

SEPARATE OPINION OF JUDGE DE ROUX RENGIFO

The preceding judgment has ordered the payment of sums of money to the siblings of the direct victims to compensate the non-pecuniary damage they suffered owing to the facts of the case. I share this decision and would like to make some comments on it.

In general (and without prejudice to the results of a more exhaustive examination of the matter), it may be said that the Court has approached the issue of non-pecuniary damage caused to the immediate next of kin of the victims of homicide and forced disappearance, as follows:

- a) It has applied the presumption that this type of facts results in non-pecuniary damage to the direct victim's parents: "in the case of the victim's parents – [the Court has said] – non-pecuniary damages need not be shown, as they can be presumed" (Castillo Páez case. Reparations. Judgment of November 27, 1998, para. 88).
- b) To the contrary, in the case of siblings, the Court has evaluated the nature of the relationship that existed between them and the victim in each specific case. Thus, for example:

1) In the Aloeboetoe case, it followed the rule that consists in distinguishing between the reparations corresponding to the "successors" and those due to the other "claimants or dependants", and it applied this rule to both non-pecuniary and pecuniary damages. Based on this distinction, it adopted the presumption that the death of the victims resulted in a damage to their "successors", but established that "with regard to the other claimants or dependants, the *onus probandi* corresponded to the Commission[, which] has not submitted the evidence necessary to show that the conditions indicated have been fulfilled" (Aloeboetoe case. Reparations. Judgment of September 10, 1993, para. 71).

2) In the Loayza Tamayo case, it granted reparations for non-pecuniary damage to the siblings of María Elena Loayza, based on the confirmation that they were "members of a close family" and that, as such, "could not have been indifferent to Ms. Loayza Tamayo's terrible suffering" (Loayza Tamayo case. Reparations. Judgment of November 27, 1998, para. 143). Each sibling received a compensation of US\$3,000.00 (three thousand United States dollars) from the State of Peru, under this heading (Judgment cited, para. 143 and operative paragraph 4.d).

3) In another case, the Court began by observing that the sibling of Adolfo Garrido and Raúl Baigorria had "offered no convincing evidence" demonstrating an "affective relationship [with the latter] such that" their disappearance would have caused them grievous suffering. However, it observed the fact that these relatives of the victims showed an interest in their fate when they disappeared and took measures to discover their whereabouts (Garrido and Baigorria case. Reparations. Judgment of August 27, 1998, para. 63 and 64). Consequently, the Court condemned the State of Argentine to pay the sum of US\$6,000 (six thousand United States dollars) to

each of the siblings of the persons who had disappeared (Judgment cited, para. 63 and 64 and operative paragraph 1). In this respect, it took into account that, when the judgment on reparations went into force, the purchasing power of the dollar in Argentina was well below the existing level in most countries of the continent.

4) In the Blake and Castillo Páez cases, the Court evaluated and gave full significance to the evidence submitted concerning the fact that – given the specific circumstances of the respective cases – the siblings of each of the victims experienced grave and exceptional suffering owing to their disappearance (Blake case. Reparations. Judgment of January 22, 1999, para. 57; Castillo Páez case. Reparations. Judgment of November 27, 1998, para. 89). We should not forget that in the first of these two cases, the siblings of the disappeared person were declared to be direct victims of the violation of Article 5 of the American Convention (Blake case. Merits. Judgment of January 24, 1998, paras. 112 to 116). The Court condemned the State of Guatemala to pay the sum of US\$30,000 (thirty thousand United States dollars) each to Richard Blake Jr. and Samuel Blake, brothers of Nicolas Chapman Blake, the direct victim of the disappearance (Judgment cited, operative paragraph 2.a.i) and, also, the State of Peru to pay to Mónica Inés Castillo Páez, sister of Rafael Castillo Páez, the direct victim in the respective case, the sum of US\$30,000 (thirty thousand United States dollars) (Judgment cited, para. 90 and operative paragraph 1).

It is therefore an innovation that the Inter-American Court has condemned a State to pay reparations for non-pecuniary damage to the siblings of the direct victims of homicides and forced disappearances, even though it was not proven that the siblings and the victim saw each other often or maintained alive the affective relations corresponding to their ties of consanguinity in some other way. This means that the Court has extended to the siblings, the presumption that applies to the parents of the victims of homicides or disappearances in its judgments, regarding the psychological and emotional sufferings caused by facts of such a horrendous nature – a presumption which, it is worth recalling, does admit evidence to the contrary. When establishing, in fairness, the amount of the respective compensations, the Court has acted with caution, calculating at US\$1,000.00 (one thousand dollars) the amount of the reparation for each of the victim's siblings. In my opinion, the caution has been greater than justified, but I must recognize that it is in keeping with the presumptive nature of the damage in question.

Both the use of reasonable presumptions (which admit evidence to the contrary) and, in particular, the inclusion of the victim's siblings within the sphere of the persons who may be presumed to be affected by homicides and other facts of a similar gravity, corresponds to the evolution of comparative law, concerning the law on responsibility. By taking the step I have referred to in this opinion in the Paniagua Morales case, the Court – in order to protect the human being and in the context of the application of the American Convention – is opportunely incorporating this evolution of comparative law in order to achieve integral reparation for the damage in question.

Carlos Vicente de Roux-Rengifo
Judge

Manuel E. Ventura-Robles
Secretary

