DISSENTING OPINION OF JUDGE NIETO-NAVIA

Although it has not proved that those responsible acted under official orders or that this was a practice of the Colombian Army and, whereas, from the record one can deduce the opposite (apparently those kidnapping the victims were dressed as guerrillas, although the difference between a military and a guerrilla uniform is not clear; and Captain Forero-Quintero was treated for several months in a military hospital for paranoia resulting from psychological trauma caused by the assassination at the hands of the guerrillas of several members of his troop while they were building a highway), the Court has not found it inappropriate to infer that the death and disappearance of Isidro Caballero-Delgado and María del Carmen Santana occurred at the hands of a paramilitary group in collusion with an official and a sub-official of the Army. The undersigned judge understands that, according to modern trends in international law, this could constitute an act of the State, which is not excused by the circumstance that those involved could have acted under their own initiative.

The criminal judge who investigated those implicated absolved them because the evidence used to charge them was weak and circumstantial. That judgment, which is a model of analysis, makes one think that, perhaps, condemning the accused would have violated the procedural rights and presumption of innocence required by Colombian law and the Convention. Except for testimony from the same individuals, which did not always coincide with their initial testimony, and the testimony of Gonzalo Arias-Alturo, which also does not agree with his earlier statements, this Court did not have additional evidence beyond that which was considered by that judge.

However, here, as the Court has stated (*Velásquez Rodríguez Case*, Judgment of July 29, 1988. Series C No. 4, paras. 134 and 135; *Godínez Cruz Case*, Judgment of January 20, 1989. Series C No. 5, paras. 140 and 141), we are dealing with the assumption of international State responsibility for violation of the Convention and not a case of criminal responsibility. Consequently, what must be analyzed is not whether Isidro Caballero-Delgado and María del Carmen Santana were killed under the circumstances accepted as a working hypothesis by the Court, which would produce criminal responsibility in those implicated, but whether Colombia has violated the Convention. That is to say, whether conditions exist under which an act which violates a right recognized in the Convention can be attributed or imputed to that State, thereby establishing its international responsibility. (*Ibid*. para. 160 and para. 169, respectively.) In paragraph 60, the Court cites Advisory Opinion OC-14/94 which fully confirms what I say here. (*International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights*), Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 56.)

In an earlier case, the Court stated that

> Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and ensure the rights recognized in the Convention. Any impairment of those rights, which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention. (*Velásquez Rodríguez Case*, para. 164 and *Godínez Cruz Case*, para. 173.)

"The rules of international law" to which the Court refers, are, of course, the principles that regulate the international responsibility of States in general and the subject of human rights in particular.

The theories of international State responsibility are well known to scholars. These theories have been evolving since the **liability for fault theory** of Grotius, in which the psychological elements peculiar to human beings are attributed to the State. This theory resulted from the identification of the State with its ruler, which was in vogue at that time. Then there came the **causal liability theory**, in which the acts which generate responsibility must not only be illicit but also attributable to the State. The **risk theory**, according to which the relationship of causality between the illicit act and the act of State would be sufficient to generate State responsibility is passed over. The codifications of the International Law Commission do not accept this last thesis. They require imputability as a precondition to the attribution of international State responsibility.

In endorsing human rights treaties, States have not reached the stage of accepting that the mere relationship of causality between the act of the State and the violation of the right protected generates international responsibility. For that reason, the analysis of the instant case cannot be separated from the content of these rights and from the duties assumed by the States under Articles 1(1) and 2 of the Convention, as they have been interpreted by this Court when dealing with the application of its international jurisdiction.

It is obvious that certain protected rights are closely linked to the act of the State and cannot be violated except by the State. For example, the promulgation of a law that conflicts with the duties assumed by the State on accepting the Convention is an act of State that violates the Convention, since only States can promulgate laws. But even under this hypothesis, as the Court has already stated, the sole promulgation of a law does not produce international responsibility, rather it must be implemented and it must affect "*the protected rights and freedoms of specific individuals." (International Responsibility For the Promulgation and Enforcement of Laws in Violation of the Convention*, cf. para. 58(1).)

The Court has held, in interpreting Article 1(1) of the Convention, that

> [w]hat is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible. Thus, the Court's task is to determine whether the violation is the result of a State's failure to fulfill its duty to respect and guarantee those rights, as required by Article 1(1) of the Convention. (*Velásquez Rodríguez Case*, cf. para. 173 and *Godínez Cruz Case*, cf. para. 183). The State, [the Court added] has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation. (*Ibid.* para. 174 and para. 184, respectively.)

The word "reasonable" qualifies the duty of prevention and was explained by the Court when it stated that, "*while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures*." (*Ibid*. para. 175 and para. 185, respectively.) It is not enough that there be a violation to say that the State failed to prevent it. To interpret the Convention in this manner obviously goes farther than what the States accepted on subscribing to it, because it would imply that it is sufficient that the act of State which violates a protected right be present for the State to have to answer

for it. This would signify, neither more nor less, that the protective organs, the Commission and the Court, are intrusive, unless their function is limited to pronouncing judgment on whether the act took place. It would also signify that international protection is not subsidiary to domestic protection but that, conversely, it operates automatically. Neither of these two suppositions is true under the American Convention.

For that reason

> [t]his duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. (*Ibid*.)

The record of this case does not prove that "reasonable" steps to prevent acts of this nature, do not exist, or if they do exist, that they have not been taken. Conversely, the record gives the impression that the event under consideration was probably due to an official who later was shown to suffer from mental disturbances, which is surely beyond existing contingent measures of protection.

The duties of the State are not limited to prevention but also include investigation of the facts so that "[i]*f the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction*." (*Ibid*. para. 176 and para. 187, respectively.) The Court has stated that

> [i]n certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane. (*Ibid*. para. 177 and para. 188 respectively.)

In this case, the Government submitted to the Court copies of more than one thousand pages of records of investigations, now reopened based on the testimony of Gonzalo Arias-Alturo, which are precisely what have allowed this Court to infer that the violation of human rights was committed at the hands of those persons implicated and discussed therein.

Based on these documents, the internal procedures have included the following:

a. Writ of *habeas corpus*:

Was interposed on February 10, 1989, before the First Superior Court of Bucaramanga by María Nodelia-Parra, companion of Caballero-Delgado. On that same date and after having obtained information "in the institutions and organizations of the State where a person can be detained for several causes," the judge concluded that Caballero was not deprived of his liberty by institutions of the State. Moreover, according to the judge, a writ of *habeas corpus* should be interposed before the criminal judge of the closest

municipality, in accordance with the Code of Criminal Procedure. The petitioner, therefore, should have resorted to another authority such as the Regional or General Office of the Public Prosecutor of the Nation. Nevertheless, the judge himself sent all the documentation to the Office of the Public Prosecutor for action. (p. 392, Penal Statute I)

b. Investigation in the lower criminal court of justice:

On March 2, 1989, in view of the oral complaint of María Nodelia-Parra, a criminal proceeding was opened before the Second Mobile Court of Criminal Investigation, although there was no party directly accused at that time. In line-ups which took place on July 12, 1989 and April 4, 1990, Javier Páez, one of the alleged witnesses to the disappearance of Caballero-Delgado and Santana, identified Luis Gonzalo Pinzón-Fontecha, who he already knew as they were natives of the same region. He also identified Gonzalo Arias-Alturo after initially confusing him with someone else. Both of these men had been captured together with Captain Forero-Quintero and Sergeant Báez for assaulting several gas stations and highway toll booths.

The Second Court of Public Order of Valledupar rendered a court order for the investigation of the crime on August 1, 1989. Considering that Pinzón-Fontecha had been captured in another case with Captain Héctor Alirio Forero-Quintero, Corporal Second-Class Norberto Báez-Báez, and Gonzalo Arias-Alturo, the Court linked them with the disappearance of Isidro Caballero-Delgado and rendered an order of detention against all of them except Norberto Báez-Báez.

By decisions of September 11 and September 20, 1990, all those implicated in this proceeding were absolved and their immediate freedom was ordered. The case was closed on October 3, 1990.

On March 12, 1992, the criminal investigation was reopened, this time against Carlos Julio Pinzón-Fontecha, who had been accused by his brother, Gonzalo Pinzón-Fontecha, in an unsworn statement made on October 17, 1989. According to information in the file, Carlos Julio Pinzón-Fontecha had died on May 29, 1989.

On November 4, 1994, the complainant requested that the case be reopened based on testimony rendered before the Public Prosecutor's Delegate for the Military Forces by an official of the General Prosecutor of the Nation, Doctor Ricardo Vargas-López. He reported that, as part of an investigation he conducted as Chief of the Investigation Section, he interviewed Gonzalo Arias-Alturo, who told him facts which incriminated him and others in the commission of the crimes of the kidnapping and disappearance of Isidro Caballero-Delgado and María del Carmen Santana. The Regional Prosecutor's Office, which is in charge of the investigation, rendered an order of detention on May 19, 1995 against Gonzalo Arias-Alturo. It abstained from issuing an order against the others who were implicated. The Court continued gathering evidence and in so doing made a new attempt to find the bodies at the site described by Arias-Alturo. That attempt was also unsuccessful.

c. Military Criminal Process

On February 27, 1989, preliminary proceedings of inquiry before 26th Court of Military Criminal Investigations were initiated to determine those responsible for kidnapping Isidro Caballero-Delgado and María del Carmen

> Santana. This investigation was initiated under orders from Lieutenant Colonel Diego Velandia, Commander of the Santander Infantry Battalion, because of the publication of newspaper articles which "*directly and in a general manner accuse soldiers of the Morrinson Base of having apprehended Isidro Caballero-Delgado and María del Carmen Santana on February 7, 1989 in the District of Guaduas. They remain disappeared*."
>
> As part of this investigation, personnel from the base who were in service on the day of the events, were questioned. Several inspections were also conducted to determine if, on February 7, 1989, operations by a troop from the Morrison Base had been ordered and executed. María Nodelia Parra was summoned to render sworn testimony about the events investigated, but she did not appear. They also requested and added to the file those documents relating to investigations completed by the Office of Criminal Investigation of Valledupar and the Municipal Representative of San Alberto.
>
> On June 6, 1989, the 26th Court mentioned above, decided to suspend the preliminary investigation into the disappearance of Caballero-Delgado and Santana and to close the proceedings provisionally, without prejudice, so that if a person were later accused it could continue the investigation.

One cannot attribute to the Republic of Colombia negligence or indolence in the investigation. Moreover, the fact that those implicated have been absolved in the first proceeding does not signify that there is "collusion" between them and the Public Power given that the rules that criminal judges must apply require that doubts be resolved in favor of the accused. Nor has it been demonstrated that the judges were not independent.

*** * ***

Except in reference to the duty to make reparations, this judgment of the Court lacks legal analysis proving that the Republic of Colombia violated the Convention. That is to say that the Court has made a pure and simple application of the **risk theory** which goes beyond not only what the States accepted on giving their consent to the Convention but also the previously cited case law of the Court.

The duty to make reparations is not autonomous in either the domestic or the international order. That is to say, to impose reparations it is first necessary to demonstrate a violation of the Convention. The Court has already stated in the Velásquez Rodríguez and Godínez Cruz Cases that "[t]*he State has a legal duty to take reasonable steps to prevent . . . to carry out a serious investigation . . . to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation*." (*Ibid*., para. 174 and para. 184, respectively.) This sequence is not accidental.

Therefore, there cannot be a violation of the Convention due to the failure to make reparation, unless that reparation arises from an injury due to another violation. Article 63(1) of the Convention recognizes it in this way and provides that:

> 1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

The reasoning of the Court on the subject of reparations is even weaker as it continues. Paragraph 69 of this Judgment states that "[i]*n the instant case*

reparations should consist of the continuation of the judicial proceedings for the clarification of the disappearance of Isidro Caballero-Delgado and María del Carmen Santana and punishment in conformance with Colombian domestic law," which it then orders in the Resolutions of the Court. Interpreted strictly, one must conclude that the Court charges the Colombian Government with violation of the Convention because the internal proceedings have not yet been concluded, even though, as the Court itself sets forth (paragraph 58 of this Judgment) in citing its earlier case law, the duty to investigate is a means and not an end. In this Judgment, the Court has not imputed to Colombia a violation of the articles that provide for the fair administration of justice.

* * *

As sound rules of interpretation require, legal norms in treaties should be interpreted in such a way that they have an effect, and not so that they have none. In criminal law, if a person is killed by a dagger it is obvious that he was also the victim of lesions. However, the crime that was committed is murder, and no judge will interpret the norms in such a way that the dead person was the victim of "murder and lesions." It is the same in the matter of violations of human rights. The Commission does not appear to understand this point, because it claims a series of violations which are connected but absorbed in others, so that they can not be duly sustained. The Court cannot fall into the same error.

This is not to say that in the matter of human rights, several violations can not be committed simultaneously or successively, as in the Velásquez Rodríguez and Godínez Cruz Cases, in which the Court held proved prolonged detention without benefit of law with presumed torture before death. The instant case, nevertheless, does not present the same situation. According to the records, the two persons were apparently detained at about 7:00 pm and killed before midnight, so that, although it is true that the proceedings in Colombia were for kidnapping, here what is being dealt with is the violation of the right to life (Article 4), since the Court did not find proof of torture. In the Gangaram Panday Case, the Court found that

> it [is] impossible to establish the responsibility of the State in the terms described above because, among other things, the Court is fixing responsibility for illegal detention by inference but not because it has been proved that the detention was indeed illegal or arbitrary or that the detainee was tortured. (*Gangaram Panday Case*, Judgment of January 21, 1994. Series C No. 16, para. 62.)

If the earlier case law of the Court is of value, the Tribunal should be consistent with it.

For the above reasons I dissent, respectfully but firmly, from the conclusions of the Court stated in resolutory part 1 and in those resolutions that derive therefrom.

Rafael Nieto-Navia
Judge

Manuel Ventura-Robles
Secretary