

CONCURRING OPINION OF JUDGE C. MEDINA-QUIROGA

In general, I concur with the decision of this Court regarding the human rights violations mentioned in the foregoing judgment. However, I have problems with the grounds on which the Court finds that Articles 8 and 25 of the American Convention have been violated, as I already have had in previous cases.¹

A. As to Article 8:

1. Upon analyzing the violation of Articles 8 and 25, in whereas clause 78 of this judgment, the Court held that:

“the victims of grave human rights violations and their next of kin, if applicable, have the right to know the truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations. This right to the truth, once recognized, constitutes an important means of reparation. Therefore, in the instant case, the right to the truth creates an expectation that the State must fulfill to the benefit of the victims. This measure benefits not only the next of kin of the victims, but also society as a whole, because, by knowing the truth about such crimes, it can prevent them in the future.”²

In whereas clause 80, the Court added that “[t]herefore, the relatives of the victims are entitled to, and the State has the duty to procure, an effective investigation by state authorities of the events involving the victim, proceedings against the alleged perpetrators and, if applicable, the appropriate penalties imposed to redress the damage sustained by said relatives.”³

2. The Court quotes these two considerations in order to support its determination that Articles 8 and 25 of the Convention have been violated.

3. In my opinion and, I believe, as it repeatedly appears in the precedents of the Court,⁴ the obligation to investigate does not derive from Articles 8 and 25, but from the general duty State Parties have to ensure the exercise of those substantive human rights that the Court considered to have been violated by the State. We can maintain that, in compliance with the general duty to guarantee such enjoyment, the State must protect the human rights of persons against third parties, either State authorities or private individuals, through legal provisions establishing the illegal nature of certain acts (undoubtedly, those that result in forced disappearance) and, after that conduct has been perpetrated, the law must be fully enforced to deter commission of acts of similar nature. Therefore, if the rule that has been infringed is a criminal provision, all those who

¹ Partially Dissenting Opinion of Judge Cecilia Medina-Quiroga, *Case of 19 Tradesmen*. Judgment of July 05, 2004. Series C No. 109, and Partially Dissenting Opinion of Judge Cecilia Medina-Quiroga, *Case of the Gómez-Paquiyaui Brothers*. Judgment of July 08, 2004. Series C No. 110.

² Cf. *Case of 19 Tradesmen*. Judgment of July 5, 2004. Series C No. 109, para. 259.

³ Cf. *Case of the Serrano-Cruz Sisters*. Judgment of March 01, 2005. Series C No. 120, para. 64; and *Case of 19 Tradesmen*, *supra* note 2, para. 184.

⁴ See on this matter, my concurring opinion in the *Case of the Moiwana Village*, also signed by Judge García-Ramírez and the case law precedents mentioned in the footnotes on pages 3 to 12.

participated in the criminal act must be investigated, prosecuted and punished in accordance with criminal legislation.

4. The events in the instant case refer to an instance of forced disappearance for which the State has acknowledged its responsibility regarding the violation of Articles 4(1), 5(1) and 5(2) of the American Convention to the detriment of Mr. Gómez-Palomino and Article 5 to the detriment of his mother, his daughter and his partner. Moreover, the Court has declared that the State violated Article 5 to the detriment of the sisters and the brother of the missing party. The violation of these two rights; i.e. the right to life and to personal integrity, in the light of the obligation to ensure set forth in Article 1(1) of the Convention, gives rise to the duty of the State to investigate, prosecute and punish perpetrators, and the right of the relatives to demand that said duty be fulfilled.

5. Once this right of the relatives of the victim arises, it is time to examine whether the State complied with its duty, as resulting therefrom. To that effect, international enforcement authorities have resorted to two mechanisms. One is the method adopted by the European system, which consists in examining, in circumstances comparable to those of the instant case, what the European Court refers to as “the procedural obligation contained in Article 2 of the European Convention,” which sets forth the right to life. In the case of *Hugh Jordan v. United Kingdom*, the Court did not examine as an independent violation the requirements of Article 6 of the Convention, which includes the requirements of due process, but included an analysis on how the investigation was carried in its considerations regarding the right to life.⁵

6. The other method, the one chosen by the Court in many cases (though in this judgment the Court omitted establishing the relation between the determination of the substantive right violation and the emergence of the right to have that violation investigated pursuant to Article 8), consists in verifying if the rules of due process contained in Article 8 have been violated upon complying with the obligation. I do not disagree with this method, as long as it be accepted that the right to know the truth about the circumstances undergone by the victim whose right to life or personal integrity has been violated, originates in the violation of a substantive right that must be “determined” by an independent and impartial court, within reasonable time. In my opinion, this makes it possible to apply Article 8, subparagraph one, wherein the general requirements with which all proceedings, whether criminal, civil or of any other nature, must comply are established.

7. In the instant case, I have not dissented with the opinion of the Court in the sense that Article 8 has been violated, since in fact the State has not complied with the terms of Article 8 as regards the investigation of the events that led to the disappearance of Mr. Gómez-Palominos, which is still pending.

B) As to Article 25:

1. The judgment in the instant case resorts to the considerations mentioned in paragraph 1 of this opinion in the sense that Article 25 also applies to support the validity of the right of the relatives of Mr. Gómez-Palomino to require the State to investigate the

⁵ *Case of Hugh Jordan v. United Kingdom*, Application No. 24746/94, judgment of May 4, 2001, letter b., particularly paragraphs 142 to 145. See also *Case of Anchova and others v. Bulgaria*, Applications Nos. 43577/98 and 43579/98, judgment of February 26, 2004, particularly paragraph 141.

events that led to the disappearance of their relative. The reasons given above are also valid to support my disagreement with such line of thought.

2. Notwithstanding the foregoing, as regards Article 25, I also raise an objection to the Court discussing the aforementioned article together with Article 8 of the Convention.

3. Article 25 sets forth that everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights, which is known in our continent as the right to the remedy called *amparo* [protection of constitutional guarantees and rights].⁶ This is so to the point that the first drafting of this provision only conferred the right regarding the rights set forth in the Constitution and in the laws of the country concerned.⁷ After it was later amended to include the wording in the International Covenant on Civil and Political Rights, Article 2, paragraph 3, it incorporated the idea to extend the protection under such remedy of *amparo* to also include the human rights set forth in the American Convention.⁸

4. The joint discussion of Articles 8 and 25, in my opinion, suggests that the only provision contained in the Convention that establishes the right to the aforementioned protection measures is the one embodied in Article 25. I believe that not to be so. That idea is indirectly supported by the provisions in Article 46(1) (a) of the Convention which requires that “all domestic remedies” be exhausted for a person to be able to resort to the individual communications examination procedure in the Inter-American system. Evidently, these remedies cannot always be simple, prompt and effective; on the contrary, they may consist in the right to bring an action to initiate judicial proceedings of the most diverse nature, even allowing for the filing of appeals, among other remedies, in each of such proceedings. The obligation of the State Parties to the Convention to provide every type of remedy originates, in my opinion, in their duty to ensure the exercise of fundamental rights since that obligation “implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”⁹ In order to legally ensure the free and full exercise of human rights, the writ of *amparo* set forth in Article 25 is definitely insufficient.

5. If that is the case, the inclusion in Article 25 of the right to any type of remedy distorts the original purpose of the rule, to the detriment of the victims. The Court thus bars itself from developing the concept and the requirements of the writ of *amparo* and, in doing so, it also hinders identification of which specific protection measures in the manner of the writ of *amparo* as such should be in force in the domestic legal system of each State Party to the American Convention to safeguard human rights in a simple, prompt and effective manner.

6. I do not dissent with the opinion of the Court regarding the violation of Article 25 in the instant case because the State acknowledged its liability for having violated Article 7(6) of the

⁶ The *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 32.

⁷ Inter-American Specialized Conference on Human Rights, Minutes and Documents, p. 22.

⁸ *Ibid.*, page 41.

⁹ *Case of Velásquez-Rodríguez*. Judgment of July 29, 1988. Series C No. 4, para. 166.

Convention, which is similar in nature to the writ of *amparo*.¹⁰ Personally, I believe that it would have been enough to acquiesce the violation of Article 7(6), but I concur that it is possible to contend that if the specific remedy was violated, the generic remedy must have been violated as well.

Cecilia Medina-Quiroga
Judge

Pablo Saavedra-Alessandri
Secretary

¹⁰ See in this regard, *The Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights), *supra* note 6, paras. 33-34.