CONCURRING OPINION OF JUDGE CECILIA MEDINA QUIROGA 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. Although I agree with the decision of the Inter-American Court of Human Rights (hereinafter "the Court," or "the Tribunal") in this case that there has been a violation of Article 5(2) of the American Convention on Human Rights (hereinafter the "American Convention" or "Convention"), I disagree with the fact that the Court has not classified the acts perpetrated against the victims as torture.

2. From a practical and juridical perspective, whether or not a conduct is classified as torture does not make much difference. Both torture and cruel, inhuman or degrading treatment are violations of a human right and all these acts are regulated in almost the same way. Despite this, in other cases, the Court has not hesitated to classify a conduct as torture, often without mentioning the reasons why, and it can be observed that the principal factor is the severity of the act and how it affects the victim. In general, it is the conduct that determines the distinction between torture and other types of cruel, inhuman or degrading treatment. An act is classified as torture because a greater stigma is assigned to torture than to other acts that are also incompatible with Article 5(2) of the Convention.

3. The Tribunal decided to explain the requirements for declaring that torture has been committed in *Bueno Alves v. Argentina*, understanding that an act constitutes torture when the ill-treatment: (a) is intentional; (b) causes severe physical or mental suffering, and (c) is committed with a specific goal or purpose.[1] If we examine these three elements, we can see that the first and third may be found in other types of treatment that are incompatible with Article 5(2) of the Convention. The intention refers to the fact that the individual is aware that he is executing an act that will cause suffering or a feeling of humiliation, and the purpose refers to the reasons why he executes it: such as, domination, discrimination, sadism, or to achieve an act or omission by the victim. Both elements may also exist in cruel, inhuman or degrading types of treatment. Consequently, what really distinguishes torture from other types of treatment, in the terms stated by the Court in the case of *Bueno Alves*, is the severity of the physical or mental suffering.

4. The European Court of Human Rights (hereinafter "European Court") adopted precisely that position. In this regard, in *Ireland v. the United Kingdom,* it decided that torture referred to "inhuman treatment causing very serious and cruel suffering."[2]

5. General Comment 20 to Article 7 of the International Covenant on Civil and Political Rights (hereinafter "the Covenant"), of the Human Rights Committee,[3] states that the distinctions between the different forms of treatment referred to in the Covenant "depend on the nature, purpose and severity of the treatment applied."[4]

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1 *Cf. Case of Bueno Alves v. Argentina. Merits, Reparations and Costs.* Judgment of May 11, 2007. Series C No.164, para. 79, and *Bayarri v. Argentina. Preliminary Objection, Merits, Reparations and Costs.* Judgment of October 30, 2008. Series C No. 187, para. 81.

2 *Cf.* European Court of Human Rights, *Ireland v. the United Kingdom (Application no. 5310/71)*, Judgment Strasbourg, 18 January 1978, para. 167.

3 *Cf.* General Comment No. 20: Replaces general comment concerning prohibition of torture and cruel treatment or punishment (Art. 7): 10/03/92 CCPR General Comment No. 20.

4 *Cf.* General Comment No. 20, *supra* note 3, para. 4.

The Committee did not make distinctions between the different types of conduct when it stated in the above-mentioned Comment that:

> The aim of the provisions of Article 7 of the International Covenant on Civil and Political Rights is to protect both the dignity and the physical and mental integrity of the individual. It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.[5]

6. Nor did the European Court make any distinctions in the recent case of *Opuz V. Turkey*[6], when it stated:

> As regards the question whether the State could be held responsible, under Article 3, for the ill-treatment inflicted on persons by non-state actors, the Court recalls that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals (see, *mutatis mutandis*, *H.L.R. v. France*, 29 April 1997, § 40, *Reports* 1997-III). Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity (see *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports* 1998-VI).[7]

7. As can be seen, none of these decisions or interpretations alludes to the requirement of the need for the active participation, acquiescence, tolerance or inaction of a State agent. This is a requirement added by the Inter-American Convention to Prevent and Punish Torture (hereinafter "the CIPST") and by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter "the Convention against Torture"). Both Conventions are subsequent to the American Convention, since they entered into force in 1987.

8. On reading paragraphs 218, 219, 220 and 230 of this Judgment, it can be observed that the three victims suffered serious physical injuries and very probably some type of sexual abuse before they died. The State's description of the bodies, even though initially inept, illustrates the scale of the treatment inflicted on them; therefore the facts should be considered acts of torture.

9. Accordingly, there appears to be no justification for not classifying the treatment applied to the three victims in this case as torture, apart from the fact that the Court considered that a State could not be found responsible for an act of torture if there was no evidence that it had been perpetrated by State agents or that it had been carried out when a public servant or employee, who could have prevented the act, failed to do so (Article 3(a)[8] of the CIPST) or, in the terms of Article 1[9] of the

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5 *Cf.* General Comment No. 20, *supra* note 3, para. 2. There is also a reference to acts of torture committed by private individuals in para. 13 of this General Comment, which reads:

> States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture and cruel, inhuman and degrading treatment or punishment, specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, or by private persons. Those who violate Article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible.

6 *Cf.* European Court of Human Rights, *Opuz v. Turkey*, *(Application no. 33401/02)*, Judgment Strasbourg, 9 June 2009, para. 159. See also, *Z and others v. the United Kingdom (Application no. 29392/95)*, Judgment Strasbourg 10 May 2001, para. 73.

7 *Cf.* European Court of Human Rights, *Opuz v. Turkey, supra* note 6, para. 159.

8 Article 3 of the Inter-American Convention to Prevent and Punish Torture establishes:

> The following shall be held guilty of the crime of torture:

Convention against Torture, the act had been carried out with the acquiescence of a State agent.

10. Regarding the formulation of the Convention against Torture, it is enough to say that the Committee against Torture, created by this Convention, has stated that:

> [W]here State authorities […] know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors […] the State bears responsibility […] for consenting to or acquiescing in such impermissible acts. Since the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-State actors to commit acts impermissible under the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or *de facto* permission The Committee has applied this principle to States parties failure to prevent and protect victims from gender-based violence, such as rape, domestic violence, female genital mutilation and trafficking.[10]

11. Also, referring to Article 1 of the Convention against Torture, which embodies similar obligations to those in the above-mentioned Article 3 of the CIPST, the Special Rapporteur on torture indicated that it:

> has frequently been used to exclude violence against women outside direct State control from the scope of protection of CAT. However, the Special Rapporteur wishes to recall that the language used in Article 1 of the Convention concerning consent and acquiescence by a public official clearly extends State obligations into the private sphere and should be interpreted to include State failure to protect persons within its jurisdiction from torture and ill-treatment committed by private individuals.[11]

12. Regarding the CIPST, three points should be highlighted. The first is that the American Convention, in force since July 1978, does not contain a definition of this conduct and the Court has had to construct a definition based on its powers as an organ authorized to provide an authentic interpretation of the provisions of the Convention, so that the Court's concept of torture, whether or not defined in its judgments but present in the mind of the judges, should not inevitably be the same as the concept set out in said Conventions and should not always be applied. The second is that not all the States Parties to the American Convention are parties to the CIPST, so that, to date, the Court may be faced with hearing a case of torture without being able to apply the latter Convention directly. Indeed, the Inter-American Convention against Torture is not applied in this Judgment, and it is not

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> (a) A public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so.
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> (b) A person who at the instigation of a public servant or employee mentioned in sub-paragraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto.

9 Article 1(1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment establishes:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

10 Committee against Torture, General Comment No. 2 on implementation of Article 2 by States Parties, U.N. doc. CAT/C/GC/2, of 24 January 2008, para. 18.

11 *2008 Report of the Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment*, Manfred Nowak, doc. A/HRC/7/3 of 15 January 2008, para. 31.

used to shed light on the interpretation of the provisions of the American Convention. The third recalls that the Court itself determined that, after considering the concept of torture developed in the European human rights system and the definition established in the CIPST, it had reached the conclusion that "[a]n international juridical system of absolute prohibition of all forms of torture, both physical and psychological,[12] has been established."[13]

13. Since an international *corpus juris* has been established, it is admissible to see how it has been applied in order to give the greatest protection to the human rights of the individual. Perhaps the best summary of the position that could be adopted in this case, which involves a serious violation of the integrity of two girls and a young woman – who belonged to a sector that society has placed in a vulnerable situation, which, in turn, was permitted by the State – can be found in a judgment of the International Criminal Tribunal for the Former Yugoslavia (hereinafter "Tribunal for the Former Yugoslavia").

14. In the *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* case,[14] the Tribunal for the Former Yugoslavia refers, in paragraph 479, to the jurisprudence of the European Court[15] and, in paragraph 482, to its own case law[16] in order to state that the definition of the Convention against Torture cannot be regarded as a provision of customary law. The definition contained in that Convention can only be used to the extent that other international instruments or national laws do not give the individual better or more extensive protection. Moreover, this reiterates one of the basic provisions of the application of the human rights instruments found in Article 29(b)[17] of the American Convention and in Article 5(2)[18] of the International Convention on Civil and Political Rights.

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12 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections.* Judgment of June 26, 1987. Series C No. 1, para.103. Similarly, *Case of Cantoral Benavides v. Peru. Merits*. Judgment of August 18, 2000. Series C No. 69, para. 102; *Case of Maritza Urrutia v. Guatemala. Merits, Reparations and Costs*. Judgment of November 27, 2003. Series C No. 103, para. 92, and *Case of the Gómez Paquiyauri Brothers v. Peru. Merits, Reparations and Costs*. Judgment of July 8, 2004. Series C No. 110, para. 112.

13 *Case of the Gómez-Paquiyauri Brothers v. Peru. Merits, Reparations and Costs.* Judgment of July 8, 2004. Series C No. 110, para. 112. See also *Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs.* Judgment of 20 June 20, 2005. Series C No. 126, para. 117, and *Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs*. Judgment of November 25, 2006. Series C No. 160, para. 271.

14 *Cf.* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Trial chamber, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Judgment of 22 February 2001.

15 C*ostello-Roberts v. UK*, 25 March 1993, Series A, No 247-C, paras. 27-28; *HLR v. France*, 29 April 1997, Reports 1997-III, p. 758, para. 40, and *A v. UK*, 23 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2692, para. 22.

16 *Cf.* International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Trial chamber, *Prosecutor v Furundžija*, Case IT-95-17/1-T, Judgment, 10 December 1998, para. 160.

17 Article 29(b) of the Convention establishes:

> No provision of this Convention shall be interpreted as:
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> b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;

18 Article 5(2) of the Convention establishes:

> There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law,

15. After examining all the laws and rules that refer to torture, the Tribunal for the Former Yugoslavia reached, on the one hand, the conclusion, which I share, that there are three elements in torture that are uncontentious and that constitute, consequently, *jus cogens*: (i) infliction, by act or omission, of severe pain or suffering, whether physical or mental; (ii) the intentional nature of the act, and (iii) the motive or purpose of the act to reach a certain goal.[19] On the other hand, there are three elements that remain in contention and, thus, do not form part of *jus cogens*: (i) the list of purposes for which the act is committed; (ii) the requirement that the act be inflicted in connection with an armed conflict, and (iii) the requirement that the act be inflicted by or at the instigation of or with the consent and acquiescence of a state official.[20]

16. This reasoning leads me to maintain that the Court is not obliged to be guided by or apply either the definition of torture in the CIPST or that of the Convention against Torture; rather it should allow the concept of *jus cogens* to prevail, because this establishes the best protection for the victims of torture. I also recall that Article 16 of the CIPST establishes that this Convention "shall not limit the provisions of the American Convention on Human Rights, other Conventions on the subject, or the Statutes of the Inter-American Commission on Human Rights, with respect to the crime of torture," so that interpreting torture in a manner that differs from that Convention does not constitute non-compliance with it but, to the contrary, its true application.

17. If the Court has independence to define torture and, thus, does not need to incorporate the participation, by act or omission, of a public official as an element of the concept of torture (and does not need to interpret the concept of acquiescence in its narrowest sense, because in this case – basing myself on the facts – I maintain that using the concept of acquiescence of the Committee against Torture, the State acquiesced), the only problem that must be examined is whether the State can be attributed with the fact that it has not complied with its obligation to safeguard the personal integrity of the victims from the possibility of torture. I need not repeat what the Court has stated in numerous judgments and reiterates in this: that the obligation to guarantee requires the duty to prevent.

18. The Judgment in this case establishes two moments at which the State failed to comply fully with this obligation. The first was before the disappearance of the victims and does not refer to the obligation to prevent the three victims from being abducted; that would be disproportionate. What could be claimed is that, as soon as the State was officially (not to mention unofficially) aware, in other words, at least as of the moment at which the National Human Rights Commission officially alerted it to the existence of a pattern of violence against women in Ciudad Juárez, there was an absence of policies designed to try and revert the situation.

19. The second moment, which is the one that interests me for the purposes of this opinion, is the lapse between the time the three victims disappeared and the State's response to their disappearance; which was, according to the Judgment, extremely belated and even today insufficient. In paragraph 283 of the Judgment, the Court recognizes that the State "was aware that there was a real and imminent

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conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

19 *Cf. Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, *supra* note 14, para. 483.

20 *Cf. Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, *supra* note 14, para. 484.

risk that the victims would be sexually abused, subjected to ill-treatment and killed," and that, consequently, it "finds that, in this context, an obligation of strict due diligence arises in regard to reports of missing women, with respect to search operations during the first hours and days."

20. If the Court had concluded that, in this case, the State was responsible for the torture inflicted on the victims, it would have followed the trend of the other international supervisory bodies, mentioned above, which have been establishing a tendency to attribute State responsibility for acts of torture committed by non-State agents. I consider that this would have been an important development and provided clarification on an issue regarding which the Court should certainly continue to occupy itself.

Cecilia Medina Quiroga
Judge

Pablo Saavedra Alessandri
Secretary