Inter-American Court of Human Rights

Case of Caballero-Delgado and Santana *v.* Colombia

Judgment of January 29, 1997
(Reparations and Costs)

In the Caballero-Delgado and Santana case,

The Inter-American Court of Human Rights, composed of the following judges (*) :

Héctor Fix-Zamudio, President;
Hernán Salgado-Pesantes, Vice President;
Alejandro Montiel-Argüello, Judge;
Alirio Abreu-Burelli, Judge,
Antônio A. Cançado Trindade, Judge
Rafael Nieto-Navia, Judge *ad hoc;*

also present:

Manuel E. Ventura-Robles, Secretary, and
Víctor M. Rodríguez-Rescia, Interim Deputy Secretary,

pursuant to Articles 29, 55 and 56 of the Rules of Procedure of the Inter-American Court (hereinafter "the Rules of Procedure"), read in conjunction with Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and in compliance with the judgment of December 8, 1995, delivers the following judgment on reparations in the instant case submitted by the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") against the Republic of Colombia (hereinafter "Colombia", "the State" or "the Government").

(*) Judge Oliver Jackman recused himself from hearing this case owing to his previous participation in several stages of the case when it was being examined by the Inter-American Commission on Human Rights when he was a member of the Commission.

Judge Máximo Pacheco-Gómez abstained from hearing this stage owing to his absence, for reasons of *force majeure*, from the hearings on reparations held on September 7, 1996.

I

1. The instant case was submitted to the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court") by the Inter-American Commission through an application dated December 24, 1992, accompanied by report Nº 31/91 of September 26, 1991, the final version of which was adopted on September 25, 1992. The case originated in a petition (Nº 10.319) against Colombia, received at the Secretariat of the Commission on April 5, 1989.

2. On December 8, 1995, the Court delivered a judgment on the merits of the case, in which it decided that there was sufficient evidence

> to infer the reasonable conclusion that the detention and the disappearance of Isidro Caballero-Delgado and María del Carmen Santana were carried out by persons who belonged to the Colombian Army and by several civilians who collaborated with them ... The fact that more than six years have passed, and there has been no news of Isidro Caballero-Delgado and María del Carmen Santana permits the reasonable conclusion that they are dead. (*Caballero Delgado and Santana Case,* Judgment of December 8, 1995. Series C No. 22, para. 53).

The Court declared in the operative part that it:

> 1. Decides that the Republic of Colombia has violated, to the detriment of Isidro Caballero-Delgado and María del Carmen Santana, the rights to personal liberty and to life contained in Articles 7 and 4, read in conjunction with Article 1(1) of the American Convention on Human Rights.
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> ...
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> 2. Decides that the Republic of Colombia has not violated the right to humane treatment contained in Article 5 of the American Convention on Human Rights.
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> ...
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> 3. Decides that the Republic of Colombia has not violated Articles 2, 8 and 25 of the American Convention on Human Rights, relative to the duty to adopt measures to give effect to the rights and freedoms ensured by the Convention, right to a fair trial, and the judicial protection of rights.
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> ...
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> 4. Decides that the Republic of Colombia has not violated Articles 51(2) and 44 of the American Convention on Human Rights.
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> ...
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> 5. Decides that the Republic of Colombia is obligated to continue judicial proceedings into the disappearance and presumed death of the persons named and to extend punishment in accordance with internal law.
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> ...

> 6. Decides that the Republic of Colombia is obligated to pay fair compensation to the relatives of the victims and to reimburse the expenses they have incurred in their actions before the Colombian authorities in relation to these proceedings.
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> ...
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> 7. Decides that the manner and amount of the compensation and reimbursement of the expenses will be fixed by this Court and for that purpose the corresponding proceeding remains open.

II

3. Pursuant to Article 62 of the Convention, the Court is competent to rule the payment of reparations, indemnities and expenditures in the instant case, Colombia having ratified the Convention on July 31, 1973, and recognized the contentious jurisdiction of the Court on June 21, 1985.

III

4. Inasmuch as none of the judges called upon to hear the case at the reparations phase were of Colombian nationality, the Court, in accordance with the provisions of Article 55(3) of the Convention, invited the State to appoint a Judge *ad hoc.* On February 15, 1996, the State informed the Court that it had appointed Dr. Rafael Nieto-Navia to serve as Judge *ad hoc.*

5. On March 15, 1996, the President of the Court decided:

> 1. To grant the Inter-American Commission on Human Rights until May 15, 1996, to submit a brief and the evidence in its possession for purposes of deciding on the indemnities and costs in the instant case.
>
> 2. To grant the Government of the Government of the Republic of Colombia until July 18, 1996, to prepare its observations on the brief of the Inter-American Commission on Human Rights referred to in the preceding paragraph.

6. On April 8, 1996, the Inter-American Commission informed the Court of the appointment of Mr. Robert Goldman as its Delegate in the case to replace Mr. Leo Valladares-Lanza, who had been its Delegate during the proceeding on merits, but who had ceased to be a member of the Commission at the end of his term.

7. On May 10, 1996, the Inter-American Commission delivered a brief in which it submitted to the Court the reparations proposed by the *"Commission's advisers"* and *"the petitioners in the case on behalf of the victims"*, and which it "*endorsed in all its parts*." The Commission also requested the Court to take into consideration a communication from the attorney for Ingrid Caballero, the daughter of Isidro Caballero. On July 26, 1996, Colombia submitted its observations on those communications.

8. On May 15, 1996, the Commission presented the following documents to the Court: an extrajudicial statement from Mr. Isaías Carrillo-Ayala and Ms. Fanny González, testifying that Mr. Cristóbal Anaya-González and Ms. María del Carmen Santana-Ortiz had been living together permanently under the same roof for two years; a copy of Isidro Caballero-Delgado's teacher's certificate; a copy of the document certifying that Isidro Caballero-

Delgado had held a teaching post; the marriage certificate of Natividad Delgado and José Manuel Caballero; a copy of the registration of Iván Andrés Caballero-Parra's birth; and extrajudicial statement from Dexy Pinto-Rangel, José Froylán Suárez-Badillo and Cleotilde Caballero-Delgado to the effect that Mr. Caballero-Delgado and María Nodelia Parra had lived together for the past eleven years; a copy of a Colombian mortality chart, an education project of the Isidro Caballero-Delgado Departmental High School, and documents relating to expenses.

9. On June 28, 1996, the President requested the Government to submit the following documents indicated by the Inter-American Commission: the decree establishing Colombia's legal minimum wage for 1996; certification on the salary that Isidro Caballero-Delgado would have earned in 1996 at the appropriate teacher's grade; the mortality chart of insured persons in Colombia, endorsed by the Office of the Superintendent of Banks on March 19, 1990; and the norms governing relations of kinship in Colombia and the manner in which they are substantiated, all of which were submitted by the Government.

10. On August 27, 1996, the State informed the Court that Mr. Jaime Bernal-Cuéllar would no longer serve as its Agent in the instant case, and on September 5, 1996, it appointed Marcela Briceño-Donn to serve as its Agent, and Felipe Piquero-Villegas as its Alternate Agent.

11. On September 4, 1996, the Inter-American Commission submitted to the Court a copy of a communication it had received from the representatives of the victims in the case, in which the representatives requested the Commission to recuse Judge *ad hoc* Nieto-Navia on the ground that he was not competent to hear the case, his having been a titular Judge of the Court at the time the judgment on the merits was delivered. On September 7, 1996, the Court merely noted the submission of the document, since the Commission had not expressed an opinion on the request in its communication.

12. On September 7, 1996, the Court held a public hearing at its seat to listen to the parties' views on the reparations and costs.

There appeared:

for the State of Colombia:

Marcela Briceño-Donn, Agent;
Felipe Piquero-Villegas, Alternate Agent; and
Luis Manuel Lasso, Adviser;

for the Commission:

Robert Goldman, Delegate;
Domingo Acevedo, Attorney;
Manuel Velasco-Clark, Attorney;
Gustavo Gallón-Giraldo, Assistant;
José Miguel Vivanco, Assistant; and
Ariel Dulitzky, Assistant.

At that hearing, the Government produced the following documentary evidence: information on norm relating to the payment of punitive damages against the Colombian State, draft laws containing the legal definition of the forced disappearance of persons and provisions for its suppression, as well as sundry other illustrative reports and drafts.

13. On November 11, 1996, the President requested the Government and the Commission to provide information concerning the identity of Ms. María del Carmen Santana. The Government responded to that request through communications submitted on November 28, 1996, and January 14, 1997. The Commission, for its part, submitted to the Court on December 13, 1996, a copy of a communication it had received from the petitioners on behalf of the victims.

IV

14. In operative paragraphs 5 and 6 of the Judgment of December 8, 1995, the Court decided that Colombia "*is obligated to pay fair compensation to the relatives of the victims and to reimburse the expenses they have incurred in their action before the Colombian authorities in relation to these proceedings*." Nonetheless, there is disagreement between the parties as to the nature and amount of the reparations and expenses, and in establishing the identity of one of the victims. The dispute over these matters is to be settled by the Court at the present judgment.

15. The provision applicable to reparations is Article 63(1) of the American Convention, which states:

> [I]f 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.

This article embodies one of the fundamental principles of general international law recognized repeatedly in the jurisprudence (*Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, p. 21 and Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 29; *Reparation for Injuries Suffered in the Service of the United Nations,* Advisory Opinion, I.C.J., Reports 1949, p. 184). It has been thus applied by this Court (*Velásquez Rodríguez Case, Compensatory Damages (Art. 63(1) American Convention on Human Rights),* Judgment of July 21, 1989. Series C No. 7, para. 25; *Godínez Cruz Case, Compensatory Damages (Art. 63(1) American Convention on Human Rights),* Judgment of July 21, 1989. Series C No. 8, para. 23; *Aloeboetoe* ***et al****. Case, Reparations (Art. 63(1) American Convention on Human Rights),* Judgment of September 10, 1993. Series C No. 15, para. 43; *El Amparo Case, Reparations (Art. 63(1) American Convention on Human Rights),* Judgment of September 14, 1996. Series C No. 28, para. 14 and *Neira Alegría et al. Case, Reparations (Art. 63(1) American Convention on Human Rights),* Judgment of September 19, 1996. Series C No. 29, para. 36).

16. The obligation to make reparation as ordered by the international tribunals is, consequently, governed by international law in all of its aspects, such as its scope, characteristics, type, and determination of the beneficiaries, none of which shall be subject to modification by the respondent State through invocation of provisions of its own domestic law (*Aloeboetoe* ***et al****. Case, Reparations, supra* 15, para. 44; *El Amparo Case, Reparations, supra* 15, para. 15, and *Neira Alegría* ***et al****. Case, Reparations, supra* 15, para. 37).

V

17. *Restitutio in integrum* being impossible in the instant case, inasmuch as its concerns a violation of the right to life, it is necessary to seek alternative forms of reparation, such as pecuniary compensation, for the victims' relatives and dependents. Such compensation

relates primarily to the damages sustained which, as this Court has ruled on previous occasions, cover both material and moral damage (*Aloeboetoe* ***et al****. Case, Reparations, supra* 15, paras. 47 and 49; *El Amparo Case, Reparations, supra* 15, para. 15 and *Neira Alegría* ***et al****. Case, Reparations, supra* 15, para. 38).

VI

18. In its communication of May 10, 1996, the Commission requested that the Court order the State to adjust Colombian law to the norms of the Convention, "*so that acts such as those committed against the persons of Isidro Caballero-Delgado and María del Carmen Santana should never recur in future*," and to amend Colombia's laws governing the remedy of *habeas corpus,* since, in its opinion,

> one cannot ignore the fact that the absence of an effective remedy of habeas corpus provided for and regulated by the Convention and the Court's jurisprudence, and the lack of codification of the crime of forced disappearance of persons in the country's domestic law facilitated the commission of the crime of forced disappearance of Isidro Caballero-Delgado and María del Carmen Santana.

19. In that connection, the Government stated in its brief of July 26, 1996, that, as the Court had ruled in its Judgment of December 8, 1995, Colombia's internal norms suffice to guarantee enjoyment of the rights protected by the Convention; that Colombia's legislation on habeas corpus is in harmony with the provisions of the Convention, and that it is classified as being of "*immediate application ... so that its application would not even require any change in the law*." It further stated that it was making the necessary arrangements for submitting an adoption by Congress the texts of the Inter-American Convention on Forced Disappearance of Persons and a law codifying the crime of forced disappearance.

VII

20. The Commission, in its brief of May 10, 1996, requested that the Court order the State to prosecute those responsible for the disappearance of Isidro Caballero-Delgado and María del Carmen Santana. It further requested that the Court

> determine that the judicial proceeding for identification and punishment of the perpetrators and authors of the disappearance and possible execution of Isidro Caballero-Delgado and María del Carmen Santana-Ortiz should be carried out by the civil courts ... in accordance with the requirements of impartiality and independence established in Article 8(1) of the Convention.

21. The Commission also requested the Court to order in its Judgment on reparations that the Government take the necessary measures to localize the bodies of Mr. Caballero-Delgado and Ms. Santana and to allow Isidro Caballero-Delgado's name to be "*duly and lawfully recovered by his comrades*"; that the Colombian State accord special attention and "*reasonable*" economic support to "Isidro Caballero-Delgado" departmental college, and develop a program for promotion and dissemination of human rights "*designed for the various strata of society*." Under that heading, the Commission also sought the State's public acknowledgement of its responsibility and its public apology to the victims' relatives and to Colombian society as a whole, "*accompanied by the declaration that such acts should never again occur*."

22. In its reply, the Government affirmed that the Office of the Prosecutor of the Nation was investigating the matter with a view to punishing those responsible for the violations

and that the Commission's request for the case to be tried in the civil courts would constitute a breach of its Political Constitution, which entrusts such cases to the military courts. It also pointed out that the Court had previously ruled that the Judgment on the merits was a form of reparation for social damage, which, in any event, should be substantiated with "*sufficient probatory evidence of the existence and extent of such damage*." In conclusion, the State stressed that the promotion and dissemination of human rights was an aim of the Colombian Government, "*which a multiplicity of bodies have been fulfilling for a long time*."

23. On the subject of public acknowledgement of responsibility, in the course of the public hearing held by the Court on September 7, 1996, the Agent of the Government declared that "[i]*f there is a need for further acceptance of responsibility by the Colombian State, this is the time for me to express it on behalf of my Government*."

VIII

24. The Commission estimated the overall expenses incurred in the proceeding at US$ 33,681.00 (thirty-three thousand six hundred and eighty-one dollars of the United States of America), "*based on the official exchange rate of the Colombian peso to the dollar on April 23, 1996*", to be paid to Mrs. María Nodelia Parra, Mr. Isidro Caballero-Delgado's common-law wife. In support of its calculation, the Commission produced documents relating to the money spent on photocopies, telephone calls, faxes, dispatch of correspondence, travel of witnesses, legal assistance, preparation of posters, and a few other items.

25. The Government claimed that there was no evidence that those expenses had been incurred by Mrs. María Nodelia Parra, inasmuch as most of the documents show that the sums were disbursed by the Santander Teachers' Union or the Andean Commission of Jurists. The State further claimed that recognition of expenses should be limited to those incurred for general representations to the Colombian authorities and that the evidence presented by the Commission did not clearly or conclusively establish that link. Lastly, it pointed out that it was not reasonable for the Court to order acknowledgement of sums invested by the interested parties to promote the proceeding before the Court "*without any kind of limitation or parameter.*"

IX

26. In Ms. María del Carmen Santana's case, the Commission estimated the loss of earnings sustained up to the date on which it submitted its brief on reparations at US$ 13,754.00 (thirteen thousand seven hundred and fifty-four dollars of the United States of America) plus six percent annual interest, and the future loss of earnings at US$ 86,138.00 (eighty-six thousand one hundred and thirty-eight dollars of the United States of America). The Commission based this calculation on the victim's presumed age of 19 at the time of the events; on life expectancy in Colombia, which is 73 years; on the assumption that Ms. Santana was earning the legal minimum wage at the time of her disappearance; and on the supposition that Colombian legislation recognizes additional social security payments of two months salary for each year worked.

27. In the case of Mr. Isidro Caballero-Delgado, the Commission calculated the loss of earnings up to the date on which it submitted its brief on reparations at US$ 23,670.00 (twenty-three thousand six hundred and seventy dollars of the United States of America) plus six percent annual interest, and future loss of earnings at US$ 112,555.00 (one hundred and twelve thousand five hundred and fifty-five dollars of the United States of America). The Commission based its calculation on Mr. Caballero's age of 32 at the time of

the events; on life expectancy in Colombia which is 73 years; on an update of Mr. Caballero-Delgado's salary at the time of his disappearance, provided by the Santander Teachers' Union; and on the assumption that Colombian law recognizes additional social security benefits of two months salary for each year worked.

28. The Government alleged that those calculations contained probatory defects, "*such as any proof that María del Carmen Santana was in any kind of full employment at the time of the events, or the assumption that she was earning the legal minimum wage, in addition to her social security benefits*."

It also pointed out that no deduction had been made in the calculation for sums the victims would have spent on their own upkeep, which would account for 25 percent to 50 percent of their income; that it had used fourteen-month years, thereby distorting the calculation; that the award of loss of earnings to María del Carmen Santana's companion would only be reasonable if there were children of the union; that it was proper to award it to the parents until such time as the victim would have reached the age of twenty-five, and to children until the beneficiary reached adulthood. The Government also questioned the idea of payment of six percent annual interest, arguing that arithmetical errors had been made in the calculations of both victims' future loss of earnings.

X

29. The Commission requested that the Court award a sum of US$ 150,000.00 (one hundred and fifty thousand dollars of the United States of America) per family for moral damage "*directly sustained by the victims themselves*", which would be "*equitably distributed between the families, depending on the number of beneficiaries and on the distribution criteria already established by the Court in other cases*."

30. In that connection, the Government argued that it was not reasonable to suppose that Isidro Caballero-Delgado and María del Carmen Santana had suffered moral damage, inasmuch as the circumstances of their disappearance or death were unknown.

31. The Commission also requested that the Court grant an indemnity for the moral damage sustained by the victims' relatives and to use "*as a minimum applicable*" to that calculation the maximum judicial assessment for such cases in Colombia, that is, an amount equivalent to one thousand grams of gold for each person, who suffered moral damage, other than the victim.

32. While the Government acknowledged the presumption of moral damages sustained by the victims' relatives, it maintained that if the sums demanded by the Commission were converted, the moral damages for each person affected in the case of María del Carmen Santana would be equivalent to four-thousand seven-hundred grams of gold, and in the case of Isidro Caballero-Delgado to three thousand one hundred and fifty grams of gold. Therefore, in its view, the amounts requested should be reduced.

XI

33. The Commission also requested the Court to order in its Judgment on reparations the adoption of certain measures relating to its main petitions, namely that Colombia recognize interest on the final amounts of the compensation from the date of the Judgment until the time of the actual payment, on the basis of the bank interest rate in effect in Colombia on the date the Judgment is delivered, that the payments be made in cash and not in public bonds or credit instruments, and that the Court decide to supervise fulfillment of the

reparations and payment of the compensation, and that only after complete compliance has been verified would the case be closed.

XII

34. On May 10, 1996 the Commission submitted to the Court an application from the minor child Ingrid Carolina Caballero-Martínez, requesting that the Judgment to be issued by the Court "*recognize the minor INGRID CAROLINA CABALLERO-MARTINEZ as the daughter of the victim ISIDRO CABALLERO-DELGADO*" (capitals in the original). To that end, the attorney submitted documents substantiating the kinship between his client and the victim and describing the moral and material damage she had sustained as a result of her father's disappearance. He also pointed out that the victim had been responsible for his daughter's upkeep, for which purpose "*25 percent of his salary and unemployment benefit had been withheld by agreement reached with the child's mother in the Bucaramanga Second Minors Civil Court.*"

35. At the public hearing held by the Court on September 7, 1996, the Government requested the Commission to refer to the situation of the youth Caballero-Martínez, to which the Commission replied that "*the proper course [*would be*] for the Court to reserve her rights in the event they were substantiated*."

XIII

36. During that same public hearing, the Alternate Agent of the Government informed the Tribunal of his concern regarding the identity of Ms. María del Carmen Santana-Ortiz: of the sixteen registrations in that name in the National Registry of the Colombian Civil State, none appeared to match the data or supposed age of the victim in the instant case.

37. The Commission, for its part, stated that in that regard it had "*heeded*" the statements made to the Court by "*a number of persons*" and that this criterion must prevail over formal criteria of the existence or otherwise of State-established records.

38. For the above reasons, on November 11, 1996 the President requested the parties to the case to inform him of any significant progress made in the investigation into the identity of Ms. Santana and her relatives, particularly Mrs. Vitelma Ortiz, referred to by the Commission at this reparations stage as Ms. Santana's mother. In response to that request, on November 28, 1996 the Government submitted a copy of a letter from the National Civil Registry of Colombia stating that the department files "*contained no evidence that any certificate of citizenship had ever been issued in the name of Santana-Ortiz María del Carmen or Ortiz Vitelma*." The Government also sent the Court a copy of the thirteen existing records relating to María del Carmen Santana. On December 13, 1996 the Commission submitted a copy of a communication it had received from the representatives of the petitioners in the case, declaring that the statements contained in the probatory evidence "*conclusively established both María del Carmen Santana's existence and her emotional ties to Mr. Cristóbal Anaya-González*."

XIV

39. In calculating the compensation for material damage suffered by the relatives of the victims, the Court decided that the amount should be one which, invested at a nominal interest rate, would have a monthly yield equivalent to the amount of the income the victims would have received during their probable lifetime. In this regard, the Court ruled

that the material damage referred to the "*present value of an income from their monthly earnings for the rest of their probable lifetime and is, perforce, less than the simple sum of their earnings*" (*Neira Alegría* ***et al****. Case, Reparations, supra* 15, para. 46).

40. To the figure obtained by this procedure should be added interest from the date of the victims death to that of the judgment, with a deduction for the personal expenses the victims would have incurred during their probable lifetime -estimated in this case at one quarter of their income- as accepted by the Government at the public hearing on September 7, 1996.

41. In the specific case of Isidro Caballero-Delgado, the Court accepts as the basis for the calculation the updated statistics submitted by the Santander Teachers' Union and by the Government concerning the salary the victim would have received in 1996, that is, 244,595.00 (Two hundred and forty-four thousand five hundred and ninety-five) Colombian pesos per month, at an exchange rate of 1,054.00 (one thousand and fifty-four) pesos to US$ 1.00 (one dollar of the United States of America), which would amount to US$ 232.06 (two hundred and thirty-two dollars of the United States of America and six cents).

42. According to the Commission, two bonuses equivalent to one half of a monthly salary should be added for each year at the end of each semester, and one month's salary for each year worked, recognized as unemployment benefit; in other words, that the yearly calculation should comprise fourteen months' salary. The Government, invoking provisions of labor law, contested the inclusion of the unemployment benefit. However, this Court does not share the Government's view and considers that the benefit should be included as part of the salary due.

43. In accordance with the above, and bearing in mind the salary that Caballero-Delgado would have received between the date of his disappearance on February 7, 1989 and the time to which he would have expected to live; his age, 32, at the time of his disappearance, and life expectancy in Colombia, with a deduction of 25 percent for personal expenses, and adding interest at the rate of six percent per annum from the date of his disappearance up to the time of the present Judgment, the Court arrives at the sum of US$ 59,500.00 (fifty-nine thousand and five-hundred dollars of the United States of America) due to the relatives of Isidro Caballero-Delgado as compensation for the material damages caused by his death.

44. In the specific case of María del Carmen Santana, there is no indication in the docket that the Commission had presented any indisputable proof of her identity. The representative of the Government declared at the public hearing that there was no information on María del Carmen Santana-Ortiz in the Civil Registry and that, disregarding her second surname, there were sixteen registrations, thirteen of which were current documents, none of which appeared to fit the description of the victim in the instant case, or her age, which the Commission claimed to be nineteen, albeit failing to produce her birth certificate. With regard to Mrs. Vitelma Ortiz, the presumed mother of María del Carmen Santana, the Commission had not produced any proof of kinship and, according to the Government, neither did her name appear in the Colombian Civil Registry. As regards Mr. Cristóbal Anaya-González, her presumed constant companion, an extrajudicial statement made by witnesses Isaías Carrillo-Ayala and Fanny González to a notary on the Bucaramanga circuit, in which they declared that they had known and had dealings with Cristóbal Anaya-González for 20 and 15 years respectively and were aware that he and Ms. María del Carmen Santana Ortiz had been living under the same roof as man and wife. Mention should also be made here of an earlier statement to the Attorney commissioned by the National Human Rights Unit of the Office of the Prosecutor, in which Ms. Fanny González stated that Cristóbal Anaya-González was her brother on their mother's side, that she "*had*

known MARIA DEL CARMEN for approximately eight months, knew nothing about her relatives or origin, or of what could have become of her" (capital letters in the original).

Bearing in mind that during the trial before the Colombian authorities, all mention of Anaya-González had been merely incidental and that this Court only became aware of his existence at the reparations stage; the vagueness of the statements by the witnesses, who had not even indicated the duration of the presumed cohabitation or where it had occurred, the Court considers that Cristóbal Anaya-González's status of constant companion has not been substantiated.

45. Consequently, as regards the compensation for material damage occasioned by the death of María del Carmen Santana, about whom the Commission admits in its petition to "*ha*[ving] *very little information*," and considering that no evidence of her real identity, age or kinship was produced for determining the amount of the damages, or of her potential beneficiaries, this Tribunal is not in a position to order payment of compensation under that heading. Given these special circumstances, the question of the victim's identity must be resolved under domestic law, and fulfillment of the part of the Judgment below (*infra* para. 52(b)) awards compensation for moral damage to the closest relative of the person referred to during this phase of the proceeding as María del Carmen Santana-Ortiz.

46. Regarding the reimbursement of the expenses incurred by the relatives of the victims in their representations concerning this proceeding, the Commission has requested the sum of US$ 33,681.00 (thirty-three thousand six hundred and eighty-one dollars of the United States of America) and attached copies of some documents it produced as evidence of those expenses.

*** * ***

47. Following a detailed examination of the documents concerning those expenses, the Court considers that a substantial portion covers travel expenses and telephone calls outside of Colombia, newspaper articles, and preparation of posters and placards by the Santander Teachers' Union and the Andean Commission of Jurists, and not by Mrs. Nodelia Parra-Rodríguez. Accordingly, they cannot be included in the reimbursable expenses covered in operative paragraph 6 of the Judgment on merits as issued by the Court, which only recognizes expenses relating to the relatives' representations to the Colombian authorities. The Court, however, considers that Ms. María Nodelia Parra-Rodríguez must have incurred expenses with the Colombian authorities and fixes at US$ 2,000.00 (two thousand dollars of the United States of America) the sum to be paid directly to her.

XV

48. The Commission, endorsing a communication from one of the representatives of the victims' relatives, requested payment of US$ 125,000.00 (one hundred and twenty-five thousand dollars of the United States of America) for each of the relatives of the victims as compensation for moral damages, basing its calculation on the criterion of the Court in the *Velásquez Rodríguez and Godínez Cruz Cases, Compensatory Damages (supra* 15).

49. For its part, the Government accepted the existence of moral damage, but contested the amount of that damage, alleging that the recent jurisprudence of the Court established that the calculation should be based on principles of equity and not on rigid criteria.

50. The Court, bearing in mind all the special circumstances of the case and its own decision in similar cases (*El Amparo Case, Reparations, supra* 15 and *Neira Alegría* ***et al****.*

Case, Reparations, supra 15), considers it fair to award compensation for moral damages caused to the relatives of Isidro Caballero-Delgado in the amount of US$ 20,000.00 (twenty thousand dollars of the United States of America).

51. The Court considers it fair to award compensation for moral damage caused by the death of María del Carmen Santana in the amount of US$ 10,000.00 (ten thousand dollars of the United States of America) to her nearest relative, pursuant to paragraphs 45 and 52(b) of this Judgment.

XVI

52. The Court shall now deal with the distribution of the amounts awarded for the various reparations and considers it fair to employ the following criteria:

a. The reparation for material and moral damages in the case of Isidro Caballero-Delgado shall be divided as follows: one-third to his son Iván Andrés Caballero-Parra, one-third to his daughter Ingrid Carolina Caballero-Martínez, and one-third to his common-law wife María Nodelia Parra, who shall also be reimbursed for expenses.

b. In the case of María del Carmen Santana, the compensation for moral damages shall be awarded to her nearest relative, as indicated in paragraphs 45 and 51 of this Judgment.

XVII

53. As regards non-pecuniary reparations, the Commission requested reform of the Colombian legislation on the remedy of *habeas corpus* and codification of the crime of forced disappearance of persons, and that the judicial proceedings on the disappearance of Isidro Caballero-Delgado and María del Carmen Santana should remain within the jurisdiction of the ordinary courts and not be transferred to the military courts.

54. On the first point, it claims that provision for the remedy of *habeas corpus* exists in the 1991 Political Constitution of Colombia in exceedingly broad terms, but that Article 430 of the Criminal Code has not been brought into line with the new Constitution or with the American Convention, insofar as it restricts judicial activity to a merely formal ascertainment of the fact that the disappeared person is not in detention. At the public hearing before this Court, the Agent of the Government said that the regulation on *habeas corpus* was currently to be found in Law 15 of 1992; that the Constitutional Court had declared that law to be consistent with the Political Constitution, and that the Ministry of Justice, together with other governmental bodies, would establish a working group to review that law. He also stated that the National Government had undertaken to enact a law on the forced disappearance of persons.

55. In that connection, the Court observes that in operative paragraph 3 of its Judgment on the merits of December 8, 1995, it was ruled that Colombia had not violated Articles 2, 8 or 25 of the Convention concerning the duty to adopt measures to give effect to the rights and freedoms ensured by the Convention, right to a fair trial and the judicial protection of rights, so that it could not now reopen consideration of that question, which, in any event, had been raised not in the petition, but at the Reparations Stage. At the same time, examination of domestic legislation was not something to be undertaken at the Reparations Stage of a proceeding, in addition to which, since in the instant case it had been impossible to prove that the disappeared persons were being held in any of the official detention establishments, the judicial authorities could not, in the absence of pertinent information as to the disappeared persons' whereabouts, take any measure under the remedy of *habeas*

corpus nor could they have prevented the deaths of the victims.

56. The Court considers the codification of the crime of forced disappearance of persons into law in the terms of the 1994 Inter-American Convention to be desirable, but is of the opinion that its non-codification does not prevent the Colombian authorities from pursuing its efforts to investigate and punish the crimes committed to the detriment of the persons referred to in the instant case.

57. Lastly, the Commission claims that the forced disappearance of persons and extrajudicial execution are crimes that cannot be considered to have been committed in exercise of military duties; accordingly, pursuant to Article 9 of the Inter-American Convention on Forced Disappearance of Persons, such cases could only be tried in the civil courts -although it recognizes the existence of military courts- but "*it is the direct responsibility of the Government of Colombia to ensure that the instant case remains within the jurisdiction of the civil courts*." In that connection, this Court considers that the question of the competence of military tribunals and their compatibility with international human rights instruments calls for a review of Colombian legislation, which it would be inappropriate to undertake in an incidental manner and at the reparations phase, let alone when it has been submitted by the Commission by way of hypothesis.

58. In conclusion, the Commission asked the Government to acknowledge its responsibility publicly, to apologize to the victims' relatives and to society, to accord special attention and economic support to the college that bears Caballero-Delgado's name, and to conduct a program for the promotion and dissemination of human rights. In connection with that request, this Court considers that its Judgment on the merits in the instant case -in which it ruled that Colombia was responsible for violating human rights- and Colombia's recognition of that responsibility reiterated by the Agent at the public hearing (*supra* 23) constitutes adequate reparation and that it would be improper to order further reparations (*El Amparo Case, Reparations, supra* 15, para. 62), without prejudice to its ordering the Government to continue its efforts to locate the victims' remains and hand them over to their relatives.

59. Costs had been denied in the Judgment on the merits, in which the Court had declared that "*the Commission cannot demand that expenses incurred as a result of its own internal work structure be reimbursed through the assessment of costs. The operation of the human rights organs of the American system is funded by the Member States by means of their annual contributions*." (*Caballero Delgado and Santana Case,* Judgment of December 8, 1995. Series C No. 22, para. 70). The same applies in this phase of reparations.

XVIII

60. In order to comply with the present Judgment, the State must pay, within six months of its notification, the indemnities awarded to the adult relatives and, if any of them have died, to their heirs.

In the case of María del Carmen Santana-Ortiz, the term for payment of the compensation shall start on the date on which the provisions contained in paragraph 52(b) are fulfilled.

61. The Government shall pay the amount of compensation decreed for the minor children by creating, within six months of notification of this Judgment, trust funds in a solvent and sound Colombian banking institution, on the most favorable conditions permitted by banking laws and practice, for each of the minor children, who shall receive

the interest accrued on a monthly basis. Once the children become of age, they shall receive the total owing to them. In the event of their death, their rights herein shall pass to their heirs.

62. The State may fulfill this obligation through payments in dollars of the United States of America, or of an equivalent amount in the local currency of Colombia. The rate of exchange used to determine the equivalent value shall be the rate of exchange rate for the dollar of the United States of America and the Colombian currency quoted on the New York market on the day before the date of payment.

63. If after one year from the date of notification of this Judgment any of the adult beneficiaries fail to claim the payment of the compensation to which they are entitled, or if the judicial decision referred to in paragraph 52(b) is not complied with, the State shall deposit the sum due in a trust fund, on the terms set forth in the paragraph 61. If, after ten years from the establishment of the trust fund the indemnity has not been claimed by those persons or their heirs or the aforementioned document has not been presented, the amount shall be returned to the State and this judgment shall be deemed to have been fulfilled.

64. The compensation payments shall be exempt from any tax currently in force or any that may be decreed in the future.

65. Should the Government be in arrears with its payments, it shall pay interest on the total of the capital owing at the current bank rate in Colombia during the period of arrears.

XIX

66. Now, therefore,

THE COURT,

DECIDES:

Unanimously,

1) To set at US$ 89,500.00 (eighty-nine thousand five hundred dollars of the United States of America) or its equivalent in the national currency the amount that the Colombian State must pay to the relatives of the Isidro Caballero-Delgado and María del Carmen Santana by July 31, 1997. These payments shall be made by the State of Colombia in the proportion and conditions set forth in the consideranda of this judgment.

Unanimously,

2) To set at US$ 2,000.00 (two thousand dollars of the United States of America) the amount that the State must pay directly to Mrs. María Nodelia Parra-Rodríguez as reimbursement of the expenses incurred in her representations before the Colombian authorities.

By five votes to one,

3) That the non-pecuniary reparations requested are inadmissible,

Judge Cançado Trindade dissenting.

Unanimously

4) That the Colombian State is obliged to continue its efforts to locate and identify the remains of the victims and deliver them to their next of kin.

Unanimously,

5) To supervise compliance with this Judgment and that only after verification of such compliance shall the case be closed.

Judge Cançado Trindade informed the Court of his dissenting opinion, and Judge Montiel-Argüello of his concurring opinion, both of which are attached hereto.

Done in Spanish and English, the Spanish text being authentic, in San José, Costa Rica, on the twenty-ninth day of January, 1997.

Héctor Fix-Zamudio
President

Hernán Salgado-Pesantes — Alejandro Montiel-Argüello

Alirio Abreu-Burelli — Antônio A. Cançado Trindade

Rafael Nieto-Navia

Manuel E. Ventura-Robles
Secretary

Read at a public session at the seat of the Court in San José, Costa Rica, on January 31, 1997.

So ordered,

Héctor Fix-Zamudio
President

Manuel E. Ventura-Robles
Secretary

DISSENTING OPINION OF
JUDGE A. A. CANÇADO TRINDADE

1. I regret not to be able to concur with the decision taken by the majority of the Court in operative paragraph n. 3, and the criterion that it adopted in paragraphs 55-57, of the present Judgment on reparations in the *Caballero Delgado and Santana* case, to the effect of refraining the Court from seeking a review of the pertinent provisions of Colombian domestic legislation regarding the remedy of *habeas corpus* with a view to determining its compatibility or otherwise with the American Convention on Human Rights, and from ordering the legislative tipification of the crime of forced disappearance of persons, in the framework of the determination of the distinct measures of reparation in the circumstances of the *cas d'espèce*. May I proceed to an explanation of the juridical foundations of my dissenting position on the matter.

2. In order to reach the decision not to order the non-pecuniary reparations at issue, the Court invoked its previous decision in the present case (Judgment of 08 December 1995, on the merits, paragraph 62) to the effect that Colombia did not violate Article 2 of the Convention (obligation to adopt measures of domestic law), nor Articles 8 and 25 (judicial guarantees and protection). While it is by no means my intention to reopen discussion of that decision - which would not be proper at the present phase of reparations, - it should not pass unnoticed that, at the same time as the Court arrived at that decision, it also decided that "as Colombia had not redressed the consequences of the violations carried out by its agents, it failed to comply with the obligations that Article 1(1) of the Convention ... imposes on it" (*ibid*., paragraph 59). This is a point which does warrant consideration at the present phase of reparations, since the Court itself has expressly established the link between the general duty of Article 1(1) of the Convention and the reparations, while Article 63(1) of the Convention adds to the indemnizations other measures of reparation resulting from the duty to secure the enjoyment of the violated rights.

3. In fact, the general duty *to respect and to ensure respect* of the protected rights (enshrined in Article 1(1) of the Convention) has a broad scope, as this Court has already indicated in previous cases.[0] The present *Caballero Delgado and Santana* case adds a new element for analysis, inasmuch as we are now faced with a situation, unlike that in previous cases, in which the Court has determined that there was violation of Article 1(1) (in conjunction with Articles 7 and 4) but not of Article 2 (in conjunction with Articles 8 and 25) of the Convention. Compliance with the obligation *to ensure respect* for the protected rights depends not only on the existing constitutional or legislative provisions - which often are not sufficient *per se* - but requires furthermore other measures from the States Parties to the effect of educating and empowering individuals under their jurisdiction to make full use of all the protected rights. They include the adoption of legislative and administrative measures designed to remove obstacles, fill in *lacunae*, and enhance the conditions for the exercise of the protected rights.

4. In the examination of a concrete case, even if a decision is reached that Article 2 of the Convention has not been violated, as the Court has done in the present *Caballero Delgado and Santana* case, it cannot be inferred therefrom that the States Parties would not be obliged to take the measures necessary *to ensure respect* for the protected rights. This general and immediate, and truly fundamental obligation, ensues

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1 Inter-American Court of Human Rights, *Velásquez Rodríguez Case*, Judgment of 29 July 1988, Series C, n. 4, paragraphs 163-171; *Godínez Cruz Case*, Judgment of 20 January 1989, Series C, n. 5, paragraphs 172-180.

from Article 1(1) of the Convention; to deny its comprehensive scope would be to deprive the American Convention of its effects. The general obligation of Article 1(1) embraces all the rights protected by the Convention. There is nothing to prevent the matter from being considered at the phase of reparations, inasmuch as these latter are demanded for the failure to comply with both the specific obligations pertaining to each of the protected rights, as well as the additional general obligations of respecting and ensuring respect for those rights (Article 1(1)) and of bringing domestic law into conformity with the norms of protection of the Convention to that effect.

5. It could hardly be denied that, at times, the reparation itself for proven human rights violations in concrete cases may require changes in domestic laws and administrative practices. Enforcement of human rights treaties has not only been known to resolve individual cases, it has also brought about such changes, thus transcending the particular circumstances of the concrete cases; examples of cases in which national laws were in fact modified, in accordance with the decisions of the international human rights supervisory organs in individual cases, abound in international practice.[0] The efficacy of human rights treaties is measured, to a large extent, by their impact upon the domestic law of the States Parties. It cannot be legitimately expected that a human rights treaty be "adapted" to the conditions prevailing within each country, as, *a contrario sensu*, it ought to have the effect of improving the conditions of exercise of the rights it protects in the ambit of the domestic law of the States Parties.

6. It is indeed surprising, and regrettable, that, at the end of five decades of evolution of the International Law of Human Rights, doctrine has not yet sufficiently and satisfactorily examined and developed the extent and consequences of the interrelations between the general duties to respect and to ensure respect for the protected rights and to harmonize the domestic legal order with the international norms of protection. The few existing indications are to be found in case-law. This Court began to consider such interrelations in its seventh Advisory Opinion, of 1986, in which it warned that the fact that States Parties "may fix the conditions of exercise" of the protected rights "does not impair the enforceability, on the international plane, of the obligations they have assumed under Article 1(1)" of the Convention; and it added that that conclusion was reinforced by the wording of Article 2 of the Convention.[0]

7. One decade after that consideration by the Court, the time has come to retake and examine the matter more deeply. The general and fundamental duty of Article 1(1) of the American Convention on Human Rights is paralleled in other treaties on the rights of the human person, such as the Covenant on Civil and Political Rights (Article 2(1)), the Convention on the Rights of the Child (Articles 2(1) and 38(1)), the four Geneva

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2 At regional level, cf., for examples, European Court of Human Rights, *Aperçus - Trente-cinq années d'activité 1959-1994*, Strasbourg, Council of Europe, 1995, pp. 70-83. - At global (United Nations) level, one may recall, e.g. that in the *Aumeeruddy-Cziffra and Others* case, the Human Rights Committee (under the Covenant on Civil and Political Rights), in its Views of 09 April 1981, concluded that the State Party (Mauritius) should modify provisions of its legislation on immigration and deportation (the *Immigration (Amendment) Act* and the Deportation *(Amendment)* Act, both of 1997) in order to harmonize them with its conventional obligations under the Covenant, and should provide "immediate remedies" to the victims of the substantiated human rights violations. Cf. International Covenant on Civil and Political Rights, *Human Rights Committee - Selected Decisions under the Optional Protocol*, vol. I, 1985, p. 71.

3 *Enforceability of the Right to Reply or Correction (Arts. 14(1), 1(1) and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-7/86 of 29 August 1986, Series A, n. 7, paragraphs 28-29. In their lucid Separate Opinions on that Advisory Opinion, Judges R.E. Piza Escalante (*loc. cit.*, paragraphs 25-33) and H. Gros Espiell (*ibid.*, paragraph 6) argued that the obligation of Article 2 complements, but does not substitute or fulfil, the unconditional and fundamental obligation of Article 1(1) of the American Convention.

Conventions of 1949 on International Humanitarian Law (Article 1) and the Additional Protocol I of 1977 to these latter (Article 1(1)). In its turn, the general duty of Article 2 of the American Convention on Human Rights also has equivalents, in its Additional Protocol of 1988 on Economic, Social and Cultural Rights (Article 2), in the Covenant on Civil and Political Rights (Article 2(2))[0], in the African Charter on Human and Peoples' Rights (Article 1), and in the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 2(1)).

8. In fact, those two general obligations, - which are added to the other specific conventional obligations concerning each of the protected rights, - are incumbent upon the States Parties by the application of International Law itself, of a general principle (*pacta sunt servanda*) whose source is metajuridical, in seeking to be based, beyond the individual consent of each State, on considerations concerning the binding character of the duties derived from international treaties. In the present domain of protection, the States Parties have the general obligation, arising from a general principle of International Law, to take all measures of domestic law *to guarantee* the effective protection (*effet utile*) of the recognized rights.[0]

9. The two general obligations enshrined in the American Convention - that of respecting and guaranteeing the protected rights (Article 1(1)) and that of harmonizing domestic law with the international norms of protection (Article 2) - appear to me to be ineluctably intertwined. Hence, the breach of Article 2 always brings about, in my view, the violation likewise of Article 1(1). The violation of Article 1(1) takes place whenever there is a breach of Article 2. And in cases of violation of Article 1(1) there is a strong presumption of non-compliance with Article 2, by virtue, e.g., of insufficiencies or lacunae of the domestic legal order as to the regulation of the conditions of the exercise of the protected rights. There is, likewise, no underestimating of the obligation of Article 2, inasmuch as it confers precision to the immediate and fundamental obligation of Article 1(1), of which it appears as almost a corollary. The obligation of Article 2 requires the adoption of the legislation needed to give effect to the conventional norms of protection, filling in eventual

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4 Provision which served as source of Article 2 of the American Convention on Human Rights, which was only included in this latter at an already late stage of its preparatory work. Cf. OAS, *International Specialized Conference on Human Rights - Proceedings and Documents* (San José of Costa Rica, 07-22 July 1969), doc. OEA/Ser.K/XVI/1.2, pp. 38, 104, 146, 148, 295, 309, 440 and 481.

5 One may recall, for instance, that under the Covenant on Civil and Political Rights, in the *J. D. Herrera Rubio* case, the Human Rights Committee, in its Views of 02 November 1987, concluded that the respondent State (Colombia) had not taken the measures needed to prevent the disappearance and death of the parents of the author of the communication, and to undertake adequate investigations, and that it accordingly had the duty, under Article 2 of the Covenant, to adopt effective measures of reparations, and to proceed with the investigations, and to take measures to ensure that similar violations did not occur in future. Cf. International Covenant on Civil and Political Rights, *Selected Decisions of the Human Rights Committee under the Optional Protocol*, vol. II, 1990, pp. 194-195. - In another case, that of *O.R., M.M. and M.S. versus Argentina,* the U.N. Committee against Torture (under the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), in its decision of 23 November 1989, in spite of declaring the communications (ns. 1/1988, 2/1988 and 3/1988) inadmissible *ratione temporis* (inasmuch as the Convention could not apply retroactively), expressed nevertheless its view that the national laws at issue ("*Ley de Punto Final*" and "*Ley de Obediencia Debida*", this latter enacted after the respondent State had ratified the aforementioned Convention and only 18 days before that Convention entered into force) were "incompatible with the spirit and purpose" of the United Nations Convention against Torture. The Committee observed that, although its competence was limited to violations of that Convention, it could not fail to indicate that, "even before the entry into force of the Convention against Torture, there was a general rule of international law that obliged all States to take effective measures to prevent torture and to punish acts of torture." Lastly, the Committee urged the State Party at issue to adopt "appropriate measures" of reparation. Cf. U.N., *Report of the Committee against Torture*, G.A.O.R. - XLV Session, 1990, pp. 111-112.

lacunae or insufficiencies in the domestic law, or else the modification of national legal provisions so as to harmonize them with the conventional norms of protection.

10. As those conventional norms bind the States Parties - and not only their governments, - in addition to the Executive, the Legislative and the Judicial Powers are also under the obligation to take the necessary measures to give effectiveness to the American Convention at domestic law level. Non-compliance with the conventional obligations, as known, engages the international responsibility of the State, for acts or omissions, either of the Executive Power, or of Legislative, or of the Judiciary. In sum, the international obligations of protection, which in their wide scope are incumbent upon all the powers of the State, comprise those which pertain to each of the protected rights, as well as the additional general obligations to respect and guarantee these latter, and to harmonize domestic law with the conventional norms of protection, taken altogether. As I maintained also in my Dissenting Opinion in the *El Amparo* case (*El Amparo Case, Reparations (Article 63(1) [of the] American Convention on Human Rights*), Judgment of 14 September 1996, Series C, n. 28), human rights violations and reparations for damages resulting therefrom ought to be determined under the American Convention bearing in mind the specific obligations pertaining to each of the protected rights in conjunction with the general obligations enshrined in Articles 1(1) and 2 of the Convention. Recognition of the *inseparability* of those two general obligations *inter se* would constitute a step forward in the evolution of the matter.

11. The interpretation which I here sustain of the meaning and wide scope of the general and fundamental duty to *respect and to ensure respect* of the protected rights (Article 1(1) of the American Convention) *in its relations* with the other general duty to adopt measures of domestic law so as to harmonize it with the international norms of protection (Article 2), accords perfectly with the provision of Article 63(1) of the American Convention, on the duty to make reparation for damages resulting from violations of the protected human rights. Article 63(1) (mentioned in the Judgment on the merits, of 08 December 1995, in the present *Caballero Delgado and Santana* case, paragraph 68) stipulates that

> 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 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 a *fair compensation* be paid to the injured party.[6]

12. May I single out three points that appear to me to be of capital importance in the provision of the above-cited Article 63(1) of the American Convention. Firstly, unlike the corresponding Article 50 of the European Convention on Human Rights,[7] Article 63(1) of the American Convention makes no reference to domestic law, thus enabling the Inter-American Court to proceed to the determination of the measures of reparation on the basis - autonomously - of the American Convention itself and of the applicable general principles of International Law. Secondly, unlike Article 50 of the European Convention, Article 63(1) of the American Convention does not limit itself to provide for "just satisfaction" (*satisfaction équitable/satisfacción equitativa*); the American Convention goes further, to provide both for

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6 Emphasis added.

7 Article 50 of the European Convention provides: - "If the [European] Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure to be erased, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

"just satisfaction" as a measure of reparation, *as well as* for the *duty to ensure* the enjoyment of the protected rights. Thirdly, Article 63(1) of the American Convention, in providing for the *duty to ensure*, refers to the *injured party* whose rights have been violated: in my understanding, the term "injured party" covers both the direct victims of human rights violations as well as the indirect victims (their relatives and dependents), who also suffer the consequences of such violations.

13. Since its earliest contentious cases on reparations (*Velásquez Rodríguez* and *Godínez Cruz*), the case-law of the Court has focused above all on the element of the "just compensation" as a measure of reparation, curiously making abstraction of the *duty to ensure or guarantee* in the present context, likewise enshrined in Article 63(1) of the American Convention. The time has come to link that duty to the "just compensation", as stipulated in Article 63(1). Such duty comprises all measures - including legislative measures - which the States Parties ought to take in order to afford the individuals under their jurisdiction the full exercise of all the rights enshrined in the American Convention. Accordingly, in the light of the provision of Article 63(1), I understand that the Court should proceed to the determination of both the indemnizations as well as the other measures of reparation resulting from the *duty to ensure or guarantee* the enjoyment of the rights that were violated. The interpretation which I uphold is the one which seems to me to be in full conformity with the objective character[8] of the conventional obligations contracted by the States Parties to the American Convention.

14. For the reasons here expressed, I am unable to concur with the determination by the Court, in operative paragraph n. 3, and its criteria, in paragraphs 55-57, of the present Judgment, to the effect that it is not possible to consider the request by the Inter-American Commission on Human Rights[9] (of 10 May 1996), to proceed, as one of the measures of non-pecuniary reparation pertaining to the remedy of *habeas corpus*, to the determination of the compatibility or otherwise of the pertinent provisions of the Colombian domestic legislation with the American Convention, and to the harmonization that may be necessary of those legal provisions with the criteria set forth in the Convention[10], as well as to the determination of the legislative tipification of the crime of forced disappearance of persons.

15. As this Court itself pertinently warned one decade ago, in its eighth Advisory Opinion,

> ... *habeas corpus* performs a vital role in ensuring that a person's life and physical integrity are respected, in *preventing his disappearance or the keeping of his whereabouts secret*, and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.[11]

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8 Acknowledged in the Court's case-law itself: *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights (Arts. 74 and 75)*, Advisory Opinion OC-2/82, of 24 September 1982, Series A, n. 2, paragraphs 29-31; *Restrictions to the Death Penalty (Arts 4.2 and 4.4 American Convention on Human Rights)*, Advisory Opinion OC-3/83, of 08 September 1983, Series A, n. 3, paragraph 50. Human rights treaties are oriented towards *guaranteeing* the enjoyment of the protected rights, rather than establishing a balance of interests between States; *"Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights)*, Advisory Opinion OC-1/82, of 24 September 1982, Series A, n. 1, paragraph 24.

9 Making its own the request of 07 May 1996 of the petitioners in the case on behalf of the victims.

10 That is, harmonization in the sense that the remedy of *habeas corpus* is not to limit itself only to ascertaining unlawful arrests or unlawful prolongations of deprivation of liberty, but, in addition, that it is also to confer, upon national judges, faculties to undertake the search of the persons at issue, with particular urgency.

11 *Habeas Corpus in Emergency Situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights),* Advisory Opinion OC-8/87, January 30 1987, Series A, n. 8, paragraph 35 (emphasis added).

The efficacy of *habeas corpus* is an imperative of the duty of prevention as one of the components of the general obligation *to guarantee* the protected rights (Article 1(1) of the Convention),[0] including in order to avoid that situations are created in violation of the rights enshrined in the American Convention, such as that of forced disappearance of persons, which moreover lead to the impunity of the persons responsible for the facts constitutive of such crime.

16. The ensuring of the efficacy of *habeas corpus* is complementary, in the present case, in my view, with the other measure of non-pecuniary reparation, consisting in the legislative tipification of the crime of forced disappearance of persons, in conformity with the provisions of the Inter-American Convention on Forced Disappearance of Persons of 1994, even as a means of guaranteeing some of the rights protected by the American Convention on Human Rights (such as the right to life, Article 4, and the right to personal freedom, Article 7). The above-mentioned tipification, mentioned by the Court in paragraph 56 of the present Judgment, in my understanding is, more than "desirable", *necessary*. It is foreseen in the aforementioned Convention of 1994 (Article IV), among other legislative obligations (Article III), which adds that the persons allegedly responsible for the facts constitutive of the crime of forced disappearance of persons "may be tried only in the competent jurisdictions of ordinary law in each State, to the exclusion of all other special jurisdictions, particular military jurisdiction" (Article IX).[0]

17. At the public hearing of 07 September 1996 before the Court, the Colombian Government itself referred clearly to the matter at issue in two moments (alluding even to national initiatives for the revision of Law 15 of 1992 on *habeas corpus),*[0] indicating that "there [was] no divergence" between itself and the Inter-American Commission in respect of the subject of *habeas corpus.*[0] Moreover, in its brief of 26 July 1996, the Government informed the Court *inter alia* that it was "progressing with the initiatives tending to place once again before Congress" the text of the Inter-American Convention on Forced Disappearance of Persons, as well as to incorporate that category of crime into its domestic criminal legislation.[0] I thus see no reason for the Court not to consider the request of the Commission[0] for non-pecuniary measures of reparation.[0] In the present Judgment on

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12 One may recall that the the Court itself, on another occasion, linked such general obligation of Article 1(1) to the right to an effective remedy before the competent judges or tribunals, enshrined in Article 25(1), which "incorporates the principle, recognized in the international law of human rights, of the effectiveness of the procedural instruments or means designed to guarantee such rights". Judicial Guarantees in States of Emergency *(*Arts. 27*(2),* 25 and 8 American Convention on Human Rights*)*, Advisory Opinion OC-9/87, of 06 October 1987, Series A, n. 9, paragraphs 22-24.

13 Article IX adds that the facts "constituting forced disappearance may not be deemed to have been committed in the course of military duties". And Article VII, in its turn, stipulates that "[c]riminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations".

14 Mentioned in paragraph 54 of the present Judgment.

15 *Verbatim Records of the Public Hearing Held by the Inter-American Court of Human Rights on 07 September 1996 - Caballero Delgado and Santana Case, Phase of Reparations*, pp. 31 and 15.

16 Page 4 of the aforementioned brief.

17 And of the petitioners in the case on behalf of the victims.

reparations, the Court has failed to extract the juridical consequences of its own determination of violation of Article 1(1) (in combination with Articles 7 and 4) of the American Convention on Human Rights, to which it devoted no less than five paragraphs in its Judgment on the merits.[0]

18. In one of those paragraphs, in the aforementioned Judgment on the merits (of 08 December 1995) in the present *Caballero Delgado and Santana* case, the Court in fact linked its determination of non-compliance by the respondent State with the general obligation of Article 1(1) of the Convention to the measures of reparation (paragraph 59).[0] That was not the first time in which the Court acted this way: in previous cases, the Court determined that the general duty to *guarantee* the protected rights implies the obligation of the States Parties to organize all the structures of public power in order to secure juridically the full exercise of the protected rights and, accordingly, to prevent, investigate and punish all violations of those rights and, moreover, *to seek reparation for the damages* resulting from those violations.[0]

19. Thus established that link by the Court itself, its Judgment on the merits in the present *Caballero Delgado and Santana* case[0] enabled it, thereby, in my view, to pronounce affirmatively on the aforementioned measures of non-pecuniary reparation requested by the Commission,[0] as it should have done in the present Judgment on reparations. In my understanding, despite the assertion that there was no violation of Article 2 of the Convention, the finding of non-compliance with the general duty of Article 1(1) is *per se* sufficient to determine to the State Party that it ought to take measures, including of legislative character, *to guarantee* to all persons under its jurisdiction the full exercise of all the rights protected by the American Convention.

20. It is perfectly possible to proceed to such determination in the present context of reparation for damages, inasmuch as the normative basis of Article 63(1) of the American Convention contemplates the ruling on both the indemnizations as well as other measures of reparation resulting from the *duty to guarantee* the enjoyment of the rights violated. In the present domain of protection, international law and domestic law are in constant

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18 It may be recalled, in this connection, that, in the cases concerning Honduras (merits), the Court, in determining the inadequacy and ineffectiveness of the remedy of *habeas corpus* in the cases of forced or involuntary disappearances at issue, in a way revised the formal "requirements" of the national law, demonstrating their insufficiencies. Cf. *Velásquez Rodríguez Case, loc. cit. supra* n. (1), paragraphs 65-77; *Godínez Cruz Case, loc. cit. supra* n. (1), paragraphs 68-82.

19 Paragraphs 55 until 59, besides operative paragraph n. 1 of the Judgment on the merits, of 08 December 1995, in the present *Caballero Delgado and Santana* case.

20 Besides having determined the violation of Article 1(1) of the Convention (paragraph 59, and operative paragraph n. 1 of that Judgment), the Court pondered that "to guarantee fully the rights recognized by the Convention, it is not sufficient that the Government undertakes an investigation and tries to sanction those guilty; rather it is also necessary that all this activity of the Government culminates in the reparation to the injured party, which in this case has not occurred" (paragraph 58). And the Court added that "in the present case the reparation ought to consist in the continuation of the judicial proceedings to inquire into the disappearance of Isidro Caballero-Delgado and María del Carmen Santana and the punishment of those responsible in accordance with Colombian domestic law" (paragraph 69).

21 *Velásquez Rodríguez Case, loc. cit. supra* n. (1), paragraph 166; *Godínez Cruz Case, loc. cit. supra* n. (1), paragraph 175.

22 Paragraphs 59, 58 and 69, and operative paragraph n. 1.

23 And by the petitioners in the case on behalf of the victims.

interaction; *national* measures of implementation, particularly those of legislative character, assume capital importance for the future of the *international* protection of human rights itself.

21. Hence, just as the value of concrete initiatives in this sense is acknowledged, one cannot consent to the reduction to a little more than dead letter of the provisions of human rights treaties concerning the conditions of exercise of the protected rights, by the omission or inaction at domestic law level. The whole future evolution of this matter, under the American Convention on Human Rights, depends ultimately today, to a large extent, on a clear understanding of the extent of the legislative obligations of the States Parties[0] to

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24 Cf. my Dissenting Opinion in the *El Amparo Case, Reparations (Art. 63(1) of the American Convention on Human Rights)* Judgment of 14 September 1996, Series C, n. 28). The *existence* of such obligations under the Convention has been maintained by both the Inter-American Court and the Inter-American Commission. The Court has pointed out that a State Party may violate the Convention both by "failing to establish the norms required by Article 2" and by "adopt[ing] provisions which do not conform to its obligations under the Convention" *(Certain Attributions of the Inter-American Commission on Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*, Advisory Opinion OC-13/93, of 16 July 1993, Series A, n. 13, paragraph 26). Ant the Commission has likewise observed that if a law is incompatible with the Convention, the State Party "is obligated, under Article 2, to adopt such legislative measures as may be necessary to give effect to the rights and freedoms guaranteed in the Convention" (IACHR, Report n. 22/94, of 20 September 1994, case 11.012 (Argentina), friendly settlement, *in Annual Report of the Inter-American Commission on Human Rights - 1994*, paragraph 22, page 45). - If it were necessary to seek for support for the affirmation of the existence of legislative obligations in previous international case-law, we would anyway find it therein, as from the *locus classicus* on the matter, in the Judgment in the case concerning *Certain German Interests in Polish Upper Silesia* (Germany *versus* Poland, 1926), and in the Advisory Opinion of 1923 on *German Settlers in Poland*, both rendered by the former Permanent Court of International Justice (PCIJ). In the exercise of both its contentious and advisory jurisdiction, the PCIJ pronounced clearly on the matter: in the aforementioned Judgment, it stated that national laws were "acts that express the will

protect individual rights, and on the willingness (*animus*) to give concrete expression to the scope of those *legislative obligations* in the framework of the determination of the distinct measures of reparation for violations of the protected human rights.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura Robles
Secretary

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of States and constitute their activities, just as judicial decisions and administrative measures do", and concluded that the Polish legislation in question was contrary to the German-Polish Convention which protected the German interests at stake; and in the aforementioned Advisory Opinion, it maintained that the Polish legislative measures at issue were not in conformity with Poland's international obligations. *Cit. in* U.N., *Yearbook of the International Law Commission* (1964) vol. II, p. 138. However, to resort to classic international case-law on the matter does not appear strictly necessary to me: given the specificity of the International Law of Human Rights, the pronouncements, on the subject, on the part of the international human rights supervisory organs, are, in my view, more than sufficient to affirm the existence of *legislative obligations* of the States Parties to the treaties of protection. - The incompatibility or otherwise of a law with human rights treaties such as the American Convention ought to be demonstrated *in the particular circumstances of a concrete case*. Once affirmed the existence of such legislative obligations of States Parties, the next step to be taken would consist of giving precision to its scope, so as to render effective the protected rights.

CONCURRING OPINION OF
JUDGE MONTIEL-ARGÜELLO

1. While agreeing with all the decisions adopted by the Court in this Judgment (Caballero-Delgado and Santana Case), I would like to make a few observations on its refusal of the request for reparations for the material damage allegedly caused by the death of María del Carmen Santana.

2. The debate between those who consider human life to possess economic or pecuniary value for its owner and those who hold the opposite view is a matter of general knowledge.

3. The former consider human life to be a possession the disappearance of which would bestow on the victim the right to apply for indemnification and that said right passes to his heirs, who would inherit the claim to compensation *jure hereditatis*. The latter, on the other hand, consider that there is no basis for a claim, but for the actual damage inflicted by the death and, in consequence, any claim would be *jure proprio.* The application for material damages suffered would in this case be equivalent to the economic resources produced by the deceased and which, owing to his or her death, are no longer produced, but only insofar as those resources were transferred to the claimants.

4. There are those who maintain that in the event of an interval between the unlawful act and the death itself, the victim becomes a person to whom an obligation is owed and that the opposite is true in the event of instantaneous death.

5. In my view, there is no justification for such a distinction, inasmuch as the right to claim would in all those cases come into being at the actual moment of death, at the very time that the person supposedly empowered to exercise the right to claim indemnification ceases to exist, and has therefore ceased to be a subject at law.

6. Should it be accepted that the victim's next-of-kin succeed *jure hereditatis,* once the unlawful act that produced his death is ascertained, action must be taken for the opening of his or her succession and consideration given to the possible existence of a will and even of creditors of the victim, who would have a preferential right.

7. In view of the opinions expressed, I contend that the right to claim compensation for a person's death is not an inherited right, but it is a right belonging to those persons who have suffered injury on account of that death.

8. In default of injury, there would be no right to any claim. I would, however, like to qualify this in two respects.

9. The first qualification is that the damage does not need to be actual; it could be potential. For instance, the case of a minor child who is economically dependent on his father at the time of the latter's death, but who could later become his source of income. Naturally, since this is a hypothetical situation and not one that would necessarily occur, it is for the court trying the case to rule on the matter, taking due account of all the circumstances.

10. The second qualification is that I still consider acceptable a presumption that the spouse and minor or handicapped children were economically dependent on the victim and could therefore claim indemnification, without needing to prove the damage suffered. However, to extend that presumption to the parents seems somewhat far-fetched and contrary to what normally occurs in reality.

11. In the case of María del Carmen Santana, I am of the view that account should be taken of the fact that there is no record of any ties between the deceased and the person claiming to be her mother, that there is no evidence that they ever shared a home or that the victim ever contributed to that home, that she had any contact with the claimant, or that the latter was in any way her dependent, or a potential dependent for that matter.

12. In the light of the above, I feel that the circumstances indicated are those on which the Court based its decision to deny reparation for material damages caused by the death of María del Carmen Santana since, furthermore, there is no evidence that she had a spouse or children and since the only application is being submitted by the person claiming to be her mother.

13. The views expressed in the preceding paragraph apply exclusively to material damage, considering, as I do, that moral damage should be presumed and that such damage is caused by the very fact of death. I agree that indemnification for moral damage be granted in the instant case and that it be paid to the person who supplies proof of the closes kinship to María del Carmen Santana.

Alejandro Montiel-Argüello
Judge

Manuel E. Ventura-Robles
Secretary