

PARTIALLY DISSENTING OPINION OF JUDGE MEDINA QUIROGA

Even though I consider proven the facts that the Court has considered violate the American Convention in chapter VIII of this judgment – which examines the violation of Articles 8(1), 25 and 1(1) of the American Convention – I submit this partially dissenting opinion rejecting the violation of Article 25 and explaining my reasoning (which differs from that of the Court), to conclude that Article 8 of the Convention has been violated.

1. Article 25 embodies the right of the individual to have his human rights protected in the domestic sphere, simply, promptly and effectively. In our hemisphere, this is known as the right to the remedy of *amparo* [protection].¹ This is underscored by the fact that the first version of this provision embodied this right only for the rights established in the Constitution and laws of the respective country.² Its subsequent amendment (incorporating the formulation of Article 2, paragraph 3, of the International Covenant on Civil and Political Rights), added the notion that the remedy of *amparo* should also protect the human rights embodied in the American Convention.³

In the American Convention, Article 25 is entitled "Judicial Protection." This could lead us to infer that it enshrines "the right of access to justice." However, we would have to say that, contrary to the International Covenant on Civil and Political Rights (article 2(3)), the title signifies that the remedies referred to must be of a judicial nature. The possible access to justice granted by Article 25 would only cover prompt, simple and effective remedies; namely, only the remedy of *amparo*.

2. Article 8, on the "Right to a Fair Trial" (Translator's note: the literal translation from Spanish is "Judicial Guarantees"), does not establish the right to a remedy, but to due process of law; namely, the series of formalities that must be observed in the procedural instances to protect the individual's right to have, on the one hand, any disputes that arise between two parties - whether individuals or State bodies, and whether they refer to matters in the sphere of human rights or not – and, on the other hand, the guilt or innocence of a person, decided with the highest level possible of justice.

Article 8 establishes a broad right of access to justice for all those effects and regulates the way in which justice should be dispensed.

3. Consequently, the two rights are different in nature and their relationship is one of substance to form, as this Court has said, since Article 26 embodies the right to a judicial remedy, while Article 8 establishes the way in which this is processed.⁴

¹ ICourHR, *Habeas Corpus in Emergency Situations* (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, para. 32.

² Inter-American Specialized Conference on Human Rights, *Actas y documentos*, Doc. 5, p.22.

³ *Ibidem*, p. 41.

⁴ ICourHR, *Judicial Guarantees in States of Emergency* (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24; and ICourHR, *Case of Hilaire, Constantine and Benjamin et al.*. Judgment of June 21, 2002. Series C No. 94, para. 148.

I consider that it is very important to preserve the distinction between the two articles. If we examine Article 25 with the parameters of Article 8 - for example, the reasonable time limit - the meaning of the former article is nullified, because it requires, not a reasonable time limit, which could easily exceed a year in the terms of Article 8, but promptness; namely, resolution within a matter of days probably.

4. Based on the above, I cannot agree with paragraph 187 of the judgment of the Court which derives from Article 25, not the right to a simple, prompt and effective remedy, but the right to the opening of an investigation and, subsequently, a trial that, obviously, could not have those characteristics. Other paragraphs of the judgment examine the possible violation of Article 25 with parameters that, I consider, are correct for the examination of Article 8 (paragraph 173 to 177 and 195 and ff.). I consider that the Court should develop specific parameters to evaluate the compliance of States Parties with their obligations under Article 25.

5. I have a second difference of opinion to that of the majority of the members of the Court, which encompasses both Article 25 and Article 8, because the Court combines the, and refers to the affirmation mentioned above that they both confer:

"on the next of kin of the victims the right that the death of the latter will be investigated effectively by the State authorities; that proceedings will be filed against those responsible for these unlawful acts; and, if applicable, the pertinent punishments will be imposed, and the losses that the said next of kin have suffered will be repaired."

6. In paragraph 187, the Court cites Articles 8 and 25 as the source of the right of the victims or their next of kin, as applicable, to require the State to prosecute the possible perpetrators of grave human rights violations. I agree that this right exists, but I consider that neither of the articles cited provides adequate grounds for the right in question.

7. Article 8, entitled "Right to a Fair Trial," embodies due process and, above all, access to justice; namely, the right to be heard by an independent and impartial court, in a reasonable time in two situations: a) when a criminal accusation is substantiated, in which case the bearer of the right is the accused; and b) for the determination of rights and obligations of a civil, labor, fiscal or any other nature.

As can be seen from examining this Article, it establishes the right of access to justice with regard to any criminal charge or litigation of a civil, labor, fiscal or any other nature. The breadth of this formulation means that the determination of any type of right requires compliance with due process, but does not, in itself, establish the previous existence of the rights that will be determined according to the procedural norms it describes. The missing step that connects Article 8 to the facts of the case is to determine the legal source of the next of kin's right to know the truth of what has happened, and to require the State to prosecute those allegedly responsible.

8. I consider that the legal grounds for requiring a trial that seeks to establish the responsibility of the participants in the violation of specific rights, to which those affected by the violation have access, should be found, not in a provision that embodies the right to a remedy or in one of a procedural nature, but in the substantive right that has been violated, in light of the general obligation to guarantee rights, contained in Article 1(1) of the American Convention, which can only be examined in connection with a substantive right, particularly in view of the

way in which that obligation has been interpreted by both this Court and other international supervisory bodies.

It can be affirmed that, in compliance with its general obligation to guarantee, the State must protect the human rights of the individual when dealing with third parties, whether they are State agents or individuals. It must do so, by legal provisions that declare certain actions to be illegal (in the case of the right to life and not to be subjected to torture, by the establishment of the corresponding criminal offenses) and, when those prohibitions are violated, it must apply the full breadth of the law, in order to discourage further acts of the same nature from being committed. And, if a criminal norm has been violated, this implies investigating, prosecuting and criminally convicting all those who took part in the offense.

9. The Court has said this on more than one occasion:

- a. In paragraph 166 of the *Velásquez Rodríguez* case,⁵ the Court stated that:

"[A]s a consequence of this obligation [that of guarantee], the Status must **prevent, investigate and punish** any violation of the rights recognized by the Convention ..."

(My emphasis)

- b. In the chapter on violation of the right to life in the *Myrna Mack Chang* case,⁶ it established:

"Therefore, the States must adopt all necessary measures, not only to prevent, **try and punish** deprivation of life as a consequence of criminal acts, in general, but also to prevent arbitrary executions by their own security agents."

(My emphasis)

- c. This same idea may be inferred from the judgment in this case. In paragraph 153, where the Court examines the violation of Article 4 of the Convention, we read that the State should provide active protection to the right to life and that, therefore, "States must adopt all necessary measures, not only to **prevent, and punish** the deprivation of life as a consequence of criminal acts, but also to prevent arbitrary executions by their own security forces."

10. The United Nations Human Rights Committee has ruled similarly, as has the European Court.

In its General Comments 6/1982, paragraph 3, and 14/1984, paragraph 1, both referring to the right to life embodied in Article 6 of the International Covenant on Civil and Political Rights, the Committee stated:

"The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to **prevent and punish** deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity.

⁵ ICourHR, Case of *Velásquez Rodríguez*. Judgment of July 29, 1988. Series C No. 4, para. 166.

⁶ ICourHR, Case of *Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101, para. 153.

Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities."⁷

In its recent General Comment on Article 2, which contains the obligations to respect and guarantee the rights of the Covenant, it has said that the obligations of the State will only be understood to be fully complied with if the State protects the individual, not only in the case of acts of its agents, but also of those of other entities or private persons, adding that:

"There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties **of those rights**, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence **to prevent, punish, investigate or redress the harm caused by such acts** by private persons or entities"⁸ (My emphasis).

The European Court has consistent case law and, in cases concerning the right to life, examines what it calls "the procedural obligation of Article 2 of the European Convention." In *Hugo Jordan v. the United Kingdom*, the Court does not consider the requirements of Article 6 of the Covenant, which embody due process, as a separate violation, but examines how the investigation was conducted in its considerations on the right to life.⁹

11. Consequently, I believe that the obligation of the State to investigate and possibly try and punish should be considered to emanate from the respective substantive right. This definition is not due merely to the desire to apply the Convention strictly, but has substantive effects. For the purposes of reparation and of admonishment, it makes a difference to assert that a procedural norm, such as Article 8, has been violated or a substantive norm, such as those contained in Articles 4 or 5.

12. Evidently, if this obligation exists, the way to comply with it falls within the sphere of Article 8. From that point of view, I share the considerations described by the majority opinion with regard to the violation of different elements of that article.

13. In conclusion, I dissent from this judgment as regards Article 25 of the Convention having been violated in this case, and I dissent from the reasoning used in Chapter VIII of the judgment. I agree that the Colombian State has violated Articles 4 and 5, for the reasons set forth by the Court, but also because it did not comply with its obligation to guarantee the respective provisions, by not conducting a genuine and effective investigation into the facts of the case. Moreover, I conclude that the State violated Article 8 because the partial investigation that it conducted did not respect the requirements that Article 8 imposes on any procedure.

⁷ Cited by this Court in the *Case of "Street Children" (Villagrán Morales et al.)*. Judgment of November 19, 1999. Series C No. 63, para. 145.

⁸ HRC, General Comment on Article 2. The Nature of the General Legal Obligation Imposed on State Parties to the Covenant (adopted at 2187th meeting on 29 March 2004), para. 8.

⁹ *Case of Hugh Jordan v. United Kingdom*, Application No. 24746/94, judgment of 4 May 2001, particularly paragraphs 142 to 145. See also *Case of Anchova and others v. Bulgaria*, Applications Nos. 43577/98 and 43579/98, judgment of 26 February 2004, particularly paragraph 141.

Cecilia Medina-Quiroga
Judge

Pablo Saavedra-Alessandri
Secretary