

**SEPARATE OPINION OF JUDGE SERGIO GARCÍA-RAMÍREZ
ON THE JUDGMENT OF THE
THE INTER-AMERICAN COURT ON HUMAN RIGHTS
IN THE CASE OF VARGAS-ARECO V. PARAGUAY
OF SEPTEMBER 26, 2006**

1. In this *Vote* I will only address one aspect of the *Judgment* entered by the Inter-American Court of Human Rights on the *Case of Vargas-Areco v. Paraguay*, to wit: the criminal relevance of the deprivation of life committed against Gerardo Vargas-Areco, which was revealed through two criminal proceedings; one before military authorities and another before the ordinary courts.

2. Undoubtedly, I believe -inasmuch the same manner as my colleagues, who signed this *Judgment*, - that the Court is not entitled, based on its *ratione temporis* jurisdiction in force as from the date when the State accepted the Court's contentious jurisdiction, to rule on the deprivation of life committed against Vargas-Areco in violation of the provisions of the American Convention regarding this fundamental right. Therefore, I do not intent to analyze or qualify this fact based on the provisions of the Pact of San José.

3. In some cases, however, the Court has decided to make certain considerations regarding serious events brought to its attention. Upon doing so, the Court takes into account its function as a body entrusted with the protection of human rights, which is required to prevent the commission of illegal acts and to guide the conduct of States to that effect, even if it has no jurisdiction to thoroughly examine said events and, consequently, to include them in its decision.

4. In view of the foregoing circumstances, the Court only comments on the context in which the facts under its jurisdiction occurred. This is what happened regarding the incorporation of minors under the age of 18 into the armed forces and the aforementioned criminal relevance of the deprivation of life committed against the minor Gerardo Vargas-Areco, who was seventeen years old at the time of death, as set forth in the *Judgment*.

5. Upon expressing these concerns --which are fully explained in paragraphs 107 and 108 of the *Judgment*, -- the Court does not intent to address and solve an issue that falls exclusively under the State's domestic jurisdiction. The competent courts of the State must examine the facts and render the appropriate *Judgment*, pursuant to applicable legislation and in accordance with its jurisdictional powers.

6. The Inter-American Court, which is responsible for performing a "control of compliance" based on the confrontation of the facts at stake and the provisions of the American Convention, cannot and does not intent --indeed, it never did- to become a new and last resort to hear a controversy originated in the domestic jurisdiction. The idea that the Inter-American Court constitutes a third or fourth instance, and eventually a jurisdiction of last resort, arises from a popular belief that is rooted in reasonable grounds; however, this idea has absolutely no connection with the jurisdiction of the Court, the legal conflict brought before it, the parties to the corresponding proceedings and the nature of international proceedings for the protection of human rights.

7. For the purposes of the instant case, we could take as an example the mission of constitutionality courts, which cannot conduct civil or criminal proceedings, as the case may be, but are only empowered to verify that proceedings and any decisions render thereunder are consistent with the National Constitution. The situation with the Inter-American Court is similar. The Court can only confront domestic rules – laws, administrative acts, jurisdictional resolutions, without limitation- to the provisions of the Convention and rule on their consistency in order to establish, if applicable, the State's international liability for failing to fulfill its obligations thereunder. The Court does not develop a new stage –or instance- i.e. ordinary proceedings. Proceedings begin, develop and conclude in the domestic jurisdiction. Therefore, the international court, as much in the same manner as constitutionality courts and as opposed to trial courts, cannot assess the facts and the evidence, nor is it empowered to order an acquittal or conviction.

8. Nevertheless, the essence of the human rights protection system, applied to conventional rules, involves the need to value the fairness, opportunity, need, adequacy and proportionality of certain facts from the point of view of human rights. This is an undeniable fact that, as reflected by the Inter-American Court's precedents, has already been analyzed when considering the limits and restrictions applicable to the exercise of rights or the suspension of the State's obligation in that regard. The foregoing considerations also apply to the guarantee regime set forth in the Convention –inherent to the natural obligations imposed upon States,- which may and should also be subject to assessment patterns in order to estimate its efficacy and validity and, in that sense, its consistency with the Convention itself.

9. The State's general obligation to guarantee the respect for human rights as set forth in Article 1(1) of the Pact of San José embodies the duty to effectively promote prosecution of any illegal act that violates the provisions of the Pact and that affects interests enjoying legal protection as human rights. Evidently, the act of prosecuting (which may consist of a series of acts by the State: crime definition, formal accusation, judgment, enforcement; all of them having large criminal relevance and significant impact in other areas of the public rules system in the event of illegal conduct) must be consistent with the duty to safeguard certain rights embodied therein. Otherwise, the act of prosecuting would no longer fulfill said duty and would result in non-compliance with a State's obligation, which should not be fulfilled through inappropriate means, arbitrarily or unreasonably.

10. Indeed, said safeguard should in fact be consistent with a series of elements whose examination allows to assess the State's fulfillment of its duties: the legally protected interest, the extent and circumstances of infringement, the conduct of the perpetrator, the need to avoid leniency –which paves the way for impunity- and excesses –which result in tyranny. Both leniency and excess, which involve a disparity between the violation committed and the public legal reaction, are in conflict with the rationality rule that must always guide a State's conduct upon exercising its powers.

11. Therefore, the analysis of the events from the human rights perspective cannot disregard the necessary balance between the violation of rights committed and the enforcement of the safeguards –within the criminal jurisdiction- undertaken by the State. These considerations, as mentioned before, do not intent to replace the trial court with the international court in determining if the illegal conduct that violates human rights falls under the definition of the crime and in imposing liability and punishment.

12. Based on these considerations, the Court has expressed its concern as regards an evident lack of proportionality; a concept that should always be respected when a right is restricted or impaired, or when a decision is rendered to punish a violation committed under a legal provision or in the exercise of jurisdictional powers. Thus, the court in charge of controlling compliance does not act as domestic trial or legislating authority, but rather evaluates their performance in accordance with the Convention, even when its analysis consists merely in assessing and not in defining specific measures -which must be established by the State, - particularly if limitations apply as a result of the recognition of the jurisdiction of the Court, as in the instant case.

13. Therefore, upon analyzing these considerations, the Inter-American Court may reasonably raise questions to address the subject in the domestic jurisdiction; even though the Court may focus its own examination on the drafting of these questions and make no effort to find answers, which would ultimately call for a judgment of conviction that the international Court is not empowered to render.

14. For instance, consider the extra-legal execution of a 16-year old child who attempted to flee from the military post to which he had been assigned. Can it be classified -as held by the military justice- as a consequence of excessive diligence in the performance of duties; i.e. excess as a ground to void the illegal nature of the act or to limit liability? The first case probably applies if an excess is associated with an alleged breach of duty. Can said act be subject to an evidently favorable punishment, even though it involved the death of a child, a harmless person who was running ahead of this executor and could have been stopped by resorting to other intimidation measures? Moreover, is it appropriate to classify said execution, as held by the ordinary courts, as "wrongful homicide"; i.e. a non-intentional act, even though the conduct displayed by the military officer could result in the death of the individual; a foreseeable and avoidable possibility, apparently accepted by the perpetrator?

15. Notwithstanding the fact that the act matches the crime definition –as it was classified as an illegal act both in the military and civil jurisdictions, - the question would be if it was reasonable to impose an evidently favorable punishment (1 to 5-year imprisonment) based on the punishment scheme established by criminal law, despite the nature of the act committed, the age of the victim, his defenseless, harmless and vulnerable status.

16. It could be held that those responsible for analyzing these issues from a human rights perspective do not have a duty to foster strict compliance with crime definitions, severe punishment or the strengthening of the penalties imposed pursuant to the law. However, those individuals do have a duty to verify that the guarantee to respect human rights satisfies the proportionality rule, preventing it from falling into illusory measures that fail to effectively honor the quest for justice. If we admit the foregoing, setting crime definitions, determining possible punishments and procedural requirements, together with the decisions contained in judgments, become a key issue to be taken into account to effectively protect human rights.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary