arrest, the Court considers that it was made without a warrant issued by a judge having jurisdiction to do so and under circumstances that do not qualify as flagrancy.

53. The aforesaid notwithstanding, the Court acknowledges that there still is a dispute as to other violations alleged in the instant case. In that sense, the representatives alleged that the State also failed to comply with the obligations set forth in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture²⁴ (hereinafter "Inter-American Convention against Torture"), even though

²⁴ Cf. Article 1: "[T]he State Parties undertake to prevent and punish torture in accordance with the terms of this Convention." Article 6: "[i]n accordance with the terms of Article 1, the States Parties shall take effective measures to prevent and punish torture within their jurisdiction. The States Parties shall ensure that all acts of torture and attempts to commit torture are offenses under their criminal law and shall make such acts punishable by severe penalties that take into account their serious nature. The States Parties likewise shall take effective measures to prevent and punish other cruel, inhuman, or degrading treatment or punishment within their jurisdiction". Article 8: "[T]he States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case. Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process. After all the domestic legal procedures of the respective State and the corresponding appeals

the Inter-American Commission did not file any allegations in that respect. It is now well established by the Court that the representatives may argue violations of the Convention other than those alleged by the Commission, as long as such legal arguments are based upon the facts set out in the application.²⁵ Petitioners are the persons entitled to the rights protected by the Convention; therefore, restricting their possibility to submit their own allegations of fact would amount to an undue restriction of their right to justice which derives from their legal standing as Subjects of International Human Rights Law.²⁶

54. The Court considers that, in the light of the general obligation of the State Parties to respect and guarantee the rights of all persons subject to its jurisdiction, contained in Article 1(1) of the American Convention, the State has the obligation to commence immediately an effective investigation that may allow the identification, the trial and the punishment of those liable, whenever there is an accusation or well-grounded reason to believe that an act of torture has been committed in violation of Article 5 of the American Convention. Furthermore, this action is specifically regulated in Articles 1, 6 and 8 of the Inter-American Convention against Torture, which Articles bind the State Parties to take all steps that may be effective to prevent and punish all acts of torture within the scope of their jurisdiction, as well as to guarantee that all torture cases be examined impartially.²⁷ In the instant case, the Court finds that Colombia did not abide by these provisions, since, to this date, no person has been punished for the tortures inflicted on Mr. Wilson Gutiérrez-Soler and the State itself has recognized the existence of shortcomings in judicial guarantees of due process of law its internal proceedings (*supra* paras. 26, 28 and 48(10)). From the moment the said Inter-American Convention against Torture became effective in Colombia on February 18, 1999, the State is bound to comply with the obligations set forth in such treaty. Therefore, in the opinion of this Court, such conduct is considered a failure to comply with the obligations stated in Articles 1, 6 and 8 of the Inter-American Convention against Torture, as regards the duty to prevent and punish torture domestically.

55. On the other hand, the representatives further alleged that the State violated the right to humane treatment, set forth in Article 5 of the American Convention, to the detriment of Mr. Wilson Gutiérrez-Soler's next of kin; the Commission did not submit any allegations in that respect.

56. Article 5(1) of the American Convention sets forth that: "Every person has the right to have his physical, mental, and moral integrity respected." In the context of the instant case, it has been proven that Mr. Wilson Gutiérrez-Soler and his next of kin have been subjected to a campaign of threats, harassment, surveillance, arrests, searches and attempts against their lives and their physical integrity (*supra*

have been exhausted, the case may be submitted to the international fora whose competence has been recognized by that State."

²⁵ Cf. *Case of YATAMA*, *supra* note 3, para. 183; *Case of Fermín Ramírez*, *supra* note 3, para. 88; and *Case of the Moiwana Community*, *supra* note 9, para. 91.

²⁶ Cf. *Case of the Moiwana Community*, *supra* note 9, para. 91; *Case of De La Cruz Flores*. Judgment of November 18, 2004. Series C No. 115, para. 122; and *Case of the "Juvenile Reeducation Institute"*, *supra* note 8, para. 125.

²⁷ Cf. *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, para. 159; *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004. Series C No. 110, para. 114; and *Case of Maritza Urrutia*. Judgment of November 27, 2003. Series C No. 103, para. 95.

para. 48(14)). As declared by Mrs. Yaqueline Reyes, the consequences of such persecutions were "terrible" for the family:

This is very hard for me. It has changed our lives; we cannot even go out to go to the store in peace for fear that someone would try to hurt us. We have to stay indoors, [...], move from house to house, be under stress [...] be always looking back. When Wilson left the country, I thought "Wilson is the one with the problems, not us". But I was wrong, because the situation continued, because Wilson left but his brother [Ricardo Gutiérrez-Soler], who had always gone everywhere with him, stayed behind and they knew him, they went on and harassing and threatening him. [...] Therefore, it is terrible for us because now we are the ones with the problem. [...]

57. Consequently, due their having suffered constant fear, distress and family separation (*supra* para. 48(14) to 48(17)), the Court concludes that the next of kin of Mr. Wilson Gutiérrez-Soler – that is to say, Kevin Daniel Gutiérrez-Niño, María Elena Soler de Gutiérrez, Álvaro Gutiérrez-Hernández (deceased), Ricardo Gutiérrez-Soler, Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Paula Camila Gutiérrez-Reyes, Leonardo Gutiérrez-Rubiano, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano and Carlos Andrés Gutiérrez-Rubiano – have undergone such suffering as would amount to a violation of Article 5(1) of the American Convention, in relation to Article 1(1) of such treaty, to their detriment, by the State,.

58. As regards the determination of those next of kin of Mr. Wilson Gutiérrez-Soler that have suffered a violation to their right to humane treatment, this Court acknowledges that in the pleading of petitions and allegations, the representatives mentioned other persons in addition to the next of kin mentioned in the application, to wit: Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano and Carlos Andrés Gutiérrez-Rubiano, all of them children of Mr. Ricardo Gutiérrez-Soler. In that respect, it is noticed by this Court that the State has objected to these persons being beneficiaries of a reparation, given the fact that they were not mentioned in the application. Furthermore, in their final arguments, the representatives only requested "that the children [of Ricardo Gutiérrez-Soler] which the State recognized as victims be compensated [for moral damage]", thus excluding the four persons mentioned above. In spite of the aforesaid, the Court has determined – on the basis of the affidavits of the incumbent next of kin (*supra* para. 41) and of the whole body of evidence in the case – that these persons have also suffered the same detriment to their mental and moral integrity as the next of kin of Mr. Wilson Gutiérrez-Soler, who were duly listed in the application. Therefore, the Court considers that the formerly mentioned are also victims of the violation of Article 5(1) of the American Convention, in relation to Article 1(1) of said treaty.

59. Finally, the Court considers that the acknowledgment of international liability made by the State constitutes a very important step in the development of this proceedings and a step towards the enforcement of the principles consecrated in the American Convention. The Court particularly appreciates the manner in which the State made such acknowledgment at the public hearing in these proceedings, that is to say, through an act requesting forgiveness, personally addressed to Mr. Wilson Gutiérrez-Soler and his next of kin. This, according to the statement made by the State, contributes to the "dignification of the victim and of his next of kin."

60. By reason of the foregoing, and pursuant to the Order of the Court of March 10, 2005, and considering the statements made by the representatives rejecting the proposal by the State to try and reach a friendly settlement regarding the reparations and costs and expenses of this action (*supra* para. 30), the Court shall proceed to determine them.

IX
REPARATIONS
APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION

Obligation to Repair

61. This Court has determined that it is a principle of International law that all violations of an international obligation which cause damage must be adequately make reparations.²⁸ In its decisions in that respect, the Court based on Article 63.1 of the American Convention that states the following:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the party harmed be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the party harmed.

62. Section 63(1) of the American Convention codifies a rule of custom which is one of the fundamental principles of contemporary International Law regarding the responsibility of States. Upon the occurrence of an internationally wrongful act attributable to a State, the international liability of such State arises, with the consequent duty to make reparations and to have the consequences of the violation remedied.²⁹

63. The reparation of the damage caused by the infringement of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists of the return to the state of affairs prior to the infringement. If this is not feasible, as it happens in the majority of cases – the instant case among others-, the International Court shall determine the measures to be ordered to protect the rights that were affected, as well as to make reparations the consequences the infringements brought about and shall determine a compensation for the damage caused.³⁰ It is necessary to add the positive measures that the State must adopt to prevent repetition of the harmful events such as those that occurred in the instant case.³¹ It is a principle of general International Law that the obligation to repair

²⁸ Cf. *Case of Acosta Calderón*, *supra* note 3, para. 145; *Case of YATAMA*, *supra* note 3, para. 230; and *Case of Fermín Ramírez*, *supra* note 3, para. 122.

²⁹ Cf. *Case of Acosta Calderón*, *supra* note 3, para. 146; *Case of YATAMA*, *supra* note 3, para. 231; and *Case of Fermín Ramírez*, *supra* note 3, para. 122.

³⁰ Cf. *Case of Acosta Calderón*, *supra* note 3, para. 147; *Case of YATAMA*, *supra* note 3, para. 232; and *Case of Fermín Ramírez*, *supra* note 3, para. 123.

³¹ Cf. *Case of Acosta Calderón*, *supra* note 3, para. 147; *Case of YATAMA*, *supra* note 3, para. 232; and *Case of Fermín Ramírez*, *supra* note 3, para. 123.

cannot be modified or unfulfilled by the State alleging its domestic laws, a principle constantly applied in the precedents of this Court.

64. Reparations are measures tending to eliminate the effects of the violations committed. Their nature and amount depend on the characteristics of the violation and on both the pecuniary and non-pecuniary damage caused. Such reparations shall not result in the victims or their successors becoming richer or poorer and the same shall bear relation to the violations declared in the Judgment.³²

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* *

A) *BENEFICIARIES*

65. The Court shall summarize now the Argument by the Inter-American Commission, the Representatives and the State, regarding the determination of those persons entitled to be considered beneficiaries of the reparations that the Court may order.

Argument by the Commission

66. The Commission alleged that the beneficiaries of the reparations are the following, to wit: Mr. Wilson Gutiérrez-Soler, as the victim, and his next of kin: Kevin Daniel Gutiérrez-Niño (son); María Elena Soler de Gutiérrez (mother); Álvaro Gutiérrez-Hernández (father); Ricardo Gutiérrez-Soler (brother); Yaqueline Reyes (sister-in-law, wife of Ricardo Gutiérrez-Soler); Luisa Fernanda Gutiérrez-Reyes (niece, daughter of Ricardo Gutiérrez-Soler); Paula Camila Gutiérrez-Reyes (niece, daughter of Ricardo Gutiérrez-Soler) and Leonardo Gutiérrez-Rubiano (nephew, son of Ricardo Gutiérrez-Soler).

Argument by the Representatives

67. The representatives considered that the beneficiaries of the reparations are those persons that have been directly affected by the violations in point, and that in the instant case, the persons harmed are: Wilson Gutiérrez-Soler, Kevin Daniel Gutiérrez-Niño (Wilson's son), Ricardo Gutiérrez-Soler (Wilson's brother), Yaqueline Reyes (Ricardo's wife); Luisa Fernanda Gutiérrez-Reyes, Paula Camila Gutiérrez-Reyes, Leonardo Gutiérrez-Rubiano, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano and Carlos Andrés Gutiérrez-Rubiano (children of Ricardo); Álvaro Gutiérrez-Hernández and María Elena Soler de Gutiérrez (parents of Wilson and Ricardo).

Argument by the State

68. The State alleged the following:

³² Cf. *Case of Acosta Calderón*, *supra* note 3, para. 148; *Case of YATAMA*, *supra* note 3, para. 233; and *Case of Fermín Ramírez*, *supra* note 3, para. 124.

a) according to the terms of the application filed by the Commission, the victim of the violations acknowledged by the State of Colombia is Mr. Wilson Gutiérrez-Soler; and

b) pursuant to the application filed by the Commission, the beneficiaries of the possible reparations to be ordered by the Court or that may be friendly settled by the parties are: Wilson Gutiérrez-Soler, Kevin Daniel Gutiérrez; María Elena Soler de Gutiérrez; Álvaro Gutiérrez-Hernández; Ricardo Gutiérrez-Soler; Yaqueline Reyes; Luisa Fernanda Gutiérrez-Reyes; Paula Camila Gutiérrez-Reyes and Leonardo Gutiérrez-Rubiano.

Considerations of the Court

69. The Court considers that Mr. Wilson Gutiérrez-Soler is a “party harmed”, as a victim of the violations hereinbefore stated (*supra* paras. 52 and 54). Likewise, Mr. Wilson Gutiérrez-Soler’s next of kin – that is to say, Kevin Daniel Gutiérrez-Niño, María Elena Soler de Gutiérrez, Álvaro Gutiérrez-Hernández (deceased), Ricardo Gutiérrez-Soler, Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Paula Camila Gutiérrez-Reyes, Leonardo Gutiérrez-Rubiano, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano and Carlos Andrés Gutiérrez-Rubiano – are victims of the violation of the right recognized by Article 5(1) of the American Convention, in relation to Article 1(1) of the same Convention (*supra* para. 57). Therefore, said next of kin shall also be beneficiaries of the reparations ordered by this Court.

70. The compensation that the Court may order shall be delivered to each beneficiary in his or her capacity as a victim. In case any of the victims is dead, as the case of Mr. Álvaro Gutiérrez-Hernández, or if a victim dies before the respective compensation is delivered, the amount that would correspond to such person shall be distributed according to the applicable domestic legislation.

B) PECUNIARY DAMAGE

Argument by the Commission

71. As regards pecuniary damage, the Commission pointed out the following:

a) Mr. Wilson Gutiérrez-Soler and his next of kin had to deploy very significant financial efforts in order to seek justice and to afford the psychological treatments necessary to withstand the consequences derived from the serious violations suffered;

b) due to their suffering, Mr. Wilson Gutiérrez-Soler and his next of kin could not go on with the normal course of their trade and work, which produced a considerable reduction of their customary earnings, necessary for their maintenance;

c) the life project of Mr. Wilson Gutiérrez-Soler and that of his family were destroyed by the impunity of those responsible and by the lack of reparation; and

- d) the compensation for actual and consequential damages, including loss of profits should be equitably fixed.

Argument by the Representatives

72. In turn, Representatives stated the following as regards pecuniary damage:

- a) for almost ten years, the Gutiérrez-Soler family have been subject to harassment, threats, surveillance, arrests, searches and attacks that forced them to radically change their lifestyle and which brought about serious economic consequences, as well as physical and psychological suffering. In this sense, the Gutiérrez-Soler family have incurred in expenses to move house, to change their work, to receive specialized medical attention and have sustained the loss of assets, including businesses, cars and plots of land. The Gutiérrez-Soler family have made "uncountable" efforts to survive, moving from one place to another or going into exile;
- b) at the moment the tortures occurred, Mr. Wilson Gutiérrez-Soler's business was to buy and sell vehicles, and also personal and real property acquired at court-ordered auctions. In addition, he drove a taxi owned by himself, thus benefiting both from an additional income and the possibility of driving over to his business activities;
- c) when Mr. Wilson Gutiérrez-Soler was arrested, he was driving a gold-colored QP Chevrolet Chevette, which he lost on that day and found it impossible to recover;
- d) due to the criminal investigation for extortion against Mr. Wilson Gutiérrez-Soler, the Gutiérrez-Soler family were forced to sell some of the vehicles to cover the fees charged by their first attorney;
- e) The family received financial support from the *Corporación Colectivo de Abogados "José Alvear Restrepo"* (Lawyers' Group "José Alvear Restrepo"), and the money was principally applied to cover the expenses related to the departure of Mr. Wilson Gutiérrez-Soler from the country and was also applied to investigation activities and to "expedite the judicial proceedings;"
- f) the Court is requested to grant, on equitable grounds, the amount of US \$30,000 (thirty thousand United States Dollars) for each family as actual damages; and
- g) Wilson, Ricardo and their father, Álvaro, were substantially limited in their working capacity as a consequence of the constant harassment they had to endure. Therefore, the Court is requested to grant an equitable amount to compensate such persons for their loss of income.

Argument by the State

73. As regards the pecuniary damage, the State made the following submission, to wit:

a) in the instant case, the estate has not been evidenced by documents under seal or any other means of evidence, and therefore, the Court may not determine accurately the amount of the possible damages suffered. Furthermore, some items of evidence are defective in that they contradict others in many aspects;

b) No documentary or testimonial evidence have been produced regarding the change of residence, work, nor evidencing the specialized medical attention received, the loss of property –including businesses, vehicles and real estate- nor the expenses incurred to seek justice by the Gutiérrez-Soler family; and

c) It has not been proved that Messrs. Wilson and Ricardo Gutiérrez-Soler and their father, Mr. Álvaro Gutiérrez, suffered a substantial detriment in their working capacity due to the constant harassment they endured. However, the State in good faith accepts, in view of the weakness of the evidence submitted by the party having the burden of proof, the existence of a minimum damage that must be compensated as loss of profit. The aforesaid, on the basis of the principle according to which every working activity has a minimum vital and adjustable remuneration, which is proportional to the amount and quality of the work performed. The compensation has to be granted on the basis of the legal minimum salary in force in Colombia and not on an equitable basis as claimed by the Commission and the Representatives. On the basis of the legal minimum salary in force in Colombia, and applying financial formulae recognized in the Colombian precedents, the State figures out the total loss of profit sustained by Mr. Wilson Gutiérrez-Soler amounts to 136,305,374.46 Colombian Pesos.

Considerations of the Court

74. The Court shall herein address the pecuniary damage, which implies the loss of, or detriment to, the income of the victim, the expenses incurred due to the events and the pecuniary consequences that may have a cause-effect link with the events in the instant case,³³ for which, if applicable, the Court fixes a compensatory amount seeking to redress the economic consequences of the violations that were determined in this Judgment. In order to make a decision as to the pecuniary damage, the Court shall take into account the body of evidence, its own precedents and the arguments submitted by the parties.

a) Loss of Income

75. Firstly, the Court is pleased to notice that the State has shown it wants to compensate the loss of income suffered by Mr. Wilson Gutiérrez-Soler as a consequence of the events in the instant case. In that sense, it has been proved that, at the moment of his illegal arrest and torture, Mr. Wilson Gutiérrez-Soler was

³³ Cf. *Case of Acosta Calderón*, *supra* note 3, para. 157; *Case of YATAMA*, *supra* note 3, para. 242; and *Case of Fermín Ramírez*, *supra* note 3, para. 129.

self-employed in his own businesses and earned enough money to keep his family (*supra* para. 48(18)). Likewise, it has been proved that, as a consequence of having reported he had been tortured, subsequent harassment and persecutions prevented Mr. Wilson Gutiérrez-Soler from finding a stable working position and was eventually forced into exile (*supra* paras. 48(14) and 48(17)).

76. This Court notices that the evidence on the records of the case is not adequate to determine with accuracy the income of Mr. Gutiérrez-Soler at the moment the events occurred. In that respect, and considering the activities whereby the victim used to earn his living, and the circumstances of the case, the Court fixes on equitable grounds the amount of US \$ 60,000.00 (sixty thousand United States Dollars) to be received by Mr. Wilson Gutiérrez-Soler as compensation for the loss of income. Said amount must be delivered to Mr. Wilson Gutiérrez-Soler as established in paragraph 70 of this order.

b) Pecuniary damages sustained by the Family

77. It is considered proved (*supra* paras. 48(14), 48(15), and 48(16)) that the campaign of threats, harassment and aggressions not only forced Mr. Wilson Gutiérrez-Soler to flee from Colombia, but also affected deeply the safety of his next of kin. For example: a) his parents suffered threats and a bomb was planted in their home, and thereby they were forced to leave Bogotá; b) Wilson's brother, Mr. Ricardo Gutiérrez-Soler, received a book bomb at his home and suffered several searches and harassment at his workplace; and c) unknown persons attempted to abduct one of the children of Mr. Ricardo Gutiérrez-Soler. These difficult circumstances have forced the family of Mr. Ricardo Gutiérrez-Soler to move house several times and have rendered it impossible for Ricardo to find continuous work and to provide for his family (*supra* para. 48(17)). Due to the aforesaid, some of the children of Mr. Ricardo Gutiérrez-Soler have been separated from the family and are suffering financial hardship, having scant possibilities of continuing their studies or following a course of studies of their choice (*supra* paras. 48(16) and 48(17)).

78. The Court notices that, though there is not enough evidence to estimate the amount of the loss, it is evident that going into exile, constantly moving house, changing work, as well as the other consequences arising out of the serious instability to which the Gutiérrez-Soler family has been subjected since 1994, have had an adverse impact on their family estate.³⁴ Since such alterations directly derive from the events of the case –i.e. they occurred due to the reports made of the acts of torture suffered by Mr. Wilson Gutiérrez-Soler, and to the subsequent harassment and aggressions suffered by his relatives – this Court considers appropriate, on equitable grounds, to order the State, to pay compensation for family pecuniary damages in the amount of US \$75,000.00 (seventy-five thousand United States Dollars). Such amount shall be paid as follows: US \$30,000.00 (thirty thousand United States Dollars) to Mr. Wilson Gutiérrez-Soler, US \$30,000.00 (thirty thousand United States Dollars) to Mr. Ricardo Gutiérrez-Soler and US \$15,000.00 (fifteen thousand United States Dollars) to Mrs. María Elena Soler de Gutiérrez, as established in paragraph 70 of this Judgment.

³⁴ Cf. *Case of Molina Theissen*. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of July 3, 2004. Series C No. 108, para. 59; *Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 88; and *Case of the "Panel Blanca" (Paniagua Morales et al.)*. Reparations (Art. 63.1 American Convention on Human Rights). Judgment of May 25, 2001. Series C No. 76, para. 99.

C) NON PECUNIARY DAMAGE

Argument by the Commission

79. The Commission contended that:

- a) Mr. Wilson Gutiérrez-Soler's medical and psychiatric examinations prove that he suffered and continues suffering from severe physical and psychological consequences of the tortures inflicted on him during his false arrest;
- b) repetitive, public questioning of Mr. Wilson Gutiérrez-Soler's credibility, character and the motives leading him to report facts, arising from the way national courts handled the case, resulted in depression and symptoms of phobia; distorting his motivation and cognition, and aggravating the psychological damage resulting from the events of August 24, 1994;
- c) violations of the rights of Mr. Wilson Gutiérrez-Soler's family have caused them pain and suffering. The arrest and the events that followed it caused them suffering and anguish, which were worsened by persistent impunity, as well as by the risky position and the harassment Wilson's parents and his brother were made to suffer; and
- d) in view of the most serious circumstances of the case, the intense pain inflicted and the alterations of the conditions in which the victims and their next of kin lived, the Commission requests said persons be paid, on equitable grounds, compensation for non pecuniary damages.

Argument by the representatives

80. The representatives argued that:

- a) Mr. Wilson Gutiérrez-Soler's moral damage results from the violation of his right to humane treatment, by inflicting on him moral, physical, and psychological pain. Almost ten years after the fact, he still suffers the physical and psychological sequels thereof. His illegal and false arrest, the lack of investigation and the lack of punishment of those who tortured him, and the biased trial against him when he was charged with extortion, contributed to his further pain and suffering. Lastly, he also was caused moral damage by having been subjected to the threats, the harassment, the search of his place of residence, the constant phone calls and the attack, all of which have resulted in his going into exile;
- b) forensic physicians in the service of the very same State have verified the severe consequences of the torture inflicted;
- c) Kevin Daniel Gutiérrez-Niño was separated from his father at an early age. In a six-year period, Kevin saw his father but once. In addition, his wife and son's prolonged exile forced Mr. Wilson Gutiérrez-Soler to seek legal separation from his wife three years ago, so his family bonds were broken apart. On account of the foregoing, the State has to acknowledge the

damage stated above and pay Wilson and Kevin a fair compensation, exemplary to underscore the seriousness of torture, of the fact that those responsible for it are still unpunished and of its moral sequels of torture;

d) on account of the seriousness of the events in the instant case, compensations to Mr. Wilson Gutiérrez-Soler and Kevin Daniel Gutiérrez-Niño, his son, be compensated with \$ 100,000.00 (one hundred thousand United States dollars), and \$ 50,000.00 (fifty thousand United States dollars), respectively;

e) the tortures inflicted on Mr. Wilson Gutiérrez-Soler also deeply affected his parents and Ricardo Gutiérrez-Soler. Furthermore, they were threatened, harassed, followed, searched, and were attacked on numerous occasions. Ricardo's wife and children have also been victims of several threatening events. None of such acts of aggression has been followed by identification, prosecution or punishment of any of the perpetrators;

f) the constant threats and aggressions have had serious consequences on Mr. Ricardo Gutiérrez-Soler, his family and his parent. They were forced to change their place of residence several times. In addition, all members of the family have suffered feelings of anguish, impotence and uncertainty on account of the constant threats;

g) Ricardo Gutiérrez has suffered unfair arrest, personal injuries and continuous harassment and other outrages. When his minor children witnessed how the police mistreated him, both them children and his common-law spouse suffered from depression and insomnia. Likewise, Paula, his daughter, has suffered from trauma, has problems to speak and shows symptoms of aggression. Ricardo Gutiérrez-Soler's two other children suffer from constant anguish and fear. On account of the foregoing, it is requested that Mr. Ricardo Gutiérrez-Soler be compensated in the amount of \$50,000.00 (fifty thousand United States dollars). Likewise, it is requested that Mr. Ricardo Gutiérrez-Soler's children, namely Carlos Andrés Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez, Sulma Tatiana Gutiérrez-Rubiano, Leydi Caterin Gutiérrez-Peña, Leonardo Gutiérrez-Rubiano, Paula Camila Gutiérrez-Reyes, and Luisa Fernanda Gutiérrez-Reyes, be compensated in the amount of \$20,000.00 (twenty thousand United States Dollars) each; and

h) the parents of the Gutiérrez-Soler brothers, have also been threatened. They have lost their property and were forced to leave their residence. Bearing in mind the seriousness of these facts, Álvaro Gutiérrez and María Elena Soler must be compensated in the amount of \$50,000.00 (fifty thousand United States dollars) each.

Argument by the State

81. The State argued that

a) evidence of non-pecuniary damage by the party alleging it is as needed as that of pecuniary damage. However, pursuant to the Court's precedents, these are presumed in view of the circumstances of the case; and

- b) it requests its acknowledgement of liability be considered as reparation of the non pecuniary damages inasmuch as it contributes to “the dignification of Wilson Gutiérrez and [that] of his next of kin.”

Considerations of the Court

82. Non pecuniary damage may include distress, suffering, tampering with the victim’s core values, and changes of a non pecuniary nature in the person’s everyday life. As it is impossible to assess the value of the non pecuniary damage sustained in a precise equivalent in money, for the purposes of full reparation to the victims it may be effected in one of two ways. On the one hand, by paying the victim an amount of money or by delivering property or services the worth of which may be established in money, as the Court may determine exercising reasonably its judicial discretion and applying equitable standards; and on the other hand by public actions or works the effect of which, among others, be to acknowledge the victim’s dignity and to avoid new violations of human rights.³⁵

83. The judgment, according to repeated international precedents, constitutes, in and of itself, a form of reparation.³⁶ However, owing to the circumstances of the instant case, the suffering the events have caused the victims, the changes in their way of living and the other consequences of a non pecuniary nature they bore, the Court considers that it is meet, on equitable grounds, to pay compensation for non pecuniary damage.

84. Bearing in mind the various aspects of the damage the Commission and the representatives allege, the Court determines, on equitable grounds, the value of compensation for the non pecuniary damage according to the following standards:

a) in order to determine the compensation for the non pecuniary damage suffered by Mr. Wilson Gutiérrez-Soler the Court takes into account, *inter alia*, that: i) he was arbitrarily arrested, subjected to torture which caused him injuries in very intimate parts of his body; ii) doubts were cast on his character, and on the motives that led him to report the events, during the eight years the proceedings against him for the crime of extortion lasted, wherein he was acquitted in 2002; iii) he suffered a campaign including harassment, aggressions and threats, as a result of which campaign he was forced to flee the country and he has remained abroad to date; iv) as a result of the aforementioned events his family broke apart and he almost lost his relationship with his son Kevin; v) those responsible for torturing him and for the ensuing persecutions are still unpunished; and vi) all the above has produced physical and psychological sequels that have affected all the aspects of his life;

b) in order to determine the compensation due Álvaro Gutiérrez-Hernández and María Elena Soler de Gutiérrez, parents of Wilson Gutiérrez-Hernández, it must be considered that both suffered threats and an attack, in which a bomb was planted in their home. On account of the foregoing, they were forced to abandon their home in Bogotá. At the same time, during

³⁵ Cf. *Case of Acosta Calderón*, *supra* note 3, para. 158; *Case of YATAMA*, *supra* note 3, para. 243; and *Case of Indigenous Community Yakye Axa*, *supra* note 7, para. 199.

³⁶ Cf. *Case of Acosta Calderón*, *supra* note 3, para. 159; *Case of YATAMA*, *supra* note 3, para. 260; and *Case of Fermín Ramírez*, *supra* note 3, para. 130.

the years of persecution they were evidently worried about their children's safety and that of their respective families. Finally Alvaro Gutiérrez-Hernández died unaware of the injustices his son Wilson suffered; he therefore suspected during many years Wilson and Ricardo Gutiérrez-Soler of being involved in illegal business, something which obviously caused him great anguish;

c) As far as Mr. Wilson Gutiérrez-Soler's son, Kevin Daniel Gutiérrez-Niño, is concerned, it must be taken into account that he could return to live with his father only at a recent date, and that they had spent several years without seeing each other, due to Mr. Gutiérrez-Soler's precarious security situation. In this regard, the events of the instant case almost destroyed the father-son ties and have estranged Kevin from his next of kin residing in Colombia;

d) the Court is well aware of the fact that Mr. Ricardo Gutiérrez-Soler's unrelenting support of his brother, Wilson, turned him into one of the main targets the campaign consisting in threats, harassment, surveillance, arrests, searches, assaults and attacks against life and personal well-being. These circumstances have not only put his life and that of his common-law spouse and children at risk, but also prevented Mr. Ricardo Gutiérrez-Soler from providing for his family, all of which has caused him a great deal of suffering and anguish; and

e) Mr. Wilson Gutiérrez-Soler's remaining next of kin, namely Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Paula Camila Gutiérrez-Reyes, Leonardo Gutiérrez-Rubiano, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano, and Carlos Andrés Gutiérrez-Rubiano, were threatened, harassed, and suffered aggression, causing distress and a state of constant fear in them. Moreover, all of them have suffered radical changes in their ways of living, in their social and family relations, as well as in their possibilities of developing their own life projects.

85. Considering the various aspects of the non pecuniary damage, the Court, determines, on equitable grounds, the value of compensations thereof as follows:

a) US \$90,000.00 (ninety thousand United States Dollars) for Mr. Wilson Gutiérrez-Soler;

b) \$40,000.00 (forty thousand United States dollars) each for Mr. Álvaro Gutiérrez-Hernández and Mrs. María Elena Soler de Gutiérrez, Mr. Wilson Gutiérrez-Soler's parents;

c) US\$ \$20,000.00 (twenty thousand United States dollars) for Kevin Daniel Gutiérrez-Niño, Mr. Wilson Gutiérrez-Soler's son.

d) US\$, \$50,000.00 (fifty thousand United States Dollars) for Mr. Ricardo Gutiérrez-Soler, Mr. Wilson Gutiérrez-Soler's brother; and

e) US\$ 8,000.00 (eight thousand United States dollars) each for Mr. Wilson Gutiérrez-Soler's next of kin: Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Paula Camila Gutiérrez-Reyes, Leonardo Gutiérrez-Rubiano,

Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano and Carlos Andrés Gutiérrez-Rubiano,.

86. Compensation shall be paid as established in paragraph 70 of this Judgment.

D) LIFE PROJECT

87. The Commission argued that “the lack of redress and the fact that the perpetrators are still unpunished destroyed [] Mr. Wilson Gutiérrez-Soler’s life project”. On the other hand, the representatives asserted that the events in the instant case changed his life “radically”, rupturing “his personality and” causing the severance of “his family ties.”

88. The Court considers that the violations of Mr. Wilson Gutiérrez-Soler’s rights prevented him from achieving his personal and vocational development expectations, which under normal circumstances would have been feasible. Furthermore, they caused irreparable damage to his life, forcing him to sever family ties and go abroad, in solitude, in financial distress, physically and emotionally broken down. In Mr. Gutiérrez-Soler’s own words, the consequences of torture and of the subsequent events were serious, to wit:

my life was done with —and not just mine—, my son’s and my wife’s as well [...] My family was lost, we lost the ties between parents and children [...] Not only was I stripped of my self-worth, but of my family and my parents too.

Likewise, it is proven that the specific sort of torture the victim underwent not only left him physical scars, but has also permanently lowered his self-esteem, and his ability to have and enjoy intimate relations of affection.

89. Considering all of the foregoing, the Court finds that damage to Mr. Wilson Gutiérrez-Soler’s “life project” has occurred as a result of the violation of his human rights. However, as in other cases,³⁷ the Court decides not to compensate for said damage financially, since the Judgment awarding damages herein contributes to compensate Mr. Wilson Gutiérrez-Soler for pecuniary and non pecuniary damages (*supra* paras. 76, 78, 84(a) and 85(a)). The complex and all-encompassing nature of damage to the “life project” calls for action securing satisfaction and guarantees of non-repetition (*infra* paras. 103, 104, 105, 107 and 110) that go beyond the financial sphere.³⁸ Notwithstanding the above, the Court considers that that no form of redress could return Mr. Wilson Gutiérrez-Soler the personal fulfillment options of which he was unfairly deprived or provide him with fresh options.

*E) OTHER FORMS OF REPARATION
(MEASURES OF SATISFACTION AND NON-REPETITION GUARANTEES)*

Argument by the Commission

90. The Commission considered the State should:

³⁷ Cf. *Case of Cantoral Benavides*. Reparations (Article 63(1) American Convention on Human Rights). Judgment of 3 December 2001. Series C No. 88, para. 80; and *Case of Loayza Tamayo*. Reparations (Article 63(1) American Convention on Human Rights). Judgment of 27 November 1998. Series C No. 42, para. 153.

³⁸ Cf. *Case of Cantoral Benavides*, *supra* note 37, paras. 63 and 80.

- a) take steps to provide Mr. Wilson Gutiérrez-Soler Mr. Wilson Gutiérrez-Soler with physical rehabilitation, and to provide his next of kin suffering emotional damage due to the events in the instant case with psychological rehabilitation;
- b) investigate the events reported, and identify and punish the perpetrators within a reasonable time;
- c) review the decision to terminate the proceedings against Colonel Luis Gonzaga Enciso-Baron and order he be brought to trial before an ordinary court; review the preclusion the investigation against Ricardo Dalel-Baron; and start disciplinary proceedings against the State officials involved in the violations that are the subject-matter of the instant case;
- d) “eliminate the risk factors,” that are instrumental to the harassment and the aggressions against the members of the Gutiérrez-Soler and Gutiérrez-Reyes families within the State’s jurisdiction;
- e) proceed experimentally with the preliminary implementation of the Istanbul Protocol;
- f) adopt the necessary measures towards effective application of Inter-American precedents on military jurisdiction;
- g) strengthen official control in arrest centers; and
- h) publish a summary of this judgment in a national daily newspaper, and the complete text in the official gazette.

Argument by the representatives

91. The representatives requested the State should:

- a) reopen as soon as possible the investigation on Mr. Wilson Gutiérrez-Soler’s torture, in an ordinary court; and begin or continue investigating the threats, harassments and aggressions suffered by Mr. Wilson Gutiérrez-Soler, by Mr. Ricardo Gutiérrez-Soler and by their next of kin;
- b) provide all the victims with effective protective measures;
- c) enforce the doctrine of the Colombian Constitutional Court and the precedents of the Inter-American System as regards the scope of jurisdiction of military courts;
- d) exclude, both in practice and in domestic statute, the possibility of members of the military acting with judicial police powers;
- e) train judicial, police, military and prison personnel, as well as state-employed physicians and psychologists, in the adequate treatment of persons arrested, and in the prevention and documentation of torture in accordance with accepted international standards, especially with the Istanbul Protocol;

- f) implement a medical surveillance system to verify the physical and psychological condition of persons deprived of their freedom;
- g) acknowledge in public the facts of the instant case in an act public apology attended by Colombia's highest state dignataries;
- h) publish this judgment in the official gazette and in another national daily newspaper;
- i) provide Mr. Wilson Gutiérrez-Soler and the other victims in the instant case with medical and psychological or psychiatric care; and
- j) provide the means for Mr. Ricardo Gutiérrez-Soler's children to access secondary school and university education.

Argument by the State

92. "Without there being any conviction", the State declared it was willing to adopt the following measures of satisfaction:

- a) it shall investigate, try and punish the individuals responsible for the injuries sustained by Mr. Wilson Gutiérrez-Soler. By way of satisfaction, the State offers , "as an obligation limited to its best efforts", to institute "the actions necessary for the competent entity to commence the review proceedings of the final decisions pronounced under domestic law in order to allow investigation of the events" connected with the instant case. The State shall endeavor to the extent of its powers, ensure compliance with the ensuing rulings by judicial authorities. Furthermore, the State grants Mr. Mr. Wilson Gutiérrez-Soler access to all criminal procedures arising from the aforementioned review action; and
- b) the following, which the State requests be considered among the non-repetition measures: i) the acknowledgement of liability; ii) to include the acknowledgement of liability and the judgment as teaching aids in National Police training schools; iii) institutional dissemination of the judgment as a self-criticism instrument and in token of the State's transparency when dealing with situations arising from human rights violations. Furthermore, the State requests that the acknowledgement of liability pronounced at the seat of the Court be deemed an act of public apology. It further asks for the Commission's technical assistance to draft documents on the "lesson learned" from the instant case. The State offers to strengthen the protective measures that may be required to reverse the threatening and risky situation in which Mr. Ricardo Gutiérrez-Soler has declared to be. Likewise, it offers to include in professional and update training courses for military justice staff the explanation and the dissemination of the scope of Inter-American System Precedents related to international standards of effectiveness as regards access to justice. Finally, the State pledges to strengthen and improve the mechanisms to prevent similar acts from being committed in the future.

Considerations of the Court

93. In this subparagraph the Court will determine those measures of satisfaction aimed at redressing non pecuniary damage that does not have a pecuniary character, as well as those other public or publicly visible measures.³⁹

a) *Obligation of the State to investigate the facts of the instant case and to identify, try and punish the perpetrators*

94. The Court found that, as of date, nobody has been punished for the events of the case, particularly for Mr. Wilson Gutiérrez-Soler's illegal and false arrest and for the tortures inflicted on him (*supra* para. 48(10)).

95. Thus, more than 11 years after the events, the impunity of those responsible for them continues to prevail. The Court has defined impunity as the overall lack of investigation, arrest, prosecution and conviction of those responsible for violations of the rights protected by the American Convention.⁴⁰ The State is obliged to combat such a situation by all available means, as it fosters the chronic repetition of human rights violations and renders victims and their next of kin completely defenseless.⁴¹

96. By reason of the foregoing, the State shall effectively investigate the facts of the instant case in order to identify, try and punish the perpetrators of Mr. Wilson Gutiérrez-Soler's arrest and torture. The findings in such proceedings shall be publicly disseminated by the State in such manner as to enable the Colombian society to know the truth regarding the facts of the instant case.

97. It is likewise needed for competent ordinary criminal courts to investigate and punish the law enforcement staff members that take part in violations of human rights cases.⁴² On the other hand, the State shall refrain from resorting to amnesty, pardon, statute of limitations and from enacting provisions to exclude liability, as well as measures, aimed at preventing criminal prosecution or at voiding the effects of a conviction.⁴³

98. The Court has already referred to "sham double jeopardy" resulting from a first trial wherein there have been breaches of the due process of the law.⁴⁴ In view of the proven facts and of Colombia's acknowledgement of liability, it is to be inferred that the proceedings in the instant case before domestic courts were vitiated by such shortcomings. Therefore, the State would not be entitled to claim exemption of the obligation to investigate and punish on the grounds of the

³⁹ Cf. *Case of Acosta Calderón*, *supra* note 3, para. 163; *Case of Indigenous Community Yakye Axa*, *supra* note 7, para. 210; and *Case of Moiwana Community*, *supra* note 9, para. 201.

⁴⁰ Cf. *Case of the Serrano Cruz Sisters*, *supra* note 9, para. 170; *Case of the Gómez Paquiyauri Brothers*, *supra* note 59, para. 148; and *Case of 19 Merchants*, *supra* note 75, para. 175.

⁴¹ Cf. *Case of Moiwana Community*, *supra* note 9, para. 203; *Case of Carpio Nicolle et al.* Judgment of 22 November 2004. Series C No. 117, para. 126; and *Case of Tibi*, *supra* note 27, para. 255.

⁴² Cf. *Case of 19 Merchants*. Judgment of 5 July 2004. Series C No. 109, para. 263; *Case of Las Palmeras*. Judgment of 6 December 2001. Series C No. 90, para. 51; and *Case of Cantoral Benavides*. Judgment of 18 August 2000. Series C No. 69, para. 113.

⁴³ Cf. *Case of Moiwana Community*, *supra* note 9, para. 206; *Case of Huilca Tecse*. Judgment of 3 March 2005. Series C No. 121, para. 108; and *Case of the Serrano Cruz Sisters*, *supra* note 7, para. 172.

⁴⁴ Cf. *Case of Carpio Nicolle et al.*, *supra* note 41, paras. 131 and 132.

judgments in proceedings that failed to meet the standards of the American Convention, because judicial decisions originating in such internationally illegal events cannot be the first step to double jeopardy.

99. In this regard, the Court notices that in Colombia, it is possible to reopen proceedings which have resulted in acquittals or in decisions to terminate proceedings or to preclude investigation, such as those that kept the perpetrators in the instant case unpunished. In this direction, the Court thinks highly of Colombia's willingness to to institute "the actions necessary for the competent entity to commence the review proceedings of the final decisions pronounced in [...] the instant case," and orders that Colombia shall proceed promptly to take the measures necessary to institute such proceedings, which it must expedite within reasonable time.

100. The aforementioned proceedings shall also be conducted in accordance with international standards for documentation and for the construction of forensic evidence proving the commission of torture acts, such as those set forth by Dr. María Cristina Nunes de Mendonça's Expert Reports submitted to the Court (*supra* para. 42), and especially with those in the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("the Istanbul Protocol").⁴⁵

b) Medical and psychological treatment

101. After reviewing the Argument by the representatives, those of the Commission as well as the body of evidence in the instant case, it is inferred that the psychological suffering by Mr. Wilson Gutiérrez-Soler and his next of kin, derived from the violations, have lasted through to this day and impair their respective life projects. On account of the foregoing, this Court, as it has done before,⁴⁶ is of the opinion that reparations must also include psychological and psychiatric treatment for all the victims who wish to undergo it.

102. For the purpose of contributing to the reparation of such damage, the Court orders that the State shall provide free of charge, at the health-care facilities the State may indicate, the psychological and psychiatric treatment the following parties may require: María Elena Soler de Gutiérrez, Ricardo Gutiérrez-Soler, Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Paula Camila Gutiérrez-Reyes, Leonardo Gutiérrez-Rubiano, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano and Carlos Andrés Gutiérrez-Rubiano. Such treatment shall include, among other things, the medication which may be needed. When providing treatment, the individual circumstances and needs of each person shall be taken into account, so that they are offered both individual and family treatment. Such treatment must start after an individual assessment has been conducted, according to what may be agreed individually with each one of those persons.

103. In the case of the medical and psychological treatment of Mr. Wilson Gutiérrez-Soler and of the psychological care of his son Kevin Daniel Gutiérrez-Niño,

⁴⁵ Cf. U.N.O., United Nations High Commissioner for Human Rights, Geneva, 2001, available at: www.unhchr.ch/pdf/8istprot.pdf.

⁴⁶ Cf. *Case of Huilca Tecse*, *supra* note 43, para. 117; *Case of the Serrano Cruz Sisters*, *supra* note 7, paras. 197 and 198; and *Case of Lori Berenson Mejía*, *supra* note 7, para. 238.

since both are exiled in the United States of America, the State shall pay Mr. Wilson Gutiérrez-Soler \$25,000.00 (twenty five thousand United States Dollars) to cover the reasonable costs thereof.

c) *Publication of relevant sections of the Judgment*

104. The Court has already stated that the violations against Mr. Wilson Gutiérrez-Soler impaired fulfillment of his personal and vocational development, while causing irreparable damage to his life and reputation (*supra* paras. 88 and 89). Therefore, the Court notices approvingly the historical moment during the public hearing, when the agents stood and approached Messrs. Wilson and Ricardo Gutiérrez-Soler to apologize on behalf of Colombia for the events in the instant case.

105. Likewise, the Court deems that the State must disseminate the relevant sections of this Judgment as an additional measure of satisfaction aimed at redressing the substantial damage to Mr. Wilson Gutiérrez-Soler's honor and life project and those of his next of kin, as well as to prevent repetition of the events of the instant case. In this direction, the State must publish, within six months of the date that notice of Judgment be served upon it, at least once in the official gazette and in another national daily newspaper, the Section of this Judgment entitled Proven Facts, without the corresponding footnotes, paragraphs 51 to 59 of the Section entitled Merits, as well as the operative paragraphs herein.

d) *Dissemination and enforcement of the Inter-American System for Human Rights Protection jurisprudence on the jurisdiction of military criminal courts*

106. The Court notices that approvingly of the contribution by the State to human rights protection by expressing its willingness to include in the training and update courses for the appropriate officials the study of the Inter-American System for Human Rights Protection precedents on "international standards of effectiveness in the access to justice." In this regard, the Court considers that the State must implement, in the training courses for military criminal court and law enforcement staff a program to analyze the Inter-American System for Human Rights Protection precedents on the limits of the jurisdiction of the military criminal courts, as well as the right to due process and to judicial protection, as a way to prevent the investigation and trial of human rights violations by such jurisdiction.⁴⁷

107. Likewise, the Court considers approvingly the State's willingness to adopt the necessary measures to use the instant case as a "lesson learned" in National Police staff courses on human rights. On this matter, Mr. Wilson Gutiérrez-Soler stated in his testimony that he agreed to his case being publicly known as a way to contribute in avoiding events as the ones he suffered from happening to others. Along these lines, the Court considers that the State must include Mr. Wilson Gutiérrez-Soler's case in the program mentioned in paragraph 106, as a teaching aid to contribute towards preventing this sort of events from happening again.

108. On the other hand, although studying the Inter-American System for Human Rights Protection precedents is a crucial factor to prevent occurrences such as the

⁴⁷ Cf., *inter alia*, *Case of 19 Merchants*, *supra* nota 42, paras. 165 to 167, 173, 174 and 263; *Case of Las Palmeras*, *supra* note 42, paras. 51 to 54; *Case of Cantoral Benavides*, *supra* nota 42, paras. 112 to 115, 138 and 139; *Case of Durand and Ugarte*. Judgment of 16 August 2000. Series C No. 68, paras. 116, 117, 125 and 126; and *Case of Castillo Petruzzi et al.* Judgment of 30 May 1999. Series C No. 52, paras. 128 to 132 and 161.

ones that befell Mr. Wilson Gutiérrez-Soler, the State must also adopt the necessary measures so that such precedents, as well as those of the Constitutional Court of Colombia regarding military jurisdiction, be effectively followed in domestic courts.

e) Implementation of the standards in the Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("the Istanbul Protocol")

109. The Court notices that the expert witness María Cristina Nunes de Mendonça (*supra* para. 42), pointed out that the examinations practised on Mr. Wilson Gutiérrez-Soler are incomplete, for they lacked photographic records, and also because examinations for internal injuries were not conducted. According to the expert witness, such omissions influenced the subsequent construction of the examinations and the outcome of the domestic proceedings, which were instituted as the result of the events in the instant case. She also pointed out the importance of implementing the standards of the Istanbul Protocol in cases of torture, for it describes how to conduct a medical examination and how to draft reports about victims of torture or cruel, inhuman or degrading treatment. By reason of the foregoing, the expert witness specified that observing said standards prevents such facts from going unnoticed and remaining unpunished.

110. Along such lines, the Court deems that by disseminating and implementing the standards of the Istanbul Protocol may contribute effectively to protecting the right to humane treatment in Colombia. For such reason, the State must implement a training program including said international standards, to be taken by physicians working in official arrest centers and by National Institute of Legal Medicine and Forensic Sciences staff, as well as by prosecutors and judges in charge of investigating and trying cases such as the one affecting Mr. Wilson Gutiérrez-Soler, so as to provide such staff with the necessary technical and scientific know-how to assess possible cases of torture or cruel, inhumane or degrading treatment. Likewise, the Court considers it necessary that such training program include the Wilson Gutiérrez-Soler case as a measure aimed at preventing repetition of such kind of events.

f) Strengthening controls of arrest centers

111. The Commission and the State agreed on the need, as a preventive measure, to strengthen existing controls with respect to persons arrested in Colombia. The Commission likewise indicated that the constant psychological evaluation of state staff who are in contact with persons arrested would constitute an important preventive measure; moreover, it declared that a physical examination of persons arrested upon arrival at the arrest center could contribute to detecting acts of torture, or cruel, inhumane or degrading treatment.

112. The Court, approvingly notices the attitude of the State towards this important matter. On such point, the Court orders that Colombia must adopt the necessary measures to strengthen existing control mechanisms in state arrest centers, for the purpose of guaranteeing adequate arrest conditions and respect for the due process of the law. Such control mechanisms must include, *inter alia*: a) medical examinations of every arrestee or convict, according to standard medical practice. Specifically, examinations shall be conducted under medical control, in private and never in the presence of security staff or other government officials. Such examinations shall be conducted as promptly as possible after the admission

of the arrested or imprisoned person to the place of arrest or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary; b) regular psychological assessments of staff in charge of the custody of persons arrested, in order to ensure their adequate mental health condition; and c) frequent access to such centers for staff of the appropriate human rights surveillance and protection organizations.⁴⁸

X COSTS AND EXPENSES

Argument by the Commission

113. The Commission, in view of the special circumstances of the instant case, requested the Court to order the costs and expenses duly evidenced by the representatives to be paid by the State.

Argument by the representatives

114. The representatives stated that:

- a) The *Corporación Colectivo de Abogados "José Alvear Restrepo"* (Lawyers' Group "José Alvear Restrepo") has incurred in costs and expenses related to the defense of Wilson Gutiérrez-Soler and his next of kin, both at the domestic and the international levels. The total amount of the expenses claimed by such organization is US\$ 89,732.94; and
- b) the International Center for Law and Justice also has incurred in many expenses related to the international proceedings to which Mr. Wilson Gutiérrez-Soler has been a party, which amply exceed the amount requested to the Court: US\$17,172.27.

Argument by the State

115. The State argued that:

- a) criminal proceedings in Colombia are free of charge, therefore all expenses incurred by the representatives of the victim and of his next of kin are based on a relation of a private character, the costs of which should be borne by the interested party; and
- b) as far as the assessment of the costs incurred in the international proceedings, the Court may determine their amount on the basis of its reasonable discretion.

Considerations of the Court

⁴⁸ Cf. *Case of Bulacio*, *supra* note 34, para. 131; U.N.O., Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Resolution 43/173 adopted by the General Assembly on 9 December 1988, principles 24 and 29; and U.N.O., Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, adopted by the General Assembly, resolution 55/89 Annex, 4 December 2000, principle 6.

116. As the Court has stated on previous occasions,⁴⁹ the costs and expenses are contemplated within the concept of reparations as enshrined in Article 63(1) of the American Convention, since the victims' efforts to obtain justice in the domestic as well as international levels lead to expenses that must be compensated when the State's international responsibility has been determined in a conviction judgment. With regard to their reimbursement, the Court must prudently assess their extent, which involve the expenses incurred when acting before the authorities with domestic jurisdiction as well as those incurred in the course of proceedings before the Inter-American System, taking into account the particular circumstances of the specific case and the nature of international jurisdiction in the protection of human rights. Such estimate must be made on grounds of equitable principles and in consideration of the expenses submitted and evidenced by the parties, as long as their amount be reasonable.

117. By reason of the foregoing, the Court considers proper to order the State to pay, by way of costs and expenses in this case, US\$ 25,000.00 (twenty five thousand United States Dollars) to Mr. Wilson Gutiérrez-Soler. Of such total amount, the sum of US\$ 20,000.00 (twenty thousand United States dollars) shall be applied to defray the costs and expenses of the *Corporación Colectivo de Abogados "José Alvear Restrepo"* (Lawyers' Institutional Group "José Alvear Restrepo"), and the sum of US\$ 5,000.00 (five thousand United States Dollars) shall be applied to defray those of CEJIL.

XI METHOD OF COMPLIANCE

118. In order to comply with this Judgment, Colombia will have to pay the compensations (*supra* paras. 76, 78, 85 and 103), and reimburse costs and expenses (*infra* para. 117) within a year from the date the notice of the judgment is served upon it. Regarding publication of the pertinent sections of the judgment (*supra* para. 105), the State shall comply with such measure within six months from the date the notice of judgment is served upon it. Regarding the other measures ordered without fixing a specific delay, the State must comply with them within reasonable time from the date the notice of judgment is served upon it.

119. Payment of compensations fixed shall be made in accordance with the provisions of paragraph 70 herein.

120. Payments covering reimbursements of costs and expenses shall be made to Mr. Wilson Gutiérrez-Soler, who shall make the corresponding payments in accordance with the provisions of paragraph 70 herein.

121. The State may discharge its pecuniary obligations by tendering United States Dollars or an equivalent amount in the currency of the State, at the New York, USA exchange rate between both currencies on the day prior to the day payment is made.

122. If the beneficiaries of compensations are not able to receive the payments within the term of a year from the date the notice of judgment is served on them, due to causes attributable to them, the State shall deposit said amounts in an

⁴⁹ Cf. *Case of YATAMA*, *supra* note 3, para. 264; *Case of the Indigenous Community Yakye Axa*, *supra* note 7, para. 231; and *Case of the Moiwana Community*, *supra* note 9, para. 222.

account in the beneficiary's name or draw a certificate of deposit from a reputable Colombian bank, in United States dollars, under the most favorable financial terms the law in force and customary banking practice allow. If after ten years compensations were still unclaimed, the amount plus accrued interests shall be returned to the State.

123. If the beneficiaries of the compensation ordered are minors, the State shall apply the amount to a bank investment in their name, in United States dollars or in local currency, at the discretion of the minor's legal representative, at a reputable Colombian banking institution. The investment shall be made within one year, under the most favorable financial terms the law in force and customary banking practice allow, until they come of age. Beneficiaries may withdraw the moneys once they come of age or upon order of the competent authority in the best interest of the minor. If, after ten years from the day the minor comes of age, the compensation is still unclaimed, the amount plus accrued interest shall be returned to the State.

124. Payments ordered in this Judgment as compensation for pecuniary and non pecuniary damages and for costs and expenses shall not be affected, reduced or conditioned by tax reasons, be they present or future. Beneficiaries shall therefore receive the total amount as per the provisions herein.

125. Should the State fall into arrears with its payments, Colombian banking default interest rates shall be paid on the amount owed.

126. In accordance with its constant practice, the Court retains the authority emanating from its jurisdiction, to monitor full compliance with this Judgment. The instant case shall be closed once the State implements in full the provisions herein. Colombia shall, within a year, submit to the Court a report on the measures adopted in compliance therewith.

XII OPERATIVE PARAGRAPHS

127. Therefore,

THE COURT,

DECIDES,

Unanimously,

1. To ratify its Order dated 10 March 2005 whereby the State's acknowledgement of international liability was admitted.

DECLARES,

Unanimously that:

1. The State violated the right enshrined in Article 5(1) (Right to Humane Treatment) of the American Convention on Human Rights, as related to Article 1(1) (Obligation to Respect Rights), to the detriment of Wilson Gutiérrez-Soler, Kevin Daniel Gutiérrez-Niño, María Elena Soler de Gutiérrez, Álvaro Gutiérrez-Hernández

(deceased), Ricardo Gutiérrez-Soler, Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Paula Camila Gutiérrez-Reyes, Leonardo Gutiérrez-Rubiano, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano, and Carlos Andrés Gutiérrez-Rubiano, as set forth in paragraphs 52, 57 and 58 herein,

2. The State violated the right enshrined in Article 5, paragraphs 5(2) and 5(4) (Right to Humane Treatment) of the American Convention as related to Article 1(1), to the detriment of Mr. Wilson Gutiérrez-Soler, as set forth in paragraph 52 herein,

3. The State violated the right enshrined in Article 7, paragraphs 7(1), 7(2), 7(3), 7(4), 7(5) and 7(6) (Right to Personal Liberty) of the American Convention, as related to Article 1(1), to the detriment of Mr. Wilson Gutiérrez-Soler, as set forth in paragraph 52 herein,

4. The State violated the rights enshrined in Article 8, paragraphs 8(1), 8(2)(d), 8(2)(e), 8(2)(g), and 8(3) (Right to Fair Trial) of the American Convention, as related to Article 1(1), to the detriment of Mr. Wilson Gutiérrez-Soler, as set forth in paragraph 52 herein,

5. The State did not comply with the obligations set forth in Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Mr. Wilson Gutiérrez-Soler, as set forth in paragraph 54 herein, and

6. This judgment is in and of itself a form of redress, as set forth in paragraph 83 herein.

AND RULES,

Unanimously that:

1. The State must comply with the measures ordered with respect to its duty to investigate the events reported, as well as to identify, try, and punish the perpetrators, as set forth in paragraphs 96 to 100 herein;

2. The State must provide, free of charge, at the health-care facilities the State itself may indicate, psychological and psychiatric treatment to María Elena Soler de Gutiérrez, Ricardo Gutiérrez-Soler, Yaqueline Reyes, Luisa Fernanda Gutiérrez-Reyes, Paula Camila Gutiérrez-Reyes, Leonardo Gutiérrez-Rubiano, Leydi Caterin Gutiérrez-Peña, Sulma Tatiana Gutiérrez-Rubiano, Ricardo Alberto Gutiérrez-Rubiano, and Carlos Andrés Gutiérrez-Rubiano, as set forth in paragraph 102 herein. In the case of medical care and psychological treatment for Mr. Wilson Gutiérrez-Soler, and of the psychological care for his son Kevin Daniel Gutiérrez-Niño, the State shall pay the amount fixed in paragraph 103 herein to Mr. Wilson Gutiérrez-Soler to cover his reasonable expenses in that respect;

3. The State must publish within six months from the date the notice of judgment is served upon it at least once in the official gazette and in another national daily newspaper, the Sections herein entitled Proven Facts, without the corresponding footnotes, paragraphs 51 to 59 of the Section herein entitled Merits, as well as the operative paragraphs, as set forth in paragraph 105 herein.

4. The State must implement in the training courses for military criminal court staff for police staff a program aimed at analyzing the Inter-American System for Human Rights Protection precedents, as set forth in paragraphs 106 to 108 herein;
5. The State must adopt a training program that takes into account the international standards set in the Istanbul Protocol, as set forth pursuant to paragraph 110 herein;
6. The State shall adopt the necessary measures to strengthen existing control mechanisms in state arrest centers, as set forth in paragraph 112 herein;
7. The State shall pay the amounts fixed in paragraphs 76 and 78 herein as compensations for pecuniary damage, as set forth in paragraphs 70, 118, 119 and 121 to 125 herein;
8. The State must pay the amounts fixed in paragraph 85 herein as non pecuniary damage, as set forth in paragraphs 70, 118, 119 and 121 to 125 herein;
9. The State must pay amount fixed in paragraph 117 herein as costs and expenses, as set forth in paragraphs 118 and 120 to 125 herein;
10. The State must exercise special care to safeguard the life, integrity and safety of Messrs. Wilson and Ricardo Gutiérrez-Soler and of their next of kin, and must afford them the necessary protection from any persons, bearing in mind the events of the instant case and in accordance with the protective measures Order made by this Court on March 11, 2005; and
11. Shall monitor full compliance with this Judgment and shall consider the instant case closed upon full compliance by the State with the provisions therein. Within a year from the date the notice of judgment is served upon it, the State shall submit a to the Court a report on the measures taken to comply as set forth in paragraph 126 herein.

Judges García-Ramírez, Jackman y Cançado-Trindade informed the Court of their opinions, annexed hereto.

Done in Spanish and English, the Spanish text being authentic, in San José, Costa Rica, on September 12, 2005.

Sergio García-Ramírez
President

Alirio Abreu-Burelli

Oliver Jackman

Antônio A. Cançado Trindade

Manuel E. Ventura-Robles

Diego García-Sayán

Ernesto Rey-Cantor
Judge *ad hoc*

Emilia Segares-Rodríguez
Deputy Secretary

So ordered,

Sergio García-Ramírez
President

Emilia Segares-Rodríguez
Deputy Secretary

**SEPARATE OPINION OF
JUDGE SERGIO GARCÍA-RAMÍREZ
IN THE CASE OF GUTIÉRREZ SOLER V. COLOMBIA
JUDGMENT OF SEPTEMBER 9, 2005**

A) OUT-OF-COURT SETTLEMENTS. CHARACTERISTICS AND CONDITIONS

1. The solution of a dispute submitted before the authorities responsible for deciding on it may be based on an out-of-court settlement reached by the parties, which could have been made before instituting legal proceedings —as it is to be desired whenever possible— or on the decision of the competent authorities, which in most cases are of a judicial character or, in any case, are vested with jurisdictional powers. At present the possibility of reaching an out-of-court settlement to solve a dispute is increasingly resorted to —even in criminal matters— as an alternative to jurisdictional proceedings, which are generally longer, more costly, and more complex. It has been said, perhaps rightly so, that it is more advantageous to reach a shared decision based on the litigants' understanding and will than to abide by a third party's decision.

2. Beyond the many considerations which may be made as to the advantages or disadvantages of out-of-court settlements, it is true that public justice could not possibly take on and resolve the great number of cases which are ended through compromise agreements among the parties or acquiescence by one of the parties to the claims made by the other. This is also true for international trials on human rights, notwithstanding the number of disputes which cannot be settled by agreement, on account of the extreme gravity or complexity of the facts, or of the great advantages to be derived from the precedent set when international authorities issue recommendations or decisions which contribute to establish the content and the new frontiers of the protection of human rights.

3. The Inter-American System allows for friendly settlements to be reached by the parties, which at the non-jurisdictional stage before the Inter-American Commission are the alleged violation of rights victim (or the party appearing as petitioner), and the State, with the approval of the above mentioned body; and which at the jurisdictional stage before the Inter-American Court are the State itself, the alleged victim —thanks to the increasing procedural rights it has gained under the protection of regulatory innovations introduced by the Court— and the Inter-American Commission, as petitioner (deemed to be "only procedurally" a party to the case, as stated by the Rules of the Inter-American Court), the party to the legal action which comes— or does not come— to a compromise when the possibility of an agreed resolution arises.

4. Now then, contrary to what may happen and normally does in domestic legal systems, in which out-of-court settlements in private actions are favored, according to the Inter-American legal system on human rights it is necessary that the authority hearing the case —the Commission or Court, consecutively— should accept (or even foster, in the case of the Inter-American Commission), the understanding reached by the parties to the case and the way it may be formally agreed. This must serve the protection of human rights, an issue of international public policy, the protection of which does not merely rely on the point of view and on the will of private individuals, but goes beyond them and is in the interest of the community which has recognized such rights and has decided to preserve them under the denomination of International Law on human rights, for which purpose it has created a protection system whose design lies in such objective protection, and not just in a mere subjective satisfaction which may be inconsistent with the preservation of the international legal system. The individual then is entitled to report the violation of which he has been a victim or not to do so, under Article 44

of the American Convention. Nevertheless, once the petition has been filed, the resolution of the conflict is no longer under the petitioner's control.

5. Consequently, the approval or the rejection of an out-of-court settlement reached by the parties implies an issue of justice and an issue of opportunity. It is necessary that the parties' agreement be: a) just, that is, consistent with the necessary preservation of human rights in general and in particular; b) supported by actual, clearly established facts rather than a "formal version" which might put justice at the mercy of fiction; and c) acceptable for the purposes of the international protection system, taking into consideration that in certain cases it is advisable to go further —notwithstanding the justice of the agreement from the individual's point of view— and leave the resolution on the issue to the public authorities having jurisdiction over it, in the interest of justice in general, in furtherance of opportunity. Hence, the Commission and the Court, in their own due time and circumstances, may approve an out-of-court settlement and close the proceedings or decide that it continue until it comes to its natural conclusion: a recommendation or judgment.

B) SETTLEMENT BEFORE THE INTER-AMERICAN JURISDICTION

6. A great number of conflicts are solved before the Inter-American Commission through a "friendly settlement of the matter on the basis of respect for the human rights recognized in" the ACHR (Article 48(1)(f) of the Convention). Contrary to what is assumed, settlements are also increasingly reached during proceedings before the Court, whether at the written stage or the oral one. Statistics covering a quarter of a century, from 1979 through the first half of 2005 —it should be borne in mind, however, that during the first years there were relatively many advisory opinions, but not as many adjudicatory cases— show that the respondent States acquiesced totally or partially to the applications made and acknowledged their international liability for the acts committed in violation of human rights in 24 percent of the cases filed for adjudication by the Court. This was true of fifteen cases, whereas in 49 there was no acquiescence to the claims. However, it is important to point out that in most cases acquiescence to the claims was partial.

7. I believe that this phenomenon shows a tendency that is encouraging, insofar as it evidences the decision of the States to take the consequences of the illicit conduct of their agents and other persons, and to avoid unnecessary and even unjustified disputes, where there is sufficient evidence of the existence of acts in violation of rights. Hence, the Court has addressed this matter in the report I submitted, as President of the Court, to the Committee on Juridical and Political Affairs of the Organization of American States on April 14, 2005. In such report a section is reserved to this matter under the title "Acquiescence and acknowledgment of liability."

8. In the first part of such Section I pointed out that "It is the parties' duty to set their respective positions in trial, taking into consideration the facts which are the subject matter thereof as well as the claims arising therefrom. It is the Court's duty to resolve the dispute by rendering judgment. Even when this is the general rule, to which most proceedings conform, it is also possible that these proceedings come to an end through settlements, either unilateral or bilateral, abandonment of action, acquiescence, or the parties' agreement. Though these acts are not in themselves binding on the Court, they may be quite useful to reach the solution of a dispute — either entirely or partially— and, above all, to highlight the respect for the protection of human rights and the effectiveness of the commitments assumed on this matter."

9. I immediately noted that in 2004 there was acquiescence in three cases regarding Guatemala (Cases of *Plan de Sánchez Massacre*, *Molina Theissen* and *Carpio Nicolle*), “whose representatives submitted in the respective hearings the request for forgiveness addressed by the State to the victims” —an expression with the positive effect of alleviating the moral consequences of the breach— and I mentioned that “the same happened during the first regular sessions of this year in two cases regarding Colombia (Cases of *Mapiripán Massacre* and *Wilson Gutiérrez Soler*).” I added that “it is significant that a tendency to this type of attitudes, which deserve reflection and consideration, seems to be emerging. We speak about a tendency -incipient or moderate, certainly- bearing in mind that over the last years several States have made statements wherein they acknowledge their international liability. This has occurred in cases from Argentina (Cases of *Garrido and Baigorria* and *Bulacio*), Bolivia (Case of *Trujillo Oroza*), Ecuador (Case of *Benavides Cevallos*), Peru (Case of *Barrios Altos*) and Venezuela (Case of *The Caracazo*), in addition to the above mentioned cases from Guatemala and Colombia.”

10. The judgment to which I attach this concurring Separate Opinion refers precisely to one of those adjudicatory cases: the *Case of Gutiérrez Soler v. Colombia*, wherein acquiescence was made under unique conditions. The “manner in which acknowledgment of liability and request for forgiveness were made —I noted in the above mentioned report submitted to the Commission on Legal and Political Affairs of the Organization of American States— sets an outstanding precedent.” I concluded that “our Court has not disregarded these facts, which have a significant political, legal, and moral value and so it has expressed in the pertinent orders.” My Separate Opinion gives me the opportunity to mention these comments —which are those of the Court as whole— and highlight once more the special characteristics of the acknowledgment of liability and request for forgiveness made at the public hearing in the *Case of Gutiérrez Soler*, held in the courtroom on March 9, 2005. As to the statements made by the parties at such hearing, I refer to paragraphs 28, 29, and 30 of the Judgment.

C) THE PRACTICE OF ACQUIESCENCE

11. It is meet to add some remarks regarding acquiescence and acknowledgment of international liability by the State. The first one refers to a practical issue which influences the course of the proceedings and the opinion of the Court. I refer to the content and manner of the procedural act performed by the State, which is undoubtedly relevant and influences the course and the resolution of the proceedings, though it does not determine them necessarily. If the State merely states that it acknowledges its “international liability” for the facts alleged in the case, that does not necessarily encompass all the issues which there is an interest in knowing and on which a decision is to be rendered. Hence, the Court addressed this subject in the amendments made to the Rules on November 25, 2003 and in effect as of January 1, 2004.

12. At present Article 38(2) of the Rules of the Court regarding the response to the application, but also applicable in its pertinent parts to the subsequent acquiescence -which, in essence, is a supplementary and delayed response to the application— sets out that: “In its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested.” In turn, Article 53(2) sets forth that: “If the respondent informs the Court of its acquiescence to the claims of the party that has brought the case as well as to the claims of the representatives of the alleged

victims, their next of kin or representatives, the Court, after hearing the opinions of the other parties to the case, shall decide whether such acquiescence and its juridical effects are acceptable (...)."

13. As it can be noted, the admission referred to in the foregoing provisions includes: a) the facts alleged in the application submitted by the Commission, which often are quite numerous and complex and which, therefore, require specific identification by the party acknowledging them so as to avoid doubt or confusion; and b) the claims for declaratory and condemnatory judgment —related to the assessment of the facts in the light of the rules in the Convention and the pertinent reparations thereof— filed by the applicant Commission itself and by the alleged victims, who in this regard —although not as far as regards the report on the facts of the case in point— may make their petitions independently of the Inter-American Commission, as provided for by the rules and regulations and as reaffirmed by the precedents of the Court.

14. Insufficient acquiescence, acknowledgment of liability or admission of facts (technically, each of these concepts has its own scope) may give rise to opposing opinions on the nature and effects of the act, which will finally be resolved by the Court, always expected to decide on the admissibility of acquiescence and, eventually, on the scope thereof as well. It is desirable that the State should clearly establish the nature and effects it attaches to the procedural act it performs, for, otherwise, the Court would be forced to "construe" the will of the State and ascribe to it the characteristics which, in its own opinion, it has.

D) ACKNOWLEDGMENT AND JUDICIAL CONSIDERATION OF THE FACTS

15. Opinions differ as to the presentation of the facts, both at the hearing and in the text of the judgment, in cases where there has been acquiescence. On the one hand, it is argued that the dispute regarding the facts has ceased, and that, therefore, it is not meet that the parties or the Court refer to them thereafter. On the other hand, it is considered that the facts are essential data in the dispute, analyzed as a whole, and must be known and assessed in order to establish the terms of judgment, in addition to the fact that the statement of what has occurred —already acknowledged by the State— is an input for the "teaching effectiveness" of the proceedings and contributes to prevent repetition of similar events.

16. In this regard, it is relevant to bear in mind that the acknowledgment of facts is not binding for the Court, which may require clarifications and even decide that the proceedings should continue despite such acknowledgment, and that, in any case, acknowledgement does not in itself amount to a legal assessment of such acts, something which the Court is the only one entitled to do. It has already been said that the truth of the facts upon which the case is based does not derive from the admission of such facts by the parties —the formal or conventional truth— but from sufficient and conclusive evidence —the material or historical truth— which is what is sought in international proceedings on human rights. Judgment is and contains, in substance, a reflection of the Court on wrongful acts and the legal consequences thereof, and an assessment made by the same body in order to pronounce the pertinent decision. It is not reasonable to exclude the acts committed in violation of human rights from such reflection and such assessment, from which it is necessary to derive certain consequences.

E) DOUBLE JEOPARDY

17. In the Judgment to which I attach this Opinion, the Court has used the expression "sham double jeopardy" (para. 98), which has already been used before (Case of *Carpio Nicolle et al.*, November 22, 2004 Judgment, paras. 131 and 132).

This expression stresses the “sham” that is rooted in some judgments, as a result of the machinations —whether their outcome be an acquittal or a conviction— of the authorities who investigate the facts, bring charges, and render judgment. The process has been “like” a process, and the judgment serves a specific design rather than the interests of justice.

18. However, such expression is not necessarily applicable to all cases to be encompassed, which evidence a manifold reality. Yet, it reflects a highly relevant issue: the subsistence or the decadence of double jeopardy —which used to be referred to as the “sanctity” of double jeopardy— which, in turn, renders operative the *ne bis in idem* principle, widely adopted in domestic and international systems. Therefore, what seemed to be unquestionable not so long ago is now being questioned: the validity of the judgment which acquires the authority of a final pronouncement, the review of which is barred by double jeopardy (in its double formal and material projection) and which, therefore, cannot be challenged by any legal means, regardless of the liability of a different nature of those who unduly or illegitimately rendered it.

19. The decadence of the absolute authority of the double jeopardy principle inherent to a final and unappealable judgment, understood in the traditional sense of the expression, is evident. International jurisdiction on human rights and international criminal jurisdiction could hardly be effective, and might not even exist, if the final decisions of domestic jurisdictional bodies were deemed to be incontestable in all cases. The incorrectness or the irrelevancy of a domestic judicial decision which puts an end to a dispute may be inferred from a variety of circumstances: an error made by the authority who issued such decision, even if there be no other source of injustice; or the illegality or illegitimacy with which the judge acts, whether in the proceedings (due process breaches) or by misrepresenting the facts leading to judgment. In both cases a judgment will be rendered which does not further justice and which apparently —formally— serves legal certainty.

20. Reflections on this issue are increasingly numerous in domestic precedents — particularly in the precedents of constitutionality courts— as they have been in international precedents before. All things considered, it is evident that the authority of the double jeopardy principle is only justified by the authority which it derives from a regular procedure and from the legitimacy of the acts performed by the judge. It is true that the solution of adjudicatory cases and the conclusion of conflicts is in the interest of society and of the State, but it is also true that such worthy aim —which “sanctifies” the double jeopardy principle— should not be sought and achieved at any cost, including the abuse of the means which make jurisdictional action by the State legitimate, an action to which the custody of both legal interests and ethical values is entrusted. In other words, the end does not justify the means; these, instead, contribute to the justification of the aim sought after. This inversion of the old pragmatic maxim is especially relevant as to procedural matters, such as the admission and validity of evidence.

21. Moreover, this has been acknowledged in the precedents of the Inter-American Court, which in several cases has found against the validity (due to their incompatibility with the American Convention) of criminal proceedings when serious procedural breaches have been committed, whereby it becomes necessary to institute new proceedings or reopen previous ones at the point at which the breach was committed. The outcome, in any case, will be the rendering of a new judgment. To put it in different terms, what prevails is the notion that flawed proceedings are not an actual proceedings and that the (apparent) judgment rendered therein is not a genuine judgment. Should this be accepted, the

subsequent trial on the same facts and against the same persons would not amount to a second trial nor would it disregard the *ne bis in idem* principle.

22. Naturally, this issue is not closed. It is still necessary to advance carefully and reflectively into the various hypotheses which might be formulated on the attainment of double jeopardy. It is to be assessed, as objectively and wisely as possible, whether it is necessary to disregard a final judgment, apparently unappealable, and so set aside the *ne bis in idem* principle, or whether to preserve the acknowledgment thereof—which is a powerful guarantee—on the basis that the proceedings instituted and the judgment rendered therein do not amount to actual proceedings and to a true and genuine judgment.

F) PUBLIC NATURE OF THE PROCEEDINGS AND PUBLICATION OF JUDGMENT

The public nature of the acts of trial in open court, one of which is the judgment, is a feature inherent to the due process of the law in a democratic society. There are quite many international instruments which refer to “fair trial” and “public hearing” within the same expression. The objective sought is to incorporate the eyes and ears of the people into the trial—notwithstanding their intervention in the trial itself, as is the case of trial by jury—, which becomes a democratic guarantee of the correct operation of justice. Public observation reinforces the proper fulfillment of the jurisdictional function, provided that the judge concentrates only on the facts and the law, which should never be “re-read” under the public pressure, and responds only to his reason and his conscience. This is another one of the important issues regarding the administration of justice in a democratic society, one which is always extensively discussed, but never adequately resolved in practice.

The Inter-American Court frequently orders the publication of the judgments it has rendered as a redress measure, either to satisfy the victim’s right or to create social hindrances to the possible repetition of conducts which are violations of human rights. Thus, the publication of the judgment serves a double purpose: an individual one and a social one, both rooted in the specific case. On several opportunities the Court has stated that the declaratory and condemnatory judgment is in itself a redress of grievances. Its reparatory effectiveness is extended when it becomes generally known due to the reasonable publicity thereof, the characteristics of which are defined by the Court itself. It thus brings about a kind of vindication of the victim in a society which might have once considered the behavior of the authorities to be legitimate. In other words, “things go back to normal”, the truth is proven in the case, and “each one is given his due” with the people watching. And all this is quite important.

25. It is also important that publication be made in such a way as to achieve the aims sought, which are invariably favorable to the cause of justice in general and of the justice awarded the particular victim. Therefore, it is advisable that the Court analyze, as it has, the details of the publication ordered. It is necessary to prevent this means from being used to “victimize the victim once more”, taking into consideration the circumstances of the case, the characteristics of the victim’s environment, his future life, the need to create conditions which favor it and which reduce the negative consequences—most of them, psychological—of the violation committed. At times the detailed dissemination of the facts does not contribute to the victim’s future welfare. Finally, what is important is to put on record that there has been an unacceptable violation of an individual right and that, therefore, the State has been found internationally liable. Obviously, this does not mean concealing facts, which are recorded in the proceedings and therefore can be accessed by any person who is interested in the case. It means doing what is

expected from a judgment without creating further problems to the victim as collateral damage.

Sergio García-Ramírez

President

Emilia Segares-Rodríguez
Deputy Secretary

SEPARATE CONCURRING OPINION

Judge Oliver Jackman

In this judgment, the Court “finds that damage to Mr. Wilson Gutiérrez-Soler’s life project has occurred as a result of the violation of his human rights.” However, the Court has decided not to compensate for said damage “financially, since the conviction pronounced elsewhere in the judgment contributes to compensate Mr. Wilson Gutiérrez-Soler for pecuniary and non pecuniary damages.”

In the *Case of Loayza Tamayo*, the Court also recognized “the existence of grave damage to the ‘life plan’ of Ms. María Elena Loayza-Tamayo, caused by violations of her human rights”, but found that “neither precedents nor doctrine has evolved to the point where acknowledgment of damage to a life plan can be translated into economic terms.” In that case, as in the one discussed herein, the Court held that “that the victim’s recourse to international tribunals and issuance of the corresponding judgment” provided an adequate reparation for damage of such kind.

In the judgment on reparations passed on the *Case of Cantoral Benavides*, the Court held that the events discussed in that case

dramatically altered the course that Luis Alberto Cantoral-Benavides’ life would otherwise have taken. The pain and suffering that those events inflicted upon him prevented the victim from fulfilling his vocation, aspirations and potential, particularly with regard to his preparation for his chosen career and his work as a professional. All this was highly detrimental to his “life project”.

In that opportunity, abandoning the reluctance displayed in the *Case of Loayza Tamayo*, the Court held – and consequently ordered – that “the best way to restore Luis Alberto Cantoral-Benavides’ life plan is for the State to provide him with a fellowship for advanced or university studies [...] at a learning institution of recognized academic excellence.”

I did not take part in that judgment due to reasons beyond my control. Had I participated in that vote, I would have concurred with the Court's ruling based on the facts; however, I would have felt the need to raise a strenuous objection, as I did in my Separate Opinion in the *Case of Loayza Tamayo*, regarding the apparent *ratio decidendi*; i.e., the thesis that there is a new category of damages aimed at redressing the damage to the “life project” sustained by the victim, that is somehow independent and different from the category of damages currently known as “moral” or “non pecuniary”.

In my Vote in the *Case of Loayza Tamayo*, I stated that:

I am of opinion that there is ample precedent in the jurisprudence of this Court, without necessity for the creation of a new head of damages, to permit the Court to assess the damage here identified and to make the appropriate orders in terms of Article 63 of the American Convention on Human Rights (“the Convention”) [...]. Under the Convention the Court has authority to order “fair compensation” to be paid to a successful plaintiff. In a given case it is thus open to the tribunal, once the standard test of remoteness of the damage is met, to rule on any identifiable damage which the plaintiff has sustained as a result of violations of the rights and freedoms protected under the Convention.

I support the decision of the Court regarding the relief granted to Gutiérrez-Soler; however, I am not satisfied that there be in this case any element that may lead me to change the opinion stated in the *Case of Loayza-Tamayo*.

Not only would the concept of redeemable damage to the so-called "life project" give the impression that the Court is too eager to find innovative methods to punish respondent States but also, in my most respectful opinion, it is artificial and a creation that does not respond to any identifiable legal need.

Oliver Jackman
Judge

Emilia Segares-Rodríguez
Deputy Secretary

SEPARATE OPINION OF JUDGE A. A. CANÇADO TRINDADE

1. In voting in favor of the adoption of the this Judgment of the Inter-American Court of Human Rights in the case of *Gutierrez Soler versus Colombia*, with which I basically agree, I feel obliged to include in this Separate Opinion, albeit briefly, my personal reflections on four fundamental issues raised in the instant case, which, in my view, should not go unnoticed. I am referring, in particular, to the following issues: a) time, the life project and the vulnerability of human existence; b) time, the vulnerability of human existence and the after-life; c) the duty of remembrance and the need to remember; and d) the ripening of time, awareness and the quest for forgiveness.

I. Time, Life project and the Vulnerability of Human Existence

2. Following the precedent developments regarding the concept of the right to a life “project” in the cases of *Loayza Tamayo versus Peru* (reparations, 1998), *“Street Children” versus Guatemala* (merits, 1999, and reparations, 2001) and *Cantoral Benavides versus Peru* (reparations, 2001),¹ the Court had the opportunity to further develop its construction on this concept. However, the lack of consensus among its members as to which direction to take hindered further progress in this regard. Still, I believe that the Court, even without unanimity, should have taken a step forward in its precedents construction, especially in light of the positive step taken by the respondent Government to accept its international liability in the *cas d’espèce* and to apologize to the victim and to the victim’s next of kin. The Court having elected not to develop its own precedent construction, I feel obliged to put on record my personal reflections on this matter in this Separate Opinion in order to support my position.

3. We all live in time, which eventually consumes us all. Precisely because of this self-perception we have of ourselves as existing in time, each one of us seeks to envisage a life project. The term “project” implies in itself a temporal dimension. The concept of life project has therefore an essentially existential value, grounded in the idea of complete personal achievement. In other words, within the framework of a transient life, people have the right to make the options they feel are best, of their own free will, in order to achieve their ideals. Therefore, endeavors to achieve a life project appear to have great existential value, and the potential to give meaning to each person’s life.

4. When this quest is suddenly torn apart by external factors caused by man (such as violence, injustice, discrimination), which unfairly and arbitrarily alter and destroy an individual’s life project, it is especially serious, —and the Law cannot remain indifferent to this. Life —at least the one we know— is the only one we have and has a time limit, and the destruction of the life project almost always implies a truly irreparable damage or sometimes reparable only with great difficulty.

¹. In other cases, the right to a project of life has been invoked by the plaintiffs before this Court at an individual level (e.g. case of *Myrna Mack Chang versus Guatemala*, 2003, and case of the *Gómez Paquiyauri Brothers versus Peru*, 2004), at a family level (e.g. case of *Molina Theissen versus Guatemala*, 2004), and at a collective level (e.g. case of *Plan de Sánchez Massacre versus Guatemala*, reparations, 2004).

5. Within the scope of the ample, general obligation of the States Parties to the American Convention on Human Rights embodied in Article 1(1) to respect and to ensure respect of the rights enshrined in the Convention, public authorities must ensure to all persons subject to the jurisdiction of said States the full exercise of protected rights, which is essential to the achievement of each individual's life project. If this right is violated, were reparation possible, it, would come close to redress *par excellence*, i.e. *restitutio in integrum*. In most cases, however, this is unattainable (as is the case of torture victims, who suffer from lifelong sequels).

6. In the instant case of *Gutiérrez Soler versus Colombia*, the victim himself expressed to the Court, as set forth in the this Judgment, that the torture inflicted upon him deeply affected his worth as a human being, his self-esteem, his ability to relate to others in terms of affection, his personal development, and his family ties (para. 88). The Court so found and, as it has in past cases, avoided quantifying the damage in monetary terms (already included in the determination of pecuniary and non-pecuniary damages), thus preserving its method of redress related to the *satisfaction* owed to the victim.

7. The Court, in ordering the respondent Government in the instant case, *inter alia*, the publication of the relevant parts of this Judgment, deemed that it was intended as aimed at "redressing the substantial damage to Mr. Wilson Gutiérrez Soler's honor and life project and those of his next of kin," as well as to prevent repetition of events (torture and mistreatment) such as those of the instant case (para. 105). Along these lines, with which I basically agree, and in order to preserve the specificity of damage to a life project (which coexists with the moral damage), the Court could and should have, however, taken a further step in the precedent development of the concept of the right to a life project.

II. Time, the Vulnerability of Human Existence and the Life Project for the future

8. As time consumes us all and continues to flow, building a life project might seem insufficient to many who, aware of their own existential vulnerability, also seek to build what I like to call the *after-life*. I addressed this issue in my Separate Opinion in the recent Case of the *Moiwana Community versus Suriname* (Judgment of June 15, 2005), in which this matter was, in my opinion, of central importance. In the instant case of *Gutiérrez Soler versus Colombia*, I will only refer to the relevant parts of my reasoning.

9. As I explained in the aforementioned Separate Opinion, I see no reason, in view of time going by, why one should exercise restraint in searching for meaning for one's life, for the life we know, for the world of those that are still alive; in fact, in my opinion, both the life project and the after-life hold fundamental values (para. 69). Damage to the latter constitutes —as I went as far as to propose in my aforementioned Separate Opinion in the case of the *Moiwana Community- spiritual damage*, which has a direct bearing on what is most intimate to the human being, namely, their inner life, their beliefs in human destiny, their relations with their dead (para. 71). This category of damage embodies the principle of humanity in a temporal dimension (para. 72).

10. Unlike moral damage, damage to the life project and after-life is not quantifiable —i.e. it is not susceptible of "quantifications"— as redress can only be secured by means of obligations to do something which involve some form of satisfaction (e.g. honoring the dead in the persons of the living) (para. 77). The

"quantification" of moral damage is, in turn, undertaken to the benefit essentially of those still living (direct or indirect victims) (para. 74).

III. The Duty of Remembrance and the Need for it

11. The passing of time imposes, in addition, the duty of remembrance and emphasizes the need for it. Each person has a "spiritual patrimony" to preserve, hence the need to cultivate memory to preserve *identity*, both at personal and collective levels.² Oblivion enhances the vulnerability of the human condition,³ and cannot be imposed (not even by "legal" contrivances, such as amnesty or the statute of limitations): there is an ethical obligation of remembrance.⁴ In the above-mentioned Separate Opinion in the case of the *Moiwana Community versus Suriname* (2005), I went as far as to point out that:

"It is incumbent upon all of us, the still living, to resist and combat oblivion, so commonplace in our post-modern, ephemeral times. The dead need our faithfulness; they are entirely dependent upon it. The duties of the living towards them (...) encompass perennial remembrance. They need our remembrance today and tomorrow, just as much as we needed their advice and care yesterday. Time, thus, instead of keeping us apart, on the contrary, brings all of us —the living and the dead— together. This, in my view, ascribes an entirely new dimension to the links of solidarity between the living and their dead. Remembrance is a manifestation of gratitude, and gratitude is perhaps the noblest manifestation of rendering true justice" (para. 93).

12. Awareness of the duty of remembrance seems to be developing in our times on a universal scale. Recently, for the first time in history, the General Assembly of the United Nations held a special session (the 28th) on January 24, 2005, specifically for the purpose of commemorating the sixtieth anniversary of the liberation of the Nazi concentration and death camps. During the special session, Delegations from several countries emphasized the importance of the duty of remembrance (invoked by Bulgaria, Belarus, and Benin),⁵ even to combat historical revisionism (as stressed by Russia and Italy),⁶ and the general indifference that has unfortunately surrounded successive atrocities in contemporary history (as noted by Canada, Tanzania, Rwanda, Kenya, and New Zealand).⁷ In addition, some delegations expressed their repudiation of State crime (such as the Armenian Delegation).⁸

13. The 28th special session of the General Assembly of the United Nations was effectively garnished with significance and symbolism, at a time when direct witnesses (the survivors) of these atrocities are growing old and will not be around

². Juan Pablo II, *Memoria e Identidad - Conversaciones al Filo de Dos Milenios*, Buenos Aires, Ed. Planeta, 2005, pp. 95, 109, 131, 176-177 and 183.

³. Cf., in that regard, P. Ricoeur, *La mémoire, l'histoire, l'oubli*, Paris, Éd. Seuil, 2000, pp. 374-375.

⁴. Cf., in that regard, N. Weill, "Y a-t-il un bon usage de la mémoire?", in *Devoir de mémoire, droit à l'oubli?* (ed. Th. Ferenczi), Bruxelles, Éditions Complexe, 2002, p. 227.

⁵. ONU/A.G. (28e. session extraordinaire), *Soixante ans après la libération des camps de concentration - Communiqué de presse AG/10330*, dated 24.01.2005, N.Y., N.U., 2005, pp. 8, 9 and 10-11, respectively.

⁶. *Ibid.*, pp. 4 and 5, respectively.

⁷. *Ibid.*, pp. 6, 9 and 11, respectively.

⁸. *Ibid.*, p. 6.

much longer. Hence the justified importance ascribed to the cultivation of memory in the face of the threat posed by historical revisionism, in complete disregard of the immeasurable human suffering of those victimized.⁹

14. As the past cannot be changed, the observance of the duty of remembrance is, in my opinion, not only a way to settle a debt (individual and social) with the fatal victims, but also a guarantee of non-repetition of these gross violations of human rights. The duty of remembrance is in fact an imperative of justice and dignity. It is a duty that one owes oneself and that is also incumbent upon the whole social body.

15. I will allow myself to cite a fictional character, Elhanan, (*L'oublié*, by Elie Wiesel), who grieves at the gradual loss of his memory to an incurable disease, the legacy of which he so desperately wanted to pass onto his son Malkiel "*Parce que je cultive le souvenir, il a décidé de m'en priver*,"¹⁰ he regrets, and tells his son that "*l'histoire elle-même se montre souvent injuste envers ses victimes. Certaines ont plus de chance que d'autres. (...) Partout se développe une vaste littérature de la mémoire.*"¹¹ And the author relates later in the book:

"Toute victoire est provisoire, et celle sur le temps plus que les autres. Cependant, Elhanan ne peut s'en passer. Pour lui, chaque instant de lucidité est un triomphe que, de tout son être, il s'efforce de prolonger (...). Aussi a-t-il souvent le sentiment que le souvenir qu'il évoque pourrait être le dernier, que chacune de ses paroles pourrait signifier rupture plutôt qu'achèvement. (...) Ainsi Elhanan assistait, impuissant, à sa propre destruction. L'oubli, pour lui, c'était la mort non seulement de la connaissance, mais aussi de l'imagination, donc de l'espérance. Mentalement écartelé, s'efforçant en vain de contrôler ses actes, de transformer la durée en conscience, il se soumettait sans cesse à des examens (...). L'oubli: mal pire que la démence (...)."¹²

16. The truth is that we need remembrance, which we pass on to one another; children need the memories of their aged loving parents, and these need their children's remembrance. We are all bound together— rather than separated— in time. Remembrance is a duty of the living toward their dead; the dead need the remembrance from their surviving loved ones so that they do not cease to exist once and for all.¹³

17. In my Separate Opinion in the case of *Bámaca Velásquez versus Guatemala* (Merits, 2000), I mentioned that:

"In my view, the time— or rather, the *passing* of the time— does not represent an element of separation, but rather of approximation and union, between the living and the dead, in the common journey of all towards the unknown. The knowledge and the preservation of the spiritual legacy of our predecessors constitute a means whereby the dead can communicate with the living. Just as the living experience of a human community develops with the continuous flux of thought and action of the individuals who compose it, there is likewise a spiritual dimension which

⁹. On the imperative of the "respectful remembrance" of the direct victims, cf., e.g. A. Liss, *Trespassing through Shadows - Memory, Photography and the Holocaust*, Minneapolis/London, Univ. of Minnesota Press, 1998, pp. XII-XIII, 8, 72, 82, 86, 116 and 121.

¹⁰. E. Wiesel, *L'oublié*, Paris, Éd. Seuil, 1989, p. 77.

¹¹. *Ibid.*, p. 109.

¹². *Ibid.*, pp. 221 and 278.

¹³. As Thomas à Kempis noted, already in his time (1380-1471), "today a man is here; tomorrow he is gone. And when he is out of sight, he is soon out of mind". Th. à Kempis, *The Inner Life*, London, Penguin, 2004 [reed.], p. 19.

is transmitted from an individual to another, from a generation to another, which precedes each human being and survives him, *in the time*. There is effectively a spiritual legacy from the dead to the living, apprehended by the human conscience. (...) What survives us is only the creation of our spirit, to the effect of elevating the human condition. This is how I conceive the legacy of the dead, from a perspective of human rights." (paras. 15-16)

18. In my Separate Opinion in the same case of *Bámaca Velásquez versus Guatemala* (reparations, 2002), I added that:

"in my view, what we conceive as the *human kind* comprises not only the living beings (holders of the human rights), but also the dead (with their spiritual legacy). The respect for the dead is in effect due in the persons of the living. Human solidarity has a wider dimension than the purely social solidarity, in so far as it manifests itself also in the links of solidarity between the dead and the living." (para. 25)

IV. The Ripening of Time, Awareness, and the Quest for forgiveness

19. To the recognition of the duty of remembrance and the need for it, it looks like awareness of the importance of the quest for forgiveness for the perpetration of gross human rights violations is likewise being added these days. In a recent work, P. Ricoeur correctly points out that "*c'est dans notre capacité à maîtriser le cours du temps que paraît pouvoir être puisé le courage de demander pardon*;"¹⁴ and evokes K. Jaspers's reflections, for whom "*l'instance compétente, c'est la conscience individuelle*."¹⁵ Indeed, if we look carefully at the world around us, we will find in it expressions of the universal human conscience which unequivocally acknowledge the significance of the quest for forgiveness. I will here go as far as to refer to examples of such expressions in different continents.

1. The American Continent (Colombia and Chile)

20. As pointed out by the Inter-American Court in the instant Judgment rendered in the case of *Gutierrez Soler*, in a memorable moment during the public hearing held on March 10, 2005, the members of the delegation of the respondent Government, when reiterating their acknowledgment of international liability in the *cas d'espèce*,¹⁶ stood and approached Messrs. Wilson and Ricardo Gutiérrez-Soler to apologize on behalf of the State of Colombia for the act whereby Wilson Gutierrez-Soler and his next of kin were victimized in the instant case, as a way to contribute, as expressed by the Government agents, to the "dignification of the victim and of his next of kin."¹⁷

21. Another significant example may be found in the presentation of the results of the work carried out by the *Comisión de la Verdad y Reconciliación de Chile* (Chilean Truth and Reconciliation Commission). In March 1991, when releasing to the public the final *Report* of the Commission (in which the need to restore the good name of the victims was put forward), the President of Chile then incumbent (Mr. Patricio Aylwin) noted in his speech that it was time "for forgiveness and

¹⁴. P. Ricoeur, *La mémoire, l'histoire, l'oubli*, op. cit. supra n. (...), p. 630.

¹⁵. Cf. *ibid.*, p. 616.

¹⁶. Previously acknowledged in its brief of March 9, 2005.

¹⁷. Paragraphs 104 and 59, and cf. para. 92(a) of this Judgment.

reconciliation," for looking "toward the future that brings us together, rather than to the past that brings us apart," and added that:

"One must begin by specifying who are the offended parties called upon to forgive and who are the offenders to be forgiven. I cannot forgive on behalf of others. Forgiveness may not be imposed by decree. Forgiveness requires repentance from one of the parties and generosity from the other. When those who caused so much suffering were officials of the State and the relevant government authorities could not or did not know how to prevent or punish them, nor was there the necessary social reaction to avert it, both the State and society as a whole are responsible, whether by act or by omission. It is the Chilean society who is in debt to the victims of human rights violations. (...) Therefore, in my capacity as President of the Republic, I dare to speak for the entire nation and, in its name, apologize to the next of kin of the victims. I also solemnly request the armed forces and the to the law enforcement forces and to all those who have participated in the excesses committed to make gestures of acknowledgment of the pain caused and make efforts to lessen it."¹⁸

2. The Asian Continent (Japan)

22. Recently, at the Asian-African Summit held in April 2005 in Jakarta, Indonesia, the Prime Minister of Japan (Mr. J. Koizumi) apologized to those victimized (particularly to those from Asian nations) for the excesses perpetrated by the military of his country during World War II. In his speech of April 22, 2005 at the aforementioned Summit, he expressed, on behalf of the Japanese Government, his feelings of "deep remorse" and "heartfelt apology always engraved in mind."¹⁹ This was not the first gesture of its kind insofar as similar statements of apology have been made by the Government of that country in the past.²⁰

23. As of December 1991, Japan embarked on a fact-finding operation on the issue known as "wartime comfort women," the results of which were announced in July 1992 and August 1993. When announcing them, Japanese authorities expressed their "sincere apologies and remorse" for the "grave affront to the honor and dignity" of the women victimized during the war. Acknowledging its "moral responsibility," Japan has undertaken several initiatives (since July 1995), such as the development of projects and funds to provide assistance to the victims (and their next of kin) in the Philippines, The Republic of Korea, Taiwan, Indonesia and the Netherlands in order to "ensure that such an issue may never be repeated."²¹

3. The European Continent (Vatican)

24. In the year 2000, Pope John Paul II, in a historical document (entitled *Memoria e Riconciliazione - La Chiesa e le Colpe del Passato*), apologized for past faults of the Roman Catholic Church. He explained that:

¹⁸. P. Aylwin Azocar, "La Comisión de la Verdad y Reconciliación de Chile", in *Estudios Básicos de Derechos Humanos - II* (eds. A.A. Cançado Trindade y L. González Volio), San José de Costa Rica, IIDH, 1995, pp. 115-116, and cf. p. 113.

¹⁹. Speech reproduced at: www.infojapan.org/region/asia-paci/meet0504, on 22.04.2005, pp. 1-3.

²⁰. To wit: on 29.09.1972, 24 and 26.08.1982, 06 and 07.09.1984, 18.04.1990, 24 and 25.05.1990, 16 and 17.01.1992, 06.07.1992, 04 and 11.08.1993, 23.08.1993, 29.09.1993, 31.08.1994, 15.08.1995, 23.06.1996, 08.10.1996, 28.08.1997, 06.09.1997, 13 and 16.01.1998, 15.07.1998, 08.10.1998, 26.11.1998, 10 and 17.08.2000, 30.08.2000, 03.04.2001, 08.09.2001, 15.10.2001, 17.09.2002, 15.08.2003, 13.04.2005 and, finally, on 22.04.2005.

²¹. Constant data of a *dossier* (of March 2003, pp. 1-6), which I received from the Japanese Ministry of Foreign Affairs, in Tokyo, during my academic visit to the country, as an official guest, in December 2004.

"Purificare la memoria significa eliminare dalla coscienza personale e collettiva tutte le forme di risentimento o di violenza che l'eredità del passato vi avesse lasciato (...)." ²²

This process of purification of memory is governed, in its formulation, by three principles, to wit: the "principle of conscience" (as "moral judgment and moral imperative"), the "principle of historicity", and the "principle of paradigm change." ²³ Among the historical examples cited, we can find the Crusades (the "*tragedia dell'uso delle armi per proteggere la fede*"), the treatment of native peoples, and the Inquisition, in addition to individual cases, such as that of Giordano Bruno and Galileo. ²⁴

4. The African Continent (South Africa and Rwanda)

25. On the occasion of receiving the *Report* from the South African Truth and Reconciliation Commission, the President of that country (Mr. Nelson Mandela), in his speech delivered in Pretoria on October 29, 1998, warned that:

"It will be difficult for the victims of gross violations of human rights to accept the philosophical account of the trade-off between punitive justice and a peaceful transition. It may be difficult for many to accept the finding the Apartheid State was the primary perpetrator of gross human rights violations. Yet if we are true to our founding pact, we cannot equivocate about a system which exacted such inhumanity. There can be no dissonance with regard to the clarion call: never again!" ²⁵

26. Shortly after, in his assessment of the work of the South African Truth and Reconciliation Commission, published in January, 1999, Mr. Desmond Tutu focused on the issue of repentance and the quest for forgiveness. He considered that:

"Forgiveness and reconciliation are not the normal terms of political discourse. They are playing on home ground in the religious area. And so it was to be expected that we would bring our religious insights and perspectives to bear on the delicate business of healing a traumatized and deeply wounded people.

(...) Forgiveness in an important way is making it possible for the wrongdoer to make a new beginning and not to be imprisoned in a paralyzing past. It opens a door to the possibility of a fresh start, which would not be feasible without that forgiveness. But the only way forgiveness can be appropriated is by the perpetrator confessing because he is penitent. Something similar is true for communities and people." ²⁶

27. Thereupon, Mr. Desmond Tutu referred to the tragedy of Rwanda:

"I visited Rwanda soon after the genocide there. I said that if retributive justice was to be the last word in dealing with that awful happening, then Rwanda had had it, for her history has been one of reprisal followed by counter-reprisal, as first Tutsi and then Hutu took the opportunity for revenge, as each in turn toppled the previous top dogs. Their hope lay in something which went beyond retributive justice,

²². [Commissione Teologica Internazionale/Vaticano,] *Memoria e Riconciliazione - La Chiesa e le Colpe del Passato: Il Papa Chiede Perdono - Purificare la Memoria*, Roma, Ed. Piemme, 2000, p. 98.

²³. *Ibid.*, pp. 98-99.

²⁴. Cf. *ibid.*, pp. 131-180.

²⁵. South African Government, www.info.gov.za/index, Statement of 29 October 1998, p. 2.

²⁶. D. Tutu, "Seeking Reconciliation in South Africa", in *Franciscan* magazine, European Province of the Society of Saint Francis (January 1999 issue), reproduced at: www.franciscans.org.uk/1999jan-tutu, pp. 1 and 3.

and that something was forgiveness. (...) And so we see that without forgiveness there can be no future."²⁷

28. In its judgment rendered in Arusha, on October 2, 1998, in the case of *Prosecutor versus Akayesu*,²⁸ the *ad hoc* International Criminal Tribunal for Rwanda (Trial Chamber) stated that the accused (Mr. J.-P Akayesu), sentenced to prison by the Tribunal (para. 3), despite having accepted responsibility for the acts only by omission (for failure to comply with the duty to protect the people of Taba) insisted, however, on:

"publicly expressing sympathy for all the victims of the tragic events which took place in Rwanda, be they Tutsi, Hutu, or Twa. He asked for the forgiveness of the people of Rwanda in general and specifically of the people of the Taba commune (...)" (para. 2)

5. Conclusion

29. The universal legal conscience —that I consider— as stressed in many of my opinions in this Court and in my briefs— the ultimate *material* source of all Law, seems to be awakening, across the world, toward the acknowledgment of the importance of the quest for forgiveness. The events occurred in the proceedings before this Court, in the instant case of *Gutierrez Soler versus Colombia*, are good examples of this encouraging line of evolution.

30. The same holds true for the successive cases of acknowledgment of international liability made by the relevant respondent governments throughout the history of this Court. Such cases total 15, including the instant case,²⁹ (some with more than one judgment), which accounts for 28% of the cases disposed of by this Court to date. This percentage is without parallel in the practice of today's international courts. I feel truly privileged to have had the opportunity to participate in the adjudication of *all* these cases, —since the first one, the Judgment dated December 4, 1991, rendered in the case of *Aloeboetoe versus Suriname*,— and to closely follow this promising awareness-raising process on the part of the States regarding their duty to protect all individuals within their respective jurisdictions.

31. I would like to end this Separate Opinion by making a reference to a masterly book (of the kind that is no longer written in this new age of information technology), entitled *Le problème du mal - l'histoire* (1948), in which its brilliant author, R.P. Sertillanges, rightly pointed out that positivist philosophy, denying immortality and insensitive to values, simply lost awareness of the problem of evil.³⁰ The awakening of the universal legal conscience seeks, in my view, to bury the indifference of positivist myopia, —always conniving with power, and subservient to it, even when exercised in gross violation of the basic rights inherent to the human person.

²⁷. *Ibid.*, p. 3.

²⁸. Case no. ICTR/96-4-T.

²⁹ *Cases of Aloeboetoe, El Amparo, Caracazo, Barrios Altos, Benavides Cevallos, Garrido and Baigorria, Carpio Nicolle et al., Trujillo Oroza, Bulacio, Molina Theissen, Myrna Mack, the Plan de Sánchez Massacre, Huilca Tecse, the Mapiripán Massacre and Gutierrez Soler.*

³⁰. R.P. Sertillanges, *Le problème du mal - l'histoire*, Paris, Aubier, 1948, p. 292, and, for the importance of values, cf. pp. 395-397.

Antônio Augusto Cançado Trindade
Judge

Emilia Segares-Rodríguez
Deputy Secretary