**CONCURRING OPION OF JUDGE DIEGO GARCIA-SAYAN IN RELATION TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE *CASE OF GONZÁLEZ ET AL. ("COTTON FIELD") V. MEXICO*, OF NOVEMBER 16, 2009**

1. Violence against women is a tragedy with different dimensions and symptoms. Without doubt, it is one of most extended and persistent expressions of discrimination throughout the world, and it is reflected in conduct ranging from subtle and veiled manifestations to inhuman and abusive situations. The violence against women in Ciudad Juárez, of which Claudia Ivette González, Esmeralda Herrera Monreal and Laura Berenice Ramos Monárrez were victims, falls into the latter category, which is the type of violence referred to in this Judgment in the case of *González et al. ("Cotton Field") v. Mexico* (hereinafter "the Judgment"). As the Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court," or "the Tribunal") states in the Judgment, the facts described have been influenced "by a culture of gender-based discrimination" (para. 164). This culture "has had an impact on both the motives and the method of the crimes, as well as on the response of the authorities" (para. 164). According to the Judgment, one example of this was "the ineffective responses and the indifferent attitudes that have been documented in relation to the investigation of these crimes" (para. 164) regarding which the Court has established the State's international responsibility.

2. In the case of the violent acts against women in Ciudad Juárez, the Court has pondered in the Judgment whether the acts perpetrated against the victims that culminated in the deaths of Mss. González, Herrera Monreal and Ramos Monárrez, could be attributed to the State (para. 231). The Court established that it lacked elements to conclude that the perpetrators were State agents (para. 242) and focused its reasoning on the State's possible responsibility for failing to comply with its obligation to guarantee.

3. The issue of the obligation to prevent has been examined by international justice, in general, and by this Court, in particular, with a clear focus, notwithstanding the undoubted complexity of the problem. The Court's jurisprudence has established precise fundamental criteria on the obligation to prevent. These criteria are more specific, evidently, in the case of individuals who are in the custody of the State, as in the case of a center where minors were interned[1] or situations in which the State occupies a special position of guarantor, as in the case of an indigenous community that has been displaced because it has been ousted from its land.[2]

4. Indeed, in more specific situations such as those in *Ximenes Lopes v. Brazil* or *Yakye Axa v. Paraguay*, the Court's criteria have been more precise, because these cases related to human groups occupying spaces under the custody of the State in view of the specific characteristics of the problems in each case. In the case of *Ximenes Lopes,* the Court established that, since this case related to individuals with mental disabilities who were in the custody or care of the State,[3] the State had

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1 *Cf. Case of Ximenes Lopes v. Brazil. Merits, Reparations and Costs*. Judgment of July 4, 2006. Series C No. 149.

2 *Cf. Case of Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of June 17, 2005. Series C No. 125

3 *Cf. Case of Ximenes Lopes v. Brazil, supra* note 1, para. 138.

incurred international responsibility because it had failed to comply with its obligation to "care and prevent the breach of the right to life and humane treatment, as well as […] its duty to regulate and monitor health care services, which are special duties derived from its obligation to guarantee the rights enshrined in Articles 4 and 5 of the American Convention."[4] While, in the case of *Yakye Axa*, which dealt with an indigenous community composed by an identifiable group of families, who had been displaced from their territory and were temporarily living in poverty-stricken conditions in an area alongside the highway, the Court determined that the State had "the duty to take positive, concrete measures geared toward fulfillment of the right to a decent life."[5]

5. Both the European Court of Human Rights (hereinafter "the European Court") and the Inter-American Court have developed precise and rigorous criteria to define the "obligation to prevent" within the framework of more extensive and general situations. In this regard, since 1998, the European Court has adopted decisions in which it has analyzed the complexity of the issue of the obligation to prevent and listed some specific criteria to define it. Thus, in *Osman v. the United Kingdom,* the European Court took a cautious approach to defining the obligation to prevent, mentioning some specific criteria that have been repeated in its more recent decisions:[6]

> For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. […] In the opinion of the Court where there is an allegation that the authorities have violated their positive obligation to protect the right to life […] it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.[7]

6. Thus, the European Court stresses the difficulty of guaranteeing public order, the unpredictability of human conduct and the vastness of the operational choices which must be made to determine priorities and allocate resources, and draws the conclusion that the obligation to prevent cannot be interpreted in a way that imposes an impossible or disproportionate burden on the State. From this perspective, it emphasizes the obligation to take "appropriate steps to safeguard the lives of those within its jurisdiction,"[8] which supposes putting in place effective criminal-law provisions to deter the commission of offenses against the person, backed up by law-enforcement machinery for prevention, suppression and sanctioning.[9] In "certain well defined circumstances"[10] this obligation may also impose a positive obligation on the

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4 *Cf. Case of Ximenes Lopes v. Brazil, supra* note 1, para. 146.

5 *Cf. Case of Yakye Axa Indigenous Community v. Paraguay, supra* note 2, para. 162

6 For example, European Court of Human Rights, *Kilic v. Turkey (Application no. 22492/93)* Judgment Strasbourg, 28 March 2000, para. 63, and *Opuz v. Turkey (Application no. 33401/02)*, Judgment Strasbourg, 9 June 2009. para. 129.

7 *Cf. Osman v. The United Kingdom (87/1997/871/1083)*. Judgment Strasbourg, 28 October 1998, para. 116.

8 *Cf. Osman v. The United Kingdom, supra* note 7, para. 115

9 *Cf. Osman v. The United Kingdom*, *supra* note 7, para. 115

10 *Cf. Osman v. The United Kingdom*, *supra* note 7, para. 115

authorities to take preventive operational measures to protect an individual whose life is at risk of experiencing the criminal acts of another individual.

7. In line and consonance with the case law of the European Court, the Inter-American Court has been evolving its own jurisprudence criteria on the obligation to prevent. Ever since its first jurisprudence in the 1988 case of *Velásquez Rodríguez v. Honduras*, the Court mentioned – and reiterated- the concept that the State has the obligation to "reasonably" prevent human rights violations.[11] In more recent cases, the Court has established the components to define and clarify the content of the "obligation to prevent" in line with decisions of the European Court such as those cited.

8. In the case of the *Pueblo Bello Massacre v. Colombia,* the Court established clear criteria using concepts that were reiterated subsequently in the cases of the *Sawhoyamaxa Indigenous Community v. Paraguay*[12] and *Valle Jaramillo et al. v. Colombia.*[13] Thus, in the *Pueblo Bello* case, the Court established that:

> […] the Court acknowledges that a State cannot be responsible for all the human rights violations committed between individuals within its jurisdiction. Indeed, the nature *erga omnes* of the treaty-based guarantee obligations of the States does not imply their unlimited responsibility for all acts or deeds of individuals, because its obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger. In other words, even though an act, omission or deed of an individual has the legal consequence of violating the specific human rights of another individual, this is not automatically attributable to the State, because the specific circumstances of the case and the execution of these guarantee obligations must be considered.[14]

9. Consequently, the Court has established that the State does not have "unlimited responsibility for all acts or deeds of individuals,"[15] and that the obligation to prevent has – in general and with the exception of special situations in which the State occupies a special position of guarantor – three components that must all be present: (1) the "awareness of a situation of real and imminent danger"; (2) "a specific individual or group of individuals," and (3) "reasonable possibilities of preventing or avoiding that danger."[16] These concepts were referred to with regard to the standard of "real and imminent danger" in the cases of *Ríos et al. v. Venezuela*[17] and *Perozo et al. v. Venezuela.*[18]

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11 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections.* Judgment of June 26, 1987. Series C No. 1, para. 174.

12 *Cf. Case of Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs*. Judgment of March 29, 2006. Series C No. 146, para. 155.

13 *Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series C No. 192, para. 78.

14 *Cf. Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs*. Judgment of January 31, 2006. Series C No. 140, para. 123.

15 *Cf. Case of the Pueblo Bello Massacre v. Colombia*, *supra* note 14, para. 123.

16 *Cf. Case of the Pueblo Bello Massacre v. Colombia*, *supra* note 14, para. 123.

17 *Cf. Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194, para. 110.

18 *Cf. Case of Perozo et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 195, para. 121.

10. When deciding the instant case, the Court recalled what it had already determined in the *Velásquez Rodríguez* case concerning the obligation to prevent "reasonably," (para. 236) and reiterated the three criteria that comprise the obligation to prevent established in the jurisprudence of this Court and of the European Court, recapitulated in the preceding paragraph

11. Thus, in this case, the Court concluded that the absence of a general policy that should have been initiated in 1998 is a failure of the State to comply with its obligation to prevent (para. 282). This "general policy" can be interpreted using the criteria established by the European Court in the case of *Osman v. Turkey,* to the effect that a public security policy designed to prevent, prosecute and punish offenses, such as the crimes against women that it was known were being committed in Ciudad Juárez, should have been implemented at least since 1998, which is when the National Human Rights Commission (a federal entity) warned of the pattern of violence against women in that city.

12. However, at the same time, the Court determined that "it has not been established that [the State] knew of the real and imminent danger for the victims in this case" (para. 282) prior to their kidnapping and disappearance. Nevertheless, the Court adopted a different attitude towards what the Judgment calls the "second stage"; namely, after the State had become aware of the "real and imminent danger" to a "specific group of individuals," when the three identified victims disappeared; thus, revealing the specific and evident danger that they would be abused and deprived of life, despite which the State "did not prove that it had adopted reasonable measures, according to with the circumstances surrounding these cases, to find the victims alive" (para. 284).

13. When reiterating its jurisprudence concerning the "obligation to prevent," the Court has emphasized the fundamental characteristics and components of this obligation to guarantee, as well as the characteristics and levels of the State's international responsibility. This results in an obligation to design and implement what this judgment calls "a general policy" of public security with its respective prevention and criminal prosecution mechanisms, taking into account the difficulties of doing this in any context and, even more so, in contexts of extensive and generalized criminality.

14. However, at the same time, the Court establishes the specific components of the obligation to prevent in determined cases in a way that avoids detracting from the criteria for determining the State's international responsibility, possibly by failing to differentiate it from ordinary crime. This avoids weakening and blurring fundamental concepts such as "violation of human rights" or "international responsibility of the States," or that such concepts are confused with facts that are, evidently, very serious but juridically different and distinguishable, such as the criminal activity of individuals. Thus, the components of the obligation to prevent insisted upon in this Judgment, help to ensure that the criminal acts of an individual will not be mistaken with the international obligations of the State in the future.

15. The States are obliged to establish general policies for public order that protect the population from criminal violence. This obligation has progressive and decided priority given the growth in the crime rate in most countries of the region. But, as stated clearly in this Judgment, this does not imply that the State has an "unlimited responsibility for any act or deed of private individuals" (para. 280), because the measures of prevention regarding which the State can be declared internationally responsible have the characteristics and components that have been developed in this Court's jurisprudence and that are repeated in this Judgment.

Diego García-Sayán
Judge

Pablo Saavedra Alessandri
Secretary