

**Order of the  
Inter-American Court of Human Rights  
of July 4, 2007  
Case of Escué-Zapata v. Colombia  
(Merits, Reparations and Costs)**

In *Case of Escué-Zapata v. Colombia*,

The Inter-American Court of Human Rights (hereinafter, the "Inter-American Court", the "Court" or the "Tribunal"), composed of the following judges:

Sergio García-Ramírez, Presidente;  
Cecilia Medina-Quiroga, Vice-President;  
Manuel E. Ventura-Robles, Judge;  
Diego García-Sayán, Judge  
Leonardo A. Franco, Judge;  
Margarette May Macaulay, Judge;  
Rhadys Abreu-Blondet, Judge and  
Diego Eduardo López-Medina, *ad- hoc* Judge;

Also present:

Pablo Saavedra-Alessandri, Secretary  
Emilia Segares-Rodríguez, Deputy Secretary.

Pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter, the "Convention" or the "American Convention") and Articles 29, 31, 53(2), 55, 56 and 58 of the Court's Rules of Procedure (hereinafter, the "Rules of Procedure") delivers this Judgment.

**I**

**INTRODUCTION OF THE CASE AND PURPOSE OF THE APPLICATION**

1. On May 16, 2006, in accordance with the terms of Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter, the "Commission" or the "Inter-American Commission") submitted an application to the Court against the Republic of Colombia (hereinafter, the "State" or "Colombia"), originating in petition N<sup>o</sup>. 10.171, forwarded to the Secretariat of the Commission on February 26, 1988 by Mrs. Etelvina Zapata Escué.<sup>1</sup> On October 24, 2005, the Commission adopted the Report on Admissibility and Merits N<sup>o</sup> 96/05 under the terms of Article 50 of the Convention, which made certain recommendations to the State. On May 16, 2006, the Commission took into account "the lack of substantial progress in the effective compliance" with the

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<sup>1</sup> On August 27, 2002, the "José Alvear Restrepo" Lawyers' Collective Association (*Asociación Colectiva de Abogados Jose Alvear Restrepo*) joined the case as co petitioner (appendixes to the complaint, file before the Commission, page 275).

recommendations and decided, unanimously, to submit the instant case to the jurisdiction of the Court.<sup>2</sup>

2. In its application, the Commission stated that "on the night of February 1, 1988, members of the Colombian National Army burst into the residence of Mr. Germán Escué [Zapata]." According to the Commission, once in there, they tied him up and forced him out of the house, beating him. The Commission pointed out that after they took the alleged victim, his mother went to dwelling of some relatives and heard some shots. Afterwards, she found his dead body in the surrounding areas of the district of Jambaló. The Commission pointed out that the body of Mr. Escué Zapata showed signs of maltreatment. Furthermore, the Commission alleged a lack of due diligence in the investigation of the facts, as well as an alleged denial of justice.

3. The Commission pointed out that Germán Escué Zapata "was a *Cabildo* Governor of the Indigenous Protection of Jambaló [...] who devoted himself to farming as well as the other members of his [c]ommunity and to the defense of the indigenous [...] territory." According to the application, the execution of Mr. Escué Zapata was framed within a "violent pattern against indigenous peoples who lived in that area of the country and their leaders."

4. Finally, the Commission requested the Court to declare that the State is responsible for the violation of the rights enshrined in Article 4 (Right to Life), 5 (Right to Humane Treatment), and 7 (Right to Personal Liberty) of the American Convention, in conjunction with Article 1(1) (Obligation to Respect Rights) therein, to the detriment of Mr. Germán Escué Zapata; for the violation of the right established in Article 5 of the Convention, to the detriment of the alleged victim's next of kin and for the violation of the rights established in Article 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the American Convention, in conjunction with Article 1(1) therein, to the detriment of the alleged victim and his relatives. As a result of the above mentioned, the Commission requested to the Court that the State be required to take certain measures of reparation.

5. On September 18, 2006, the "*José Alvear Restrepo*" *Lawyers' Collective Association* (Corporación Colectivo de Abogados Jose Alvear Restrepo), representatives of the alleged victim and of his next of kin in the case at hand (hereinafter, the "representatives") filed a brief containing pleadings, motions and evidence (hereinafter, "brief containing pleadings and arguments") under the terms of Article 23 of the Court's Rules of Procedure. The representatives pointed out that they share "in essence, the legal and factual arguments of the application filed by the Commission." Nevertheless, they requested the Court to declare, apart from the violations alleged by the Commission, that the State is internationally responsible for the violation of the rights enshrined in Articles 11(2) (Protection to the Honor and Dignity), 21 (Right to Property) and 23 (Right to Participate in Government) of the American Convention, because the militaries allegedly stole some goods from the household of the alleged victim and from the "community store" and because they did not let Mr. Escué Zapata continue in charge of the position he had in the Community according to their own traditions and ways of election. Given the above-mentioned allegations, they requested the Court to order the State to adopt certain reparations measures.

6. On November 17, 2006, the State filed a brief containing the answer to the petition and its comments on the brief of pleadings and arguments (hereinafter, "answer to the

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<sup>2</sup> The Commission appointed Mr. Victor Abramovich, Commissioner and Mr. Santiago A. Canton, Executive Secretary as delegates and lawyers Ariel E. Dulitzky, Victor H. Madrigal Borloz, Verónica Gómez and Juan Pablo Albán as legal advisors.

application.”<sup>3</sup> In said brief, the State partially confessed the facts and recognized specific legal petitions and reparations claimed by the Commission and the representatives, the scope and content of which shall be determined in the corresponding chapter (*infra* para. 11 to 21).

## II

### JURISDICTION

7. The Inter-American Court has jurisdiction to hear the instant case pursuant to the terms of Articles 62 and 63 (1) of the American Convention, since Colombia has been a State Party to the American Convention since July 31, 1973 and accepted the contentious jurisdiction of the Court on June 21, 1985.

## III

### PROCEEDINGS BEFORE THE COURT

8. The application filed by the Commission was served on the State<sup>4</sup> and on the representatives on July 17, 2006. During the proceedings before this Tribunal, in addition to the main briefs forwarded by the parties (*supra* paras. 1, 5 y 6), the President of the Court,<sup>5</sup> (hereinafter the “President”) ordered that the following statements rendered before a notary public (affidavits) be admitted: testimonies and experts’ opinions offered by the Commission, the representatives and the State, with respect to which the parties may have the chance to present their observations. Furthermore, in consideration of the specific circumstances of the case at hand, the President summoned the Inter-American Commission, the representatives and the State to a public hearing in order to hear the statements of two relatives of the alleged victim, two witnesses and one expert witness, as well as the final oral arguments on the merits and the possible reparations and costs of this case. The public hearing was held on January 29 and 30, 2007, during the 74th Regular Session of the Court.<sup>6</sup>

<sup>3</sup> The State appointed Mr. José del Carmen Ortega Chaparro as Agent and Mrs. Luz Marina Gil Garcia as Deputy Agent. Afterwards, on November 10, 2006, the State substituted Mrs. Gil Garcia for Mr. Jaime Castillo Farfán.

<sup>4</sup> At the moment of serving the application on the State, the State was informed of its right to appoint an *ad hoc* judge in order to participate in the determination of the case. On July 31, 2006, the State appointed Mr. Diego Eduardo López Medina as *ad hoc* judge (record on the merits, Volume I, page 89).

<sup>5</sup> Resolution of the President of the Inter-American Court of December 20, 2006 (record on the merits, Volume IV, page 505).

<sup>6</sup> At this public hearing there appeared: a) for the Inter-American Commission: Víctor Abramovich, Commissioner and Santiago A. Canton, Executive Secretary, as Delegates ; Elizabeth Abi-Mershed, Juan Pablo Albán and Verónica Gómez, as advisors ; b) for the representatives : Eduardo Carreño Wilches, Rafael Barrios Mendivil and Jomary Ortégón Osorio, members of the “José Alvear Restrepo” Lawyers’ Collective Association and c) for the State: José del Carmen Ortega Chaparro, Agent; Jaime Castillo Farfán, Deputy Agent; Luis Guillermo Fernández, Ambassador of Colombia in Costa Rica; Camilo Ospina Bernal, Ambassador, Permanent Representative of Colombia before OAS; Clara Inés Vargas Silva, Director of Human Rights and International Humanitarian Law of the Ministry of Foreign Affairs; Luz Marina Gil García, Director of Military Criminal Justice of the Ministry of National Defense; Hernán Guillermo Aldana Duque, Paula Lizano Van Der Latt, Diana Patricia Ávila and Álvaro Francisco Amaya Villarreal, as advisors of the Department of Human Rights and International Humanitarian Law of the Ministry of Foreign Affairs; Dionisio Araujo, Director of the National Legal Defense of the Ministry of Justice and Domestic Affairs; María Fernanda Cabal Molina, Director of International Affairs of the Public Prosecutors’ Office of Colombia; Sonia Uribe, Coordinator of the Contentious Group within the Ministry of National Defense; Diana Bravo Rubio, Advisor of the Presidential Program for Human Rights and International Humanitarian Law; Laura Virginia Benedetti Rocallo, International Affairs of the Public Prosecutors’ Office of Colombia; Gustavo Paredes, from the

9. On March 1, 2007, the parties submitted their respective closing written arguments.

10. On April 10, 2007, the Secretariat, following the President's instructions and based on the terms of Article 45(2) of the Rules of Procedure, requested the representatives and the State to provide certain information and documents as evidence to facilitate the adjudication of the case, which were submitted within the period set for that purpose.

#### IV

##### ACCEPTANCE OF RESPONSIBILITY BY THE STATE

11. In the State's response to the application, as previously accepted before the Commission the State acknowledged<sup>7</sup>, "its international responsibility for the violation of the rights to a Fair Trial (Article 8(1)) and the right to Judicial Protection (Article 25(1)) to the detriment of the [alleged] victim and his next of kin, since a significant period of time has passed from the death of Mr. Escué [Zapata] and the case was still pending resolution." Furthermore, the State "acknowledged its international responsibility [...] for the violation of the [rights enshrined in] Articles 4(1), 5 and 7 in conjunction with Article 1(1) of the Convention, to the detriment of Mr. Germán Escué Zapata and Article 5, in conjunction with Article 1(1) therein, to the detriment of the victim's next of kin." Without prejudice to the foregoing, the State did not agree on "the context established in the application and in the brief [...] of the representatives" and on the position of *Cabildo Governor* assigned to Mr. Escué Zapata by the Commission and the representatives. Besides, the State also disputed the alleged violations of the rights established in Articles 11(2), 21 and 23 of the Convention and some petitions regarding reparations.

12. During the public hearing held in the instant case (*supra*, para. 8), Mr. Camilo Ospina, Colombian Ambassador before the OAS, directly spoke to Mrs. Etelvina Zapata and Myriam Escué, mother and daughter of Mr. Germán Escué Zapata, who were present in the room and stated the following:

Etelvina and Myriam [...] it is my duty, on behalf of the Colombian State, to ask you for forgiveness regarding the incidents, because you have been involved in situations that, for the country's sake, have caused a serious damage to your family, your life, the development of your personality and have had an important consequence in the possibility of having better conditions of life. The Colombian society, through me, is begging for forgiveness and offering solidarity, expressing that we cannot possibly repair all the damage caused to you but we are going to do anything in our power to be with you and do what as a society is our duty in order to help those persons that have been affected by the events that should never have happened and for those irresponsible actions of the State, performed in strict violation of the authority, affecting citizens like you who should have never suffered from those incidents. [...]

The State of Colombia deeply regrets the violation of the rights of Mr. Germán Escué Zapata regarding the right to liberty and humane treatment, life and judicial guarantees and a fair trial under the general obligation to respect the rights enshrined in the American Convention of Human Rights on the part of some agents of the State, in clear breach of their duties and acknowledges, before you, the next of kin, the responsibility for the events already mentioned and asks for forgiveness to Mrs. Etelvina and Myriam, mother and daughter of the victim, who are today present in here, and to your father, sisters and brothers, as well as his companion at that time. The State further acknowledges the violation of your rights to humane treatment and the judicial guarantees and protection as well as it begs for forgiveness. The Colombian State hopes that this act be of help to the next of kin of Mr.

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Colombian Embassy in Costa Rica; Margarita Rey, Second Secretary of Foreign Affairs in the Permanent Mission of Colombia before the OAS and Ángela María Yepes, Advisor of the Legal Office of the Republic's Presidency.

<sup>7</sup> The Court has pointed out in similar cases that the acknowledgment of responsibility before the Commission has full legal effects. *Cf. Case of Neira-Alegría et al. v. Peru. Preliminary Objections, Judgment of December 11, 1991, Series C N.º 13, para. 29; Case of the Rochela Masacre v. Colombia. Judgment on Merits and Reparations of May 11, 2007. Series C N.º 163, para. 8 and Case of Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela. Judgment of July 5, 2006. Series C N.º 150, para. 49.*

Germán Escué Zapata in order to alleviate the emptiness and the pain caused by the tragic loss and also, undertakes to, sincerely, strengthen the measures that have been adopting in order to avoid that painful events like these from repeating and so that any Colombian family have to endure these situations again. This acknowledgment constitutes a confirmation of what has been expressed by the State before the Inter-American system, without prejudice to the offer made in the respond to the application, of performing a public act in order for the Colombian society, as a whole, know the truth of the facts, if this honorable Court allows so.

13. The Commission and the representatives positively value the partial acknowledgment of the international responsibility made by the State.

14. Under the provisions of Articles 53(2) and 55 of the Rules of Procedure, in the exercise of its inherent powers of international legal protection of human rights, the Court may determine if an acknowledgment of international responsibility made by a respondent government is a sufficient ground, in the terms of the American Convention, to continue or not with the determination of the merits and the final reparations and costs. For such purposes, the Tribunal analyzes the situation of each particular case.<sup>8</sup>

15. In the case at hand, the Court points out that the State confessed the events that occurred on February 1, 1988 with respect to Mr. Germán Escué Zapata and the events referred to the excessive delay of the procedure initiated at the domestic level regarding the investigation and final punishment of the responsible. As a result, the Court declares that there are no disputed facts, which have been established according to the description of the following chapters.

16. There is still a dispute regarding the facts referred to the alleged "pattern of violence against the indigenous peoples that live in the [district of Cauca] and their leaders"; the alleged quality of "Cabildo Governor" of Mr. Escué Zapata and the alleged "theft and destruction" of the goods of Mr. Escué Zapata's relatives and the store or community enterprise.

17. By the same token, the Court notes that the State acknowledged the legal petitions of the Commission and the representatives with respect to: a) the violation of the rights enshrined in Articles 4(1), 5 and 7 of the American Convention, in conjunction with the obligation established in Article 1(1) therein, to the detriment of Mr. Germán Escué Zapata; b) the violation of the rights established in Articles 8(1) and 25(1) of the American Convention, in conjunction with Article 1(1) therein, to the detriment of Mr. Escué Zapata y his relatives; and c) the violation of the right established in Article 5(1) of the Convention, in relation to Article 1(1) therein, to the detriment of Mr. Escué Zapata's next of kin. Besides, the State disputed the arguments referred to the alleged violation of the rights established in Articles 11(2), 21 and 23 of the American Convention, in conjunction with Article 1(1) therein. In the next chapters, the Court will determine if the facts that the State has confessed and the facts that are effectively proven violate the rights established in said articles.

18. Finally, the State acknowledged the duty to repair the violations committed against the alleged victim and his next of kin, but it has not accepted the Paez Indigenous Community as plaintiff. Furthermore, it has pointed out certain items regarding the compensation for the pecuniary and non pecuniary damages, which will be analyzed in Chapter XIII of this Judgment and accepted to adopt the following reparation measures:

To carry out the investigation to punish the perpetrators and instigators of the facts of the case; to publish the relevant parts of the Judgment delivered by the [...] Court; to perform an act of public recognition; to place a slab in memory of the [alleged] victim; to grant scholarships named after Mr. Germán Escué Zapata; to grant a scholarship to the daughter of Mr. Germán Escué Zapata; to provide

<sup>8</sup> Cf. *Case of Myrna Mack-Chang v. Guatemala*. Judgment of November 25, 2003. Series C N° 101, para. 105; *Case of the Rochela Massacre v. Colombia*, supra note 7, para. 9, and *Case of La Cantuta v. Peru*. Judgment of November 29, 2006. Series C No. 162, para. 49.

medical and psychological treatment to the [alleged] victim's next of kin, according to their vision of the world.

19. Nevertheless, the State denied "the measures of reparations lately requested by the Inter-American Commission in the public hearing", as well as the following measures for reparations: Promotion of formation processes of young leaders in the *Resguardo de Jambaló*; publication of a book about Mr. Escué Zapata's life; protection of indigenous autonomy and support of the life plan of the Community; elimination of the registry of indigenous leaders from the Municipality and continuation of the project of a community store. As a result, the Court declares that these facts are still disputed.

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20. The Court considers that the acknowledgment of international responsibility made by the State constitutes an important step towards the development of this process, the proper fulfillment of the Inter-American human rights jurisdictional function and, in general, the enforcement of the principles enshrined by the American Convention.<sup>9</sup>

21. Considering that there is a controversy over the arguments of law and of fact, and taking into account the powers vested in the Court for the protection of human rights, the Court considers that a judgment adjudicating on the issues of fact and on all the elements of the merits of the case, as well as on the consequences thereof, would contribute to redress the damage inflicted upon Mr. Escué Zapata and would help prevent similar facts from taking place in the future and, in sum, achieve the purposes of the Inter-American jurisdiction on human rights.<sup>10</sup>

## V

### EVIDENCE

22. Based on the provisions of Articles 44 and 45 of the Rules of Procedure, as well as on the Court's case law regarding the evidence and the assessment thereof<sup>11</sup>, the Court will now examine and assess the documentary evidence forwarded by the Commission, the representative, and the State at the different procedural stages or as evidence to facilitate the adjudication of the case as requested by the President, as well as the testimonial and experts' opinions offered. In doing so, the Tribunal will assess them on the basis of sound judgment, within the applicable legal framework.<sup>12</sup>

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<sup>9</sup> Cf. *Case of Carpio-Nicolle et al. v. Guatemala*. Judgment of November 22, 2004. Series C No. 117, para. 84; *Case of Bueno-Alves v. Argentina*. Judgment on Merits, Reparations and Costs of May 11, 2007. Series C No. 164, para. 34, and *Case of the Rochela Massacre v. Colombia*, *supra* note 7, para. 29.

<sup>10</sup> Cf. *Case of the "Mapiripán Massacre" v. Colombia*. Judgment of September 15, 2005. Series C No. 134, para. 69; *Case of Bueno-Alves v. Argentina*, *supra* note 9, par. 35, and *Case of the Rochela Massacre*, *supra* note 7, para. 54.

<sup>11</sup> Cf. *Case of the Mayagna (Sumo) Awás Tingni Community*. Judgment of August 31, 2001. Series C No. 79, para. 86 to 90; *Case of the "White Van" (Paniagua-Morales et al.) v. Guatemala. Reparations Judgment of May 25, 2001. Series C No. 76, para. 50, and Case of Bámaca-Velásquez v. Guatemala. Reparations. Judgment of February 22, 2002. Series C No. 91, para. 15.*

<sup>12</sup> Cf. *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala*; *supra* note 11, para. 76; *Case of Bueno-Alves v. Argentina*, *supra* note 9, para. 36, and *Case of the Rochela Massacre v. Colombia*, *supra* note 7, para. 55.

**A) Documentary, Testimonial and Expert Opinion Evidence**

23. At the request of the President of the Court (*supra*, para. 8) the statements rendered before a notary public by the following witnesses and experts were admitted:

- a) *Bertha Escué Coicue* (affidavit) witness proposed by the Commission. She declared, *inter alia*, on: The circumstances of the military raid in which his companion Germán Escué Zapata was, allegedly, illegally tortured and executed; the obstacles faced by the alleged victim's next of kin in their search for justice and the consequences for the family of the alleged victim, for the Indigenous Community of *Resguardo de Jambaló* and for the other surrounding indigenous communities, regarding the alleged violation of human rights suffered by their comrade;
- b) *Aldemar Escué Zapata* (affidavit) witness proposed by the representatives. He declared, *inter alia*, on: The alleged arbitrary and illegal detention and torture of Mr. Escué Zapata; the forced entrance to his home; the alleged extrajudicial execution of his brother and the consequences for the family and the Indigenous Community.
- c) *Ayénder Escué Zapata* (affidavit) witness proposed by the representatives. He declared, *inter alia*, on: The impact of the alleged illegal detention, torture, extrajudicial execution, lack of clarification of the facts and punishment of the responsible for the death of his brother on the family and the Community. All of the above within an alleged context of persecution from the part of the State of the Escué Pasu family and its struggle for the territory; and the importance that Germán Escué Zapata had for his family and the Community in the role of protector of the relationship of the Community with its territory.
- d) *Mario Pasu* (affidavit) witness proposed by the representatives. He declared, *inter alia*, on: The facts related to the alleged arbitrary and illegal detention, torture and extrajudicial execution of his son; the alleged pattern of violence exercised against the indigenous communities of Cauca in the time of the events; the alleged damage caused to the family and the Indigenous Community as a result of such events.
- e) *Oscar Ivan Arias Herrera* (Affidavit), witness proposed by the State. He declared, *inter alia*, on: The presence of an indigenous person in the path of Loma Redonda accompanied by the Army of Loma Redonda and Vitoyó on February 1, 1988; the death of the Paez Germán Escué Zapata, indigenous; the return of the Army units to Loma Redonda and the instructions the soldiers received about the case;
- f) *Esther Sánchez de Guzmán* (affidavit), expert witness proposed by the Commission. She declared, *inter alia*, on: The situation of the indigenous communities within the Colombian conflict; the consequences for the indigenous community regarding the murder of one of its leaders; and the access to justice for the indigenous people, and
- g) *Héctor Hernán Mondragón Báez* (affidavit), expert witness proposed by the representatives. He declared, *inter alia*, on: The meaning "impunity" has for the Indigenous Paeces; the related implications, consequences and reaction of the community; the impact on the indigenous community of the impunity with respect to the facts that have damaged its members; the meaning of Cabildo Governor for the Community Paez, especially, the implications on the indigenous people of the damage or violation of rights of its Cabildo Governor; the concept, basis and present situation of the territory for the

indigenous communities, particularly, that of the north of the district of Cauca, when facing the controversies over the territory.

24. As to the evidence furnished in the public hearing, the Court listened to the testimonies and expert's opinions of:

- a) *Etelvina Zapata Escué*, witness proposed by the Commission. She declared, *inter alia*, on: The circumstances of the military raid in which his son, Germán Escué Zapata, was, allegedly, illegally tortured and executed; the obstacles faced by the alleged victim's next of kin in their search for justice and the consequences for the family of the alleged victim, for the Indigenous Community of *Resguardo de Jambaló* and for the other surrounding indigenous communities, regarding the alleged violation of human rights suffered by her son;
- b) *Myriam Zapata Escué*, witness proposed by the Commission. She declared, *inter alia*, on: The consequences for the alleged victim's next of kin regarding the violation of human rights suffered by his father.
- c) *Flor Ilva Trochez Ramos*, witness proposed by the representatives. She declared, *inter alia*, on: The alleged impact of the violation of the rights of Germán Escué Zapata and the related impunity on the members of the Indigenous Community of *Resguardo de Jambaló* and the Community in itself; the present situation of *Resguardo de Jambaló* when dealing with the alleged consequences of a period of time marked by violence against indigenous communities.
- d) *Yolanda Prado Ruiz Redonda*, witness proposed by the State. She declared, *inter alia*, on: The proceedings pertaining to the judicial preliminary stage for the death of Mr. Germán Escué Zapata and the facts and circumstances related to the events that occurred on February 1, 1988 in Vitoyó and Loma Redonda, and
- e) *Gloria Lucy Zamora Patiño*, expert witness proposed by the representatives. She declared, *inter alia*, on: The social and political organization of the Indigenous Paeces; the concepts of violence and impunity in such Community; the concept of Cabildo Governor of the territory and the consequences of the violation of the traditional values in such Community.

### **B) Evidence Assessment**

25. In the case at hand, as in many other cases,<sup>13</sup> the Court admits the evidentiary value of such documents forwarded by the parties in the procedural stage that have not been disputed nor challenged, or its authenticity questioned. In relation to the documents forwarded as evidence to facilitate the adjudication of the case (*supra*, para. 10), the Court admits them into the body of evidence of the instant case, pursuant to the provisions of Article 45(2) of the Rules of Procedure.

26. The Tribunal notes that several of the documents mentioned by the parties in their respective briefs have not been submitted to the Court. These documents can be divided into three groups: a) documents not submitted to the Court that have an electronic link to

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<sup>13</sup> Cf. *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, para. Judgment of June 21, 2002. Series C No. 94, para. 80; *Case of Bueno-Alves v. Argentina*, *supra* note 9, para. 36, and *Case of the Rochela Massacre v. Colombia*, *supra* note 7, para. 55.



an Internet website;<sup>14</sup> b) documents not submitted to the Court that correspond to international or domestic organizations or organs, or public institutions of the State that can be traced through the Internet;<sup>15</sup> and c) documents not submitted to the Court that cannot be located.<sup>16</sup> In general, the parties have the duty to attach to their respective main briefs

<sup>14</sup> Mentioned by the Commission: IACHR, Press Release 31/03, October 20, 2003, available since February 28, 2007 at [http://www.cidh.org/Comunicados/Spanish/2003/31\\_03.htm](http://www.cidh.org/Comunicados/Spanish/2003/31_03.htm); Mentioned by the Representatives: [http://www.etniasdecolombia.org/grupos\\_pueblos.asp](http://www.etniasdecolombia.org/grupos_pueblos.asp); <http://www.etniasdecolombia.org>; XII Report of the Peoples Defenders 122, available at [http://www.defensoria.org.co/pdf/informes/informe\\_115.pdf](http://www.defensoria.org.co/pdf/informes/informe_115.pdf); Peoples Ombudsman, Press Release number 1176 "Ombudsman urges for a State policy of total assistance for indigenous people." Bogotá, D.C., August 9, 2006. <http://www.defensoria.org.co/?s=e6&c=1176>; Asociación de Cabildos Indígenas del Norte del Cauca Acin Cxahb Wala Kiwe (*Association of Indigenous Cabildos from the North of Cauca Acin Cxahb Wala Kiwe*) [http://www.nasaacin.net/libertad\\_madre\\_tierra.htm](http://www.nasaacin.net/libertad_madre_tierra.htm); Press Release, October 122005, "Comunidades Indígenas del Cauca defiende sus derechos a la tierra, a la vida y a la memoria ancestral" (*Indigenous Communities from Cauca defend their rights to land, life and ancestral memory*), [www.derechos.org/nizkor/colombia/doc/japi04.html](http://www.derechos.org/nizkor/colombia/doc/japi04.html); DORADO, Mauricio. "Indígenas del Cauca piden libertad para la Madre Tierra" (*Indigenous People of Cauca ask the freedom of Mother Earth*) September 20, 2005, [www.landaction.org/display.php?article=337](http://www.landaction.org/display.php?article=337); Hemera Institution, Organizations, at [http://www.etniasdecolombia.org/organiza\\_nacionales.asp](http://www.etniasdecolombia.org/organiza_nacionales.asp); Asociación de Cabildos Indígenas del Norte del Cauca Acin - Cxahb Wala Kiwe. [http://www.nasaacin.net/libertad\\_madre\\_tierra.htm](http://www.nasaacin.net/libertad_madre_tierra.htm); Asociación de Cabildos Indígenas del Norte del Cauca ACIN (*Association of Indigenous Cabildos of the North of Cauca ACIN*) [http://www.nasaacin.net/defensa\\_vida.htm](http://www.nasaacin.net/defensa_vida.htm); HERNANDEZ, Esperanza. "Apuestas, propuestas y enseñanzas del movimiento indígena" ("*Bets, proposals and lectures of the indigenous movement*"); <http://www.voltairenet.org/article135367.html>; Asociación de Cabildos Indígenas del Norte del Cauca ACIN (*Association of Indigenous Cabildos of the North of Cauca ACIN*). [http://www.nasaacin.net/sobre\\_acin.htm](http://www.nasaacin.net/sobre_acin.htm); Asociación de Cabildos Indígenas del Norte del Cauca ACIN (*Association of Indigenous Cabildos of the North of Cauca ACIN*). [http://www.nasaacin.net/prg\\_juridico.htm](http://www.nasaacin.net/prg_juridico.htm); Periódico Desde Abajo (*Desde Abajo, Newspaper*). [http://www.desdeabajo.info/mostrar\\_articulo.php?tipo=edicion&id=52](http://www.desdeabajo.info/mostrar_articulo.php?tipo=edicion&id=52); Mentioned by the State: Reports of the Commission 1986-1987, 1988-1989 and 1990, at [www.cidh.org](http://www.cidh.org); OEA/Ser.L/V/II.84, Doc. 39 mag., October 14, 1993, Original: Spanish Chapter 11 Literal A, <http://www.cidh.org/countryrep/Colombia93sp/cap.11.htm>.

<sup>15</sup> Mentioned by the Commission: IACHR, *Second Report on the Situation of Human Rights in Colombia*, Chapter XI: The Rights of the Indigenous People in Colombia, and Chapter VII: Right to Life, OAS/Ser.L/V/II.84, Doc. 39, mag. October 14, 1993; IACHR, Third Report on the Situation of Human Rights in Colombia, Chapter X: The Rights of the Indigenous People in Colombia, OAS/Ser.L/V/II.102, Doc. 9 mag. 1, February 26, 1999. Mentioned by the representatives: Amnesty International, More information about AU 456/91; Possible Extrajudicial Execution, AMR 23/013/1992, March 19, 1992; Amnesty International, More information about AU 456/91; Threats and Torture (new concerns), AMR 23/067/1992, November 23, 1992; Amnesty International, More information about AU 456/91; Possible Extrajudicial Execution, AMR 23/031/1992, June 5, 1992, STAVENHAGEN, Rodolfo. The indigenous issues: The human rights and the indigenous issues: Report of the Special Rapporteur on the situation of human rights and the fundamental freedoms of the indigenous peoples; Amnesty International; "Colombia: Inform, make a campaign and serve the citizens without fear: The rights of the journalists, political candidates and elected officers", February 9, 2006, AMR 23/001/2006; Report of the Special Rapporteur on the situation of human rights and the fundamental freedoms of the indigenous people, Mr. Rodolfo Stavenhagen, E/CN.4/2006/78; Annual report of the Inter-American Commission on Human Rights 2005, chapter V, February 27, 2006, OAS/Ser.L/II.124, Doc. 7; Report of the High Commissioner of the United Nations for the Human Rights on the situation of the human rights in Colombia, January 20, 2006, E/CN.4/2006/9; Press Release, Colombian Peoples Ombudsman, Bogotá, D.C., March 21, 2006, "Ombudsman calls for a reflection regarding intolerance and social exclusion in Colombia"; Inter-American Commission on Human Rights N. 36/00, Case 11.101, of Masacre "Caloto", Colombia, April 13, 2000; Inter-American Commission of Human Rights, Report No. 4/98, Case 9853 of Ceferino U Musicue and Leonel Coicue, Colombia, April 7, 1998; Mentioned by the State: Permanent Council of the Organization of American States. Commission on Legal and Political Affairs. Team work in charge of elaborating the Project of the American Declaration on the Rights of the Indigenous Peoples, Session: "Traditional ways of property and cultural survival." Right to the land and territories," Washington, November 7/8, 2002.

<sup>16</sup> Mentioned by the Commission: Douglas W. Cassel Jr., *International Truth Commissions and Justice en Transitional Justice*, Volume I: General Considerations; Mentioned by the representatives: GALEANO LOZANO, Myriam. "Indigenous Resistance in Cauca: Farming another World", 2006, VEGA CANTOR, Renán. "Very rebel people. Indigenous peasants and farming protests." Bogotá: Pensamiento Crítico, Publishers, 2002; HRISTOV, Jasmin, *Indigenous Struggles for Land and Culture in Cauca, Colombia*, 32 Journal of Peasant Studies 1:88. 2005; SERJE de la Ossa, Margarita Rosa, et al. "Palabras para Desarmar. Una mirada crítica al vocabulario del reconocimiento cultural." Ministry of Culture and Colombian Institute of Anthropology and History, Bogotá D.C. 2002; Colectivo de Abogados "José Alvear Restrepo" (*Lawyers Association*), "Gotas que Agrietan la Roca," 2005. Mentioned by the State: Norbert ROULAND, Stéphane PIERRE-CAPS et Jacques POUMAREDE, *Droit des Minorités et des Peuples Autochtones*, Paris, PUF, 1996; GROSS, Christian. "Políticas de Etnicidad: Identidad, Estado y

all the documentation that they wish to submit as evidence, so that the Tribunal and the other parties can learn from those documents immediately. Nevertheless, the Court has pointed out before that, in admitting and assessing evidence, the procedures observed before this Court are not subject to the same formalities as those required in domestic judicial actions and that the admission of certain items into the body of evidence must be made paying special attention to the circumstances of the specific case, and bearing in mind the limits set by respect for legal certainty and for the procedural equality for the parties.<sup>17</sup> Taking into consideration the above mentioned, the Court considered that neither the legal certainty nor the procedural balance has been impaired in the cases in which one of the parties provides, at least, the direct electronic link to the document that such party mentions as evidence, since it can be immediately traced by the Court and the other parties. However, when dealing with documents from international organizations as the Inter-American Commission or the Organization of American States and its different agencies, or documents from international or domestic organizations or public institutions that can be located by the Tribunal and the other parties through the Internet or other media, the Tribunal has the authority to decide whether to admit them in the records of the case, if it thinks will be useful for the adjudication of the particular case, except one of the parties objects. This is one of the powers of the Tribunal, but it is not an obligation since, as has been already said, it is the parties' duties to submit to the Court the documents that they intend to use as evidence. Given the fact that the parties have had the chance to object to these kinds of documents in the present case and the Court has had access to such documents and has considered them as timely submitted, they are hereby admitted to the records of the case. Finally, if the parties do not submit the documents they quoted in their respective briefs and the Tribunal cannot locate them, they will not be admitted into the body of evidence and the Court hereby declares with respect to the documents mentioned in the point c) of this paragraph.

27. The State objected the statement rendered by Mrs. Etelvina Zapata on October 17, 2002, in the public hearing before the Commission. To such respect, the State pointed out that "her narration of the facts is not consistent with her written and oral statements rendered under oath in another opportunity." Furthermore, the State objected "the two rulings of the United Nations High Commissioner for Human Rights, corresponding to the years 2005 and 2006 and the 2004 Report of the Special Rapporteur for human rights and fundamental liberties of the indigenous peoples provided as exhibits to the [...] brief of the representatives," since "it contains new facts, that occurred 16, 17 and 18 years after the facts of the case recognized by the State." Finally, the State objects "the certificate issued by the Indigenous Governor of Jambaló Cabildo, dated August 31, 2006[;], the certificate of ACIN Asociación de Cabildos Indígenas del Norte del Cauca' (*Association of Indigenous Cabildo of the North of Cauca*), dated August 30, 2006, [and] the extrajudicial statements rendered by Julio Albeiro Pasu Zapata and Mario Pasu [dated] August 30, 2006," where it is confirmed that Mr. Germán Escué Zapata was a Cabildo Governor. The Tribunal admits this

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*Modernidad*", ICAN, 2000; MARTINAT LEPILLIEZ, Françoise. *Les stratégies politiques et juridiques des leaders indigènes de la Colombie et du Venezuela*. Universidad de Lille 2, dissertation in political sciences, September of 2003; AGUDELO ALVARADO, Carlos Efrén. *Populations Noires et politique dans le Pacifique colombien: paradoxes d'une inclusion ambiguë*, dissertation in sociology, University of Paris III, *Instituto de Altos Estudios sobre América Latina IHEAL*, Paris, October 22, 2002; Nacional History Archive. *Tierras del Cauca*, Volume 3; CASTAÑO, William; LONDOÑO, Edgar; and ROLDÁN ORTEGA, Roque; "ARCHIVO CENTRAL DEL CAUCA, Government Reports 1871-1894 and Reports of 1873"; GARCÍA ANTONIO. *Critical Introduction to the Legislation of Indigenous People*. Edition of 1951; *La Différence*, Balland, Paris, 2001.

<sup>17</sup> Cf. *Case of Baena-Ricardo et al. v. Panama*. Judgment of February 2, 2001. Series C No. 72, para. 71 and 76; *Case of the Miguel Castro-Castro Prison v. Peru*, Judgment of November 25, 2006. Series C No. 160, para. 184; and *Case of Almonacid-Arellano et al. v. Chile*, *supra* note 16, para. Judgment on Preliminary Objections, Merits, Reparations and Costs. Judgment of September 26, 2006. Series C No. 154, para. 69.

evidence into the body of evidence of the instant case, taking into account the observations forwarded by the State.

28. Regarding the press documents submitted by the parties, the Court considers that they may be assessed insofar as they refer to public and notorious facts or statements made by State officials which have not been rectified, or when they corroborate aspects related to the case and evidenced by other means.<sup>18</sup>

29. With respect to the testimonies and expert's opinions, the Court consider they are relevant inasmuch they adjust to the purpose defined by the President in the Resolution ordering their admission (*supra*, para. 8), taking into account the observations submitted by the parties. The Court points out that the statements rendered by the victims' next of kin cannot be assessed separately for they have a direct interest in the outcome of the case, and therefore, must be assessed as a whole with the rest of the body of evidence of the proceedings.<sup>19</sup>

30. The Court considers the documents submitted by the State during the public hearing as useful. These documents have not been challenged and their authenticity have not been questioned, that is why the Tribunal admits them into the body of evidence.

31. Furthermore, the Court admits the two compact discs forwarded by the State into the body of evidence; the first disc refers to the burial of the body of Mr. Germán Escué Zapata, and the second disc, refers to the delivery of the mortal rests of the alleged victim to their relatives, bearing in mind that they have not been challenged by the parties, nor even its authenticity questioned. Nevertheless, the Court, as in several occasions,<sup>20</sup> shall assess the content of such disc within the context of the body of evidence, taking into account that the State edited some of the videos. Finally, the Court admits into the body of evidence the documents forwarded by the State on June 21 and 25, 2007, in as much as they refer to the supervening facts relative to the new advances of the domestic proceedings which has been open due to the facts of the case and as to which the Commission and the representatives had a chance to rule.

32. As the evidentiary items incorporated into the body of evidence of the instant case has been assessed, the Court will proceed to analyze the alleged violations in the present case considering the facts which have already been acknowledged and those which may come to be proven,<sup>21</sup> included in each chapter as pertinent. Likewise, the Court will consider the parties' arguments which it deems relevant to analyze, taking into consideration the acknowledgment of facts and the claims made by the State.

## VI

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<sup>18</sup> Cf. *Case of Velásquez-Rodríguez v. Honduras*. Judgment of July 29, 1988. Series C N°. 4, para. 146; Cf. *Case of Bueno-Alves v. Argentina*, *supra* note 9, para. 46 and *Case of La Cantuta v. Peru*, *supra* note 8, para. 62.

<sup>19</sup> Cf. *Case of the Pueblo Bello Massacre v. Colombia*, Judgment of January 31, 2006, Series C N°. 140, para. 69, *Case of the Rochela Massacre v. Colombia*, *supra* note 7, para. 60 and *Case of La Cantuta v. Peru*, *supra* note 8, para. 64.

<sup>20</sup> Cf. *Case of the Serrano-Cruz Sisters v. El Salvador*. Judgment of March 1, 2005. Series C No. 120, para. 40, *Case of the Sawhoyamaya Indigenous Community v. Paraguay*. Judgment of March 29, 2006. Series C No. 146, para. 44 and *Case of Acevedo Jaramillo et al. v. Peru*. Judgment of February 7, 2006. Series C No. 144, para. 193.

<sup>21</sup> Hereinafter, the Judgment of the instant case contain facts that this Tribunal consider them as proven taking into account the State's confession. Some of these facts have been completed with evidentiary items, in which case there appear the corresponding notes of the footnotes.

**ARTICLE 4(1) (RIGHT TO LIFE)<sup>22</sup> IN CONJUNCTION WITH ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) OF THE AMERICAN CONVENTION**

33. When analyzing the violation of Article 4 of the Convention, the Court will refer, in the first place, to the facts related to the execution of Mr. Escué Zapata, after which it will refer to the situation during which these facts occurred and the relationship of such facts with the condition of leader of the victim.

**a) Execution of Germán Escué Zapata.**

34. According to the facts exhibited by the Commission and the representatives, acknowledged by the State and proven in the instant case, on February 1, 1988, an indigenous informer went to a place where a Unit of the National Army of Colombia was camping, in Loma Redonda, in the surroundings of Resguardo de Jambaló, district of Cauca, and reported that there were firearms in a house of Vitoyó. Said Unit was under the charge of Sergeant Roberto Camacho Riaño, who belonged to the Pelotón de Contra guerrilla which was under the command of Lieutenant Jorge Alberto Navarro Devia.<sup>23</sup>

35. On that same day, at night, Sergeant Camacho Riaño communicated to Sergeant Evert Ospina Martínez that there was an order from Lieutenant Navarro Devia in order to carry out the capture of an indigenous person who was residing at Resguardo de Jambaló.<sup>24</sup>

36. The militaries, as part of the operation, went to the home of Mr. Germán Escué Zapata and his relatives, broke into the dwelling, inspected it and, while they were asking them about the firearms and calling them "guerrilleros", they hit them.<sup>25</sup>

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<sup>22</sup> Article 4 of the Convention, in its relevant part, provides that:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

<sup>23</sup> Cf. Statement of Etelvina Zapata Escué of September 22, 1994 (Record of the Appendixes of the complaint, Volume I, Exhibit 17, pages 109 and 110); statement of Marco Tulio Cañas Torres of February 24, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's case file, Folder 3, page 2334); statement of Hidelbran Castro Quintero, of March 17, 2006 (Record of the Appendixes of the answer to the complaint, Folder 3, pages 2389 and 2391); statement of Ramón Alberto Álvarez of March 17, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 3, pages 2396 and 2397); elaboration upon the statement of Roberto Camacho Riaño of July 11, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 5, pages 2833 and 2834); statement of Oscar Iván Arias Herrera of March 18, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's case file, Folder 3, page 2409); affidavit rendered by Oscar Iván Arias Herrera of December 26, 2006 (records of the case, Volume III, page 601); actions as part of the inquiry of Evert Ospina Martínez of April 1, 2006 (Record of the Appendixes of the answer of the complaint, Prosecutor's file, Folder 4, page 2543), and statement of Francisco Javier Bedoya Aguirre, of March 18, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 3, pages 2403 and 2404).

<sup>24</sup> Cf. Action for inquiry of Evert Ospina Martínez, of April 1, 2006 (attachments' case file of the answer to the complaint, Prosecutor's File, Folder 4, Page 2543); elaboration upon the preliminary statements of Evert Ospina Martínez of June 7, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 4, page 2736); action for inquiry of Jorge Alberto Navarro Devia of May 23, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 4, page 2658), and elaboration upon the preliminary statement of Roberto Camacho Riaño of June 11, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 5, page 2833).

<sup>25</sup> Cf. Statement of Omaira Escué Coicue, of December 4, 2002 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 1, page 1915); statement of Etelvina Zapata Escué in the public hearing before the Inter-American Commission, held on October 17, 2002 (Record of the Appendixes of the complaint, Volume I, Exhibit 3, page 37); statement of Bertha Escué Coicue of December 4, 2002 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 1, page 1905); statement of Marco Tulio Cañas Torres of February 24, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file Folder 3, page 2334); statement rendered by Oscar Iván Arias Herrera, on March 18, 2006. (Record of the Appendixes of the

37. Germán Escué was stripped to the waist, barefooted and in pants, when he was detained and taken by the militaries to the mountains.<sup>26</sup>

38. Alter having walked for around twenty minutes,<sup>27</sup> Sergeant Camacho Riaño got behind together with Germán Escué Zapata,<sup>28</sup> to whom he hit in the stomach with the butt of the breech of the gun he was carrying, making him bent.<sup>29</sup> Mr. Escué Zapata begged Sergeant Camacho Riaño not to kill him,<sup>30</sup> but the Sergeant took some steps back and shot at him several times, provoking his death.<sup>31</sup> Afterwards, his body was found by his relatives on the way to Loma Redonda, from Vitoyó.<sup>32</sup>

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answer to the complaint, Prosecutor's file, Fólder 3, pages 2410 and 2411); statement rendered by Francisco Javier Bedoya Aguirre, on March 18, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 3, page 2403), and affidavit of Bertha Escué Coicue, of January 16, 2007 (records of the case, Volume III, page 606).

<sup>26</sup> Cf. Statement rendered by Etelvina Zapata Escué on September 22, 1994 (Record of the Appendixes of the complaint, Exhibit 17, page 110) and statement rendered by Omaira Escué Coicue, on December 4, 2002 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 1, page 1915).

<sup>27</sup> Cf. Statement rendered by Mr. Francisco Javier Bedoya Aguirre, March 18, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 3, page 2402).

<sup>28</sup> Cf. statement rendered by Hidelbran Castro Quintero, on March 17, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's File, Folder 3, Page 2389); statement rendered by Ruben Darío Aricapa García, on March 18, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 3, page 2406; action for inquiry of Evert Ospina Martínez of April 1, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 4, page 2544), and elaboration upon the statement of Oscar Iván Arias Herrera of June 7, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 4, page 2731).

<sup>29</sup> Cf. Statement rendered by Oscar Iván Arias Herrera on March 18, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 3, page 2411) and elaboration upon the statement of Oscar Iván Arias Herrera of June 7, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 4, page 2731).

<sup>30</sup> Cf. elaboration upon the inquiry of Evert Ospina Martínez, of June 7 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 4, page 2737).

<sup>31</sup> Cf. Statement rendered by Hidelbran Castro Quintero, on March 17, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 3, page 2390); Statement rendered by Oscar Iván Arias Herrera, on March 18, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 3, page 2411); elaboration upon the statement rendered by Osvar Iván Arias Herrera, on June 7, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 4, page 2731); action for inquiry of Evert Ospina Martínez, of April 1, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 4, page 2544) and elaboration upon the inquiry of Evert Ospina Martínez of June 7, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 4, pages 2737).

<sup>32</sup> Cf. Statement rendered by Bertha Escue Coicue on July 1, 1999 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 1, page 1802); sketch made by Amalfi Ordóñez Realpe, legal technician, in the preliminary inquiries for the mortal remains on November 27, 2002 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 1, page 1876); statement rendered by Etelvina Zapata Escué in the public hearing before the Inter-American Commission held in October 17, 2002 (Record of the Appendixes of the complaint, Volume I, Exhibit 3, page 37); statement rendered by Mario Pasu on May 27, 1999 (Record of the Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1782), statement rendered by Mr. Aldemar Escué Zapata on July 1, 1999 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 1, page 1805), statement rendered by Aldemar Escué Zapata on November 30, 2002 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 1, page 1912); affidavit rendered by Mario Pasu, on January 16, 2007 (records of the case, Volume III, page 645); affidavit rendered by Bertha Escué Coicue on January 16, 2007 (records of the merits, Volume III, page 606) and affidavit rendered by Avénder Escué Zapata on January 16, 2007 (records of the merits, Volume III, page 652).

39. When they arrived to the camp, the soldiers who witnessed the events were instructed by their superiors to say that during the transfer they had to "whip" the guerrilleros and that Germán Escué had died in the middle of the cross fire.<sup>33</sup>

40. This Court has indicated that the right to life plays a fundamental role in the American Convention, as it is the essential corollary for realizing the other rights.<sup>34</sup> States have the obligation to guarantee the creation of the necessary conditions to ensure that violations of this inalienable right do not occur as well as the duty to prevent, especially, its officials from violating it.<sup>35</sup> The duty to guarantee the right set forth in Article 4, in conjunction with Article 1(1) of the American Convention, not only presupposes that no person may be arbitrarily deprived of his life (negative duty) but also requires, pursuant to the obligation to guarantee the full and free exercise of human rights, that the States adopt any and all necessary measures to protect and preserve the right to life (positive duty),<sup>36</sup> of the individuals under their jurisdiction.<sup>37</sup> As stated above, the States must adopt all necessary measures not only to prevent, prosecute and punish the deprivation of life as a consequence of criminal acts, in general, but also to prevent arbitrary killings on the part of their own security forces.<sup>38</sup>

41. Thus, and bearing in mind the confession of the State, the Court declares that Colombia violated the rights enshrined in Article 4(1) of the American Convention, in conjunction with Article 1(1) therein, to the detriment of Mr. Germán Escué Zapata.

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42. Furthermore, the Court understand that the State took the initiative to investigate the death of Mr. Escué Zapata as a consequence of the facts established in the above paragraphs and according to the terms of Articles 1(1) and 4(1) of the American Convention. The evaluation of the duty to guarantee the right to life through a serious, complete and effective investigation of the events shall be done in Chapter X of this Judgment. It is enough to say, for the purposes of the determination of the violation of

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<sup>33</sup> Cf. Statement rendered by Marco Tulio Cañas Torres, on February 24, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 3, page 2333); elaboration upon the statement rendered by Marco Tulio Cañas Torres, of March 17, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 3, page 2378); statement rendered by Rubén Darío Aricapa García, on March 18, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 3, page 2406); statement rendered by Oscar Iván Arias Herrera on March 18, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 3, page 2411) and action for the inquiry of Evert Ospina Martínez of April 1, 2006 (Record of the Appendixes of the answer to the complaint, Prosecutor's file, Folder 4, pages 2544 and 2545).

<sup>34</sup> Cf. *Case of "Street Children" (Villagrán-Morales et al.) v. Guatemala*, Judgment of November 19, 1999. Series C, No. 63, para. 144; *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 17, para. 237, and *Case of the Pueblo Bello Massacre v. Colombia*, *supra* note 19, para. 120.

<sup>35</sup> Cf. *Case of "Street Children" (Villagrán-Morales et al.) v. Guatemala*; *supra* note 34, para. 144; *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 17, para. 237 and *Case of Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*, *supra* note 7, para. 64.

<sup>36</sup> Cf. *Case of "Street Children" (Villagrán-Morales et al.) v. Guatemala*; *supra* note 34, para. 144; *Case of Miguel Castro-Castro Prison v. Peru*, *supra* note 17, para. 237 and *Case of Vargas-Areco v. Paraguay*. Judgment of September 26, 2006. Series C No. 155, para. 75.

<sup>37</sup> Cf. *Case of the Pueblo Bello Massacre v. Colombia*, *supra* note 19, para. 120; *Case of Miguel Castro-Castro Prison v. Peru*, *supra* note 17, para. 237 and *Case of Vargas-Areco v. Paraguay*, *supra* note 36, para. 75.

<sup>38</sup> Cf. *Case of "Street Children" (Villagrán-Morales et al.) v. Guatemala*; *supra* note 34, para. 145; *Case of Miguel Castro-Castro Prison v. Peru*, *supra* note 17, para. 238, *Case of Baldeón-García v. Peru*. Judgment on April 6, 2006. Series C No. 147, para. 87.

Article 4(1) of the Convention, that in the instant case, the State has not effectively guaranteed this right.

**b) *Situation in which the events occurred***

43. There is no controversy, in the case at hand, regarding the following general facts related to the Colombian indigenous peoples:

- a) There are, officially, within the national territory, 87 indigenous peoples<sup>39</sup> with an approximate population of 1,378,884 inhabitants<sup>40</sup> and 64 different languages;<sup>41</sup>
- b) The indigenous peoples live in *resguardos*, that is to say, territories of collective property. At the moment, there are 710 *resguardos titulados* located in 27 departments and in 228 municipalities of the country, that occupy an approximate extension of 34 millions of hectares, that is, 29.8% of the national territory.
- c) In the department of Cauca, there is a great presence of indigenous people, since it has a population of 247,987 inhabitants,<sup>42</sup> corresponding to seven ethnics: the Paeces, Guambianos, Totoroes, Yanacona, Eperara-Siapidara, Inga and Kokonucos; the Paez is the town with greater population: 118,845 indigenous;<sup>43</sup>
- d) The people of Paez or Nasa are established in the territory and the collective memory. In their territories, the political and social organization of the *resguardo* prevails over the structure of the municipal government. The *resguardos* correspond to the tradition of the colonies, while the municipalities constitute the basic territorial entity of the Colombian State, governed by a mayor and a municipal council, democratically elected and
- e) The facts of the instant case occurred in the path of Vitoyó, municipality of Jambaló, department of Cauca. Jambaló is located in the northeast of said department, in the jurisdiction of the municipality of Jambaló. The Nasas of Jambaló are a part of Pueblo Paez.

<sup>39</sup> Cf. *Colombia. una nación multicultural. Su diversidad étnica* (Colombia: a multicultural nation. Its ethnical diversity). Departamento Administrativo Nacional de Estadísticas, Dirección de Censos y Demografías (Vital Statistics National Administrative Department, Surveys and Demographic's Agency). (Record of Appendixes to the answer of the application, Exhibit 1, page 1099).

<sup>40</sup> Cf. *Colombia. una nación multicultural. Su diversidad étnica* (Colombia: a multicultural nation. Its ethnical diversity). Departamento Administrativo Nacional de Estadísticas, Dirección de Censos y Demografías (Vital Statistics National Administrative Department, Surveys and Demographic's Agency). (Record of Appendixes to the answer of the application, Exhibit 1, page 1117).

<sup>41</sup> Cf. [http://www.etniasdecolombia.org/grupos\\_pueblos.asp](http://www.etniasdecolombia.org/grupos_pueblos.asp) (brief of requests and arguments, record of the merits, Volume I, page 150).

<sup>42</sup> Cf. *Colombia. una nación multicultural. Su diversidad étnica* (Colombia: a multicultural nation. Its ethnical diversity). Departamento Administrativo Nacional de Estadísticas, Dirección de Censos y Demografías (Vital Statistics National Administrative Department, Surveys and Demographic's Agency). (Record of Appendixes to the answer of the application, Exhibit 1, page 1118).

<sup>43</sup> Cf. *Grupos Étnicos: Páez*, (Ethnic groups: Paez) Fundación Hemera. Available at <http://www.etniasdecolombia.org/indigenas/paez.asp> (record of the merits, Volume I, page 160)

44. Thus, according to the Commission and the representatives, the facts of the present case are described within a pattern of violence against the indigenous people that live in the north of Cauca and their leaders. Furthermore, the State sustained that "none of the argument, documents or events furnished by the Commission and the representatives are relevant to demonstrate the alleged context." In short, it is just an evidentiary issue.

45. In such respect, this Court has established that it cannot ignore the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory. This requires the Court "to apply a standard of proof which considers the seriousness of the charge and which, notwithstanding what has already been said, is capable of establishing the truth of the allegations in a convincing manner."<sup>44</sup>

46. The documentary evidence furnished to the Tribunal in this regard is the following: i) the Second and Third Reports of the Commission on the situation of human rights in Colombia<sup>45</sup>; ii) the Reports on merits adopted by the Commission in the cases of *Masacre de Caloto* and *Masacre de "Los Uvos"*;<sup>46</sup> iii) The annual Report of the Inter-American Commission 2005;<sup>47</sup> iv) the report of the Special Rapporteur of the United Nations on the situation of human rights of the indigenous people<sup>48</sup> and a report of the same Rapporteur related to a Mission in Colombia;<sup>49</sup> v) a report of the United Nations High Commissioner of Human Rights on the situation of human rights in Colombia<sup>50</sup> and two rulings of the Office in Colombia of the United Nations High Commission of Human Rights;<sup>51</sup> vi) three press-releases<sup>52</sup> and the XII Report of the Ombudsman of the Colombian People;<sup>53</sup> vii) a

<sup>44</sup> Cf. *Case of Godínez-Cruz v. Honduras*. Judgment of January 20, 1989. Series C No. 5, para. 135.

<sup>45</sup> Cf. IACHR, *Second Report on the Situation of Human Rights in Colombia*, chapter XI: The Rights of the Indigenous in Colombia, OAS/Ser.L/V/II.84, Doc. 39 rev.1, October 14, 1993 and IACHR, *Third Report on the Situation of Human Rights in Colombia*, Chapter X: The Rights of the Indigenous People in Colombia, OAS/Ser.L/V/II.102, Doc. 9 mag. 1, February 26, 1999.

<sup>46</sup> Cf. IACHR, Report 36/00, Case 11.101 *Masacre de Caloto*, April 13, 2000, in the *Annual Report of the IACHR 1999* and IACHR, Report 35/00, Case 11.020 *Masacre "Los Uvos"*, April 13, 2000, in the *Annual Report of the IACHR 1999*.

<sup>47</sup> Cf. Annual Report of the Inter-American Commission of Human Rights 2005, February 27, 2006, OAS/Ser.L/V/II.124, Doc. 7, Chapter V

<sup>48</sup> Cf. STAVENHAGEN, Rodolfo. The indigenous issues: The human rights and the indigenous issues: Report of the Special Rapporteur on the situation of human rights and the fundamental freedoms of the indigenous, January 20, 2006, E/CN.4/2006/78/Add.4.

<sup>49</sup> Cf. United Nations. Economic and Social Council. Indigenous Issues. Report of the Special Rapporteur on the situation of human rights and the fundamental freedoms of the indigenous peoples; Mr. Rodolfo Stavenhagen. Adición Misión a Colombia. E/CN.4/2005/88/Add.2., November 10, 2004 (Record of Appendixes to the brief of requests and arguments, Exhibit 53, pages 899 to 923).

<sup>50</sup> Cf. Report of the United Nations High Commissioner for the Human Rights on the situation of human rights in Colombia, January 20, 2006, E/CB.4/2006/9, Exhibit IV.

<sup>51</sup> Cf. Ruling on the "*Concern About the Violent Acts in Cauca*", United Nations High Commission for Human Rights- Colombian Office (record of appendixes to the brief of requests, arguments and evidence, Exhibit 51, page 895); Ruling on the "*Concern About the Protests in Cauca and Nariño*", United Nations High Commission for Human Rights- Colombia Office (record of appendixes to the brief of requests, arguments and evidence, Exhibit 52, page 897).

<sup>52</sup> Cf. Press Release, Ombudsman of the Colombian People, Bogotá, D. C., March 21, 2006, "Ombudsman calls for reflection over intolerance and social exclusion in Colombia"; Ombudsman of the People. Press Release n° 1176 "**Ombudsman calls for a State policy to assist the indigenous peoples.**" Bogotá, D.C., August 9, 2006. [http://www.defensoria.org.co/?\\_s=e6&c=1176](http://www.defensoria.org.co/?_s=e6&c=1176); Press Release, October 12, 2005, "Indigenous Communities of Cauca defend their rights to land, life and ancestral memory," available at [www.derechos.org/nizkor/colombia/doc/japi04.html](http://www.derechos.org/nizkor/colombia/doc/japi04.html).



document of the organization of Amnesty International,<sup>54</sup> and viii) a report of the Association of Indigenous Cabildos of the North of Cauca (ACIN).<sup>55</sup>

47. As regard the analysis of the evidence, the Court notes that according to the Third Report of the Commission on the situation of Human Rights of Colombia (*supra* para. 46(i)), "[m]ore than 500 political indigenous leaders were murdered in the last 25 years for political reasons."<sup>56</sup>

48. Furthermore, according to the Report of the Special Rapporteur on the situation of human rights and fundamental liberties of the indigenous, Mr. Rodolfo Stavenhagen, with regard to its mission in Colombia (*supra*, para. 46(iv)), even when it refers to his official visit to the country on March 8 to 17, 2004:

[A]lthough Colombia has a long history of political violence in rural areas, indigenous regions were, until around 20 years ago, relatively free of armed conflict. Beginning in the 1980s, however, the guerrilla fronts of the Fuerzas Armadas Revolucionarias de Colombia- Ejército del Pueblo (FARC-EP) (Revolutionary Armed Forces of Colombia- People's Army) and the Ejército de Liberación Nacional (ELN) (national Liberation Army), and the paramilitary groups belonging to the Autodefensas Unidas de Colombia (AUC) (United Self- Defence Groups of Colombia) stepped up their operations in the indigenous regions as they became involved in the spread of illicit crops to those areas. Military pressure from the Colombian Army also forced them back into indigenous areas.

[...]

Political violence against indigenous peoples increased during the 1990s, prompting increasing opposition to the war. Over the past 15 years, more than 2,660 cases of violence of human rights and international humanitarian law aimed at indigenous peoples have been reported.

[...]

For some 20 years now, there have been close links between the armed conflict and associated violations of human rights of the indigenous peoples and drug cultivation in indigenous areas.<sup>57</sup>

49. The rest of the documentary evidence pointed out in paragraph 46 refers to violent acts committed against Colombian indigenous peoples in a time subsequent to the period during which the facts of the instant case occurred.

50. With respect to the testimonial and experts' opinion evidence, the mother of Germán Escué Zapata, Mrs. Etelvina Zapata and the expert witness, Gloria Lucy Zamora Patiño, have identified some acts of violence committed against indigenous people, which, according to the criterion of the Commission and the representatives, would indicate a pattern of the alleged violence. To such respect, the Court observes that the facts narrated by the witness and the expert witness exceed the purpose of the statements ordered by the President (*supra* para. 24), that is why they will not be taken into consideration.

51. Furthermore, the expert witness, Esther Sánchez de Guzmán, rendered a statement on the "situation of the indigenous peoples within the Colombian conflict," which falls within

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<sup>53</sup> Cf. XII Report of the Ombudsman of the People 122, available at [http://www.defensoria.org.co/pdf/informes/informe\\_115.pdf](http://www.defensoria.org.co/pdf/informes/informe_115.pdf)

<sup>54</sup> Cf. Amnesty International, Colombia: Inform, make a campaign and serve the citizens without fear: The rights of the journalists, political candidates and elected officers, February 9, 2006, AMR 23/001/2006.

<sup>55</sup> Cf. Association of Indigenous Cabildos of the North of Cauca ACIN, [http://www.nasaacin.net/defensa\\_vida.htm](http://www.nasaacin.net/defensa_vida.htm).

<sup>56</sup> IACHR, Third Report on the Situation of Human Rights in Colombia, Chapter X: The Rights of the Indigenous People in Colombia, OAS/Ser.L/V/II.102, Doc. 9 mag. 1, February 26, 1999. para. 36.

<sup>57</sup> Cf. Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, on Mission to Colombia, E/CB.4/2005/88/Add.2 (record of the Appendixes to the brief of requests and arguments, pages 905, 907, 911 and 912).

her expertise (*supra*, para. 23). The expert witness points out, mainly, the present situation of the indigenous peoples but a few of them relates, clearly, to the time during which the facts of the instant case occurred. In that sense, she mentioned that

[I]n the last two decades, some of the regions of Colombia are facing an agrarian counter-reform sponsored by the drug traffic that is accumulating lands in areas of high potential valuation [...]

The expansion of the drug cultivation is supported by the "paramilitary" violence, which is displacing peasants and farmers, black peoples and indigenous communities.

[...]

Since the end of the '70, the CRIC (*Cauca Indigenous Regional Council*) made its best efforts to have a conversation with the Secretary of the FARC (*Revolutionary Armed Forces of Colombia*) in an attempt to stop the murders of indigenous leaders on the part of such organization.

[T]he indigenous communities, since its beginning, thirty years ago, have been seen by insurgent groups with precaution and fear for the political independence that has characterized them. The "paramilitaries", in its turn, consider that those communities are a subversive movement.<sup>58</sup>

52. Flor Ilva Trochez Ramos, witness, stated to the Court that "up to the moment, we have registered in the Department of Cauca, 503 murders [...] involving Nasa peoples," since 1971 up to the present time.

53. Finally, the Court notes that the State pointed out that "its regrets that along the national history there have been violent events involving indigenous communities."

54. As to the connection of the facts of the instant case to the general situation described in the above paragraphs, the Commission alleged that the death of Mr. Escué Zapata has "a direct relationship with the participation of the victim in the political activity of the community, as sponsor of productive projects that were [...] a key of the strategy of the indigenous social organization in Cauca." The representatives sustained that "the extrajudicial execution of Germán [Escué Zapata] was linked to his position as a leader and traditional authority of his Town and to the work, as leader, that he carried out that was actively engaged in the recovery of the ancestral land of Paez People and the survival and development of its particular way of life." The State disputed the above mentioned paragraph and pointed out that the victim "was not an indigenous leader at the time of the events" and that his death occurred as a consequence of "an internal ethnic conflict that resulted in wrong information for the Army on the part of an indigenous person of the same ethnic and the abuse of power of some state agents."

55. Gloria Lucy Zamora Patiño, expert witness, explained to the Tribunal the social and political organization of the indigenous Paeces and the differences between each of their traditional authorities. The expert witness stated that:

The *Tu Tenza* or *Cacique-Gobernador* is the believable subject, the one that generates confidence within the community, who is useful for the service; he is a communitarian product assigned to that position by the [*Nasa Wala* or Indian Meeting] in order to fulfil the fundamental mandate of Nasa and he has certain "tasks" for which he has been preparing and according to which he will continue accumulating knowledge and expertise. That is why the election in the meeting is compulsory. Once he has fulfilled his position, the *Tu Tenza* delivers the baton of authority to his successor, who, together with the *Te'wala* [*Chamán*] should go to a sacred lagoon to "clean" the dirt off the baton of authority; the retiring governors constitute the *Consejo de Exgobernadores* [*Council of Former Governors*] who support and assess the new *cabildantes*, as well as guide the community through complex and delicate issues; the *Te Wala* accompanies them in the "harmonization" task of the communal life.

Though he is the head of the governing organ called *Cabildo*, he is not a self-sufficient subject; otherwise, he is accompanied by other members who will help him to carry out the assigned tasks. In this institution, all the community is equally represented, though he may have not received the

<sup>58</sup> Cf. Anthropological expert's opinion developed by Esther Sánchez de Guzmán (records of the merits, Volume III, page 617, note 33).

support of all the sectors and segments of the community. Once he is elected, he represents the whole community or town that elected him, not only the segment of the population that supported him. The *Asamblea de Comuneros* [Indians' Meeting] makes sure that all the different segments of the community are well represented in this body called *Cabildo* so that there is no room for internal disputes, or at least they try to minimize them, that lead to the breaking of harmony and balance, as well as the non-compliance or insufficient exercise of the mandate assigned.

[...]

The *Cabildo Indígena* [Indigenous Cabildo] exercises the governmental functions of economic, administrative and legal order, among others. It is elected in the *Nasa Wala* or Indians Meeting each year, with the participation of all the people older than 14 years of age. It is regularly composed by more than six members who fulfil positions as Principal Governor, Deputy Governor, Mayor, Constable, Principal Captain and Deputy Captain. The Constables are elected by each *vereda*. Once the election is carried out, they take possession of the community and later on, they register said election in the municipal mayoralties. It is not the Municipal Mayor who puts them in such position, it is the *Nasa Wala* or Meeting the one in charge of doing that; the registry of each autonomous act of the community is considered a simple administrative proceeding, compulsory for the Mayors, who register such election. Failure to comply with this obligation could result in the filing of a complaint before the General Public Prosecutors' Office.

The *Cacique- Gobernador* complies with "internal" and "external" tasks in order to represent the community before the State and other political and private actors. In many cases, since the Principal Governor is the one who must be the legal representative and sign, he is the one who carries out the "external" tasks, whereas the Deputy Governor takes up the internal affairs. Also, there can be a distribution of work between these two individuals in order to cover all the territory, so that they can guarantee a major proximity to the *veredas* and communities that they serve and assist; in other cases, because of the distance and traveling costs or safety, or both, it is considered adequate to distribute the work taking into account all the factors.

56. The Commission and the representatives pointed out in their briefs that Germán Escué was a "Cabildo Governor" of the indigenous *resguardo de Jambaló*. Notwithstanding, as from the public hearing (*supra*, para. 8), they changed that and they sustained that the position of the victim was the one of "Deputy Cabildo Governor."

57. The evidence furnished to the Tribunal is not conclusive to determine the position Germán Escué Zapata occupied at the time of his death. Thus, the representatives submitted a certificate from the Governor of the Indigenous Cabildo of Jambaló in 2006 and witness in the instant case, Mrs. Flor Ilva Trochez and a certificate from the *Asociación de Cabildos Indígenas del Norte del Cauca* (*Association of Indigenous Cabildos of the North of Cauca*) (ACIN),<sup>59</sup> which indicate that Mr. Escué Zapata was "Principal Governor" of the Indigenous Cabildo. Furthermore, Gloria Lucy Zamora, expert witness, pointed out that the victim was Deputy Governor in the years 1986 and 1987, that is, before the date of his death.<sup>60</sup> Some relatives of Germán mentioned that he was Deputy Governor<sup>61</sup> at the moment of his death, whereas his companion indicated that he was just Cabildo.<sup>62</sup> The State submitted the minutes of the title of Governor and his "Basallos" of the Indigenous Cabildo of Jambaló in 1988<sup>63</sup> and a list of the Governors of such *resguardo* from the year 1970 to 2006.<sup>64</sup> It is mentioned in these documents that in 1988, year in which the victim

<sup>59</sup> Cf. Record of appendixes to the brief of requests, arguments and evidence, pages 619 y 620.

<sup>60</sup> Cf. Written summary of the experts' opinion, delivered by Gloria Zamora Patiño (merits of the case, Volume III, page 788).

<sup>61</sup> Cf. Affidavit of Mario Pasu, January 16, 2007 (records of the merits, Volume III, page 644); statement rendered by Ayénder Escué, on January 16, 2007 (records of the merits, Volume III, page 650), and statement rendered by Etelvina Escué Zapata in the public hearing before the Inter-American Court.

<sup>62</sup> Cf. Affidavit of Bertha Escué Zapata, January 16, 2007 (records of the merits, Volume III, page 604).

<sup>63</sup> Cf. Record of appendixes to the answer of the complaint, Exhibit 8, page 1366.

<sup>64</sup> Cf. Record of appendixes to the answer of the complaint, Exhibit 9, page 1375.

died, the Governor was Mr. Ángel Quitumbo Dagua and the name of Germán Escué Zapata does not appear in the documents as member of the Cabildo. The name of the victim appears in the Cabildo's composition for the year 1986.<sup>65</sup> Furthermore, the State submitted two statements received in the domestic court, of Mr. Ángel Quitumbo Dagua. In the first of such statements it was mentioned that Germán Escué occupied the position of Secretary and Deputy Governor of the Cabildo in the year 1987,<sup>66</sup> whereas in the second one, it was pointed out that "yes, I heard that a Zapata has been killed", who "I know [...] but did not distinguish very well."<sup>67</sup> Finally, the State referred to the statement of an indigenous who said not to have met Germán Escué.<sup>68</sup>

58. Nevertheless, even when the formal leadership of the victim is not demonstrated, the evidence furnished in the instant case allows the Court to conclude that the victim exercised, in fact, a leadership within the community he belonged and, apart from having occupied the position of Cabildo in 1986, which is a non-disputed issue, he was in charge of several tasks that the community has assigned to him; among them, it can be mentioned the job in the communal store.<sup>69</sup> The active leadership of Germán was evidenced by his personal attitudes and his ability to read, write and do math, as well as the preparation he received for such purpose.<sup>70</sup> To such respect, Zamora Patiño, the expert witness, expressed:

The members of the Cabildo as well as the leaders, who comply with specific functions in the communities or towns, represent a "collective investment" inasmuch as they have been preparing to take up responsibilities since they were children. It is not a person who appears out of the blue, but a "social accumulation" that has been preparing since he was a child to assume responsibilities with his identity and with knowledge of the principles and values of identities of the community.<sup>71</sup>

59. However, as it has been previously mentioned, the Commission and the representatives sustained that the motive of the death of Mr. Escué Zapata was linked to his position of leader and to the hope that the whole Community had with respect to the protection of their traditional lands. The State, in return, recognizes that there was a conflict of lands, and it adds that such conflict was between the family of Mr. Escué Zapata and the family of Mr. Edelmiro UI and that the participation of the Army was the result of a complaint related to possession of firearms.

60. From the testimonies acquired during the domestic proceedings and furnished to this Tribunal as documentary evidence, it is clear that during the '80s, the two families, in effect, had several conflicts over land and even that those conflicts resulted in the death of some

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<sup>65</sup> Cf. Record of appendixes to the answer of the complaint, Exhibit 8, page 1360.

<sup>66</sup> Cf. Statement rendered by Ángel Quitumbo Dagua, on May 2, 1988 (record of the Appendixes to the answer of the complaint, Prosecutor's file, Folder 2, page 2025).

<sup>67</sup> Cf. Statement rendered by Ángel Quitumbo Dagua, on June 9, 1999 (record of the Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1792).

<sup>68</sup> Cf. Statement rendered by Mario Henry Cifuentes UI, on October 23, 2006 (record of the Appendixes to the answer of the complaint, Prosecutor's file, Folder 6, page 3198).

<sup>69</sup> Cf. Statement rendered by Omar Zapata, on January 25, 1996 (record of appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1756); expert opinion rendered by Gloria Lucy Zamora Patiño in the public hearing before the Court held on January 19 and 20, 2007; affidavit rendered by Aldemar Escué Zapata, on January 16, 2007 (records of the merits, Volume III, page 655), and affidavit rendered by Mario Pasu on January 16, 2007 (record of the merits, Volume III, page 644).

<sup>70</sup> Cf. Affidavit rendered by Bertha Escué Zapata, January 16, 2007 (records of the merits, Volume III, page 644).

<sup>71</sup> Cf. Written summary of the experts' opinion, delivered by Gloria Zamora Patiño (merits of the case, Volume III, page 788).

people.<sup>72</sup> In view of such confrontations, the authorities of Jambaló intervened in order to reach a settlement of disputes, which ended in 1994 when the two families came to an agreement and the cease of all type of aggressions.<sup>73</sup>

61. Furthermore, the representatives and the Commission did not challenge the evidence furnished by the State regarding the fact that during 1976 and 1987 the Instituto Colombiano de la Reforma Agraria (*Colombian Institute of the Agrarian Reform*) acquired and expropriated 27 pieces of land with the purpose of restructuring the Indigenous Resguardo de Jambaló,<sup>74</sup> which would have ended the existing conflicts over land between the indigenous and the local owners of large estates.

62. Finally, the line of investigation carried out by the Public Ministry is oriented to the personal motives the militaries who executed Germán Escué Zapata had when they received the tip that in Escué's home there were firearms and applied "its motto [...] '*guerrillero captured, guerrillero dead.*'"<sup>75</sup>

63. Based on the foregoing, the Court cannot considered proved the fact that the militaries acted on their own behalf or by other indigenous or local landowners' challenge, with the specific purpose of executing Germán Escué Zapata for the leadership he exercised within his Community. The foregoing is the result, in general, to a lack of efficiency in the domestic investigations that, up to the present, could not clarify all of the facts; such issue shall be analyzed by the Tribunal in Chapter X of this Judgment.

64. Therefore, the Court considers that, though there is evidence that would allow the Tribunal to interpret that there was a serious situation against the human rights of the indigenous peoples of the department of Cauca at the time Mr. Escué Zapata was extra judicially executed, there are no sufficient facts in the case file for this Tribunal to decide that this case is framed within the alleged situation.

## VII

### **ARTICLE 5 (RIGHT TO HUMANE TREATMENT)<sup>76</sup> IN CONJUNCTION WITH ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) OF THE AMERICAN CONVENTION**

<sup>72</sup> Cf. Statement rendered by Edelmiro UI Vargas on December 20, 2002 (record of Appendixes to the answer of the complaint, Prosecutor's File, Folder 1, page 1893); statement rendered by Jairo Gómez on October 27, 2006, Folder 6, page 3242; statement rendered by Edelmiro UI on October 25, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 6, pages 3221 to 3229); statement rendered by Mario Henry Cifuentes UI on October 23, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 6, pages 3198 to 3201), statement rendered by Pablo Elías Filigrana Mostizo on October 26, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 6, pages 3238 to 3240) and statement rendered by Etelvina Zapata on October 17, 2002 in the public hearing held before the Inter-American Commission.

<sup>73</sup> Cf. Statement rendered by Ángel Quitumbo Dagua on September 4, 2005 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 4, pages 2260 and 2261); statement rendered by Edelmiro UI on October 25, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 6, pages 3220 to 3229) and statement rendered by Aldemar Escué Zapata on November 30, 2002 (record of Appendixes to the application, Exhibit 15, page 94).

<sup>74</sup> Cf. Resolutions N° 68 of October 22, 1992 and N° 10 of February 20, 2001 of the Instituto Colombiano de la Reforma Agraria (record of Appendixes to the answer of the complaint, Exhibits 5 and 6, pages 1311 to 1353).

<sup>75</sup> Cf. Statement rendered by Oscar Iván Arias Herrera on March 18, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2411) and resolution of the 21 Specialized Prosecutor's Office of the National Unit of Human Rights and International Humanitarian Law, on January 12, 2007 (record of the merits, Volume III, page 681).

<sup>76</sup> Article 5 of the Convention, in its relevant part, provides for:

65. The Commission alleged that the State violated the right to humane treatment established in Articles 5(1) and 5(2) of the American Convention to the detriment of Mr. Escué Zapata, for the circumstances leading to his detention, marked by the violence and the fear, plus the uncertainty over the outcome of said measure. According to the Commission, the victim was tortured while he was under the custody of the agents of the National Army, in a defenseless state, and his body was found with multiple fractures. Furthermore, according to the application, the State has not offered any explanation regarding the allegations on the damage caused to the victim while he was under the custody of its agents. With respect to the victim's relatives, the Commission considered that their physical and moral integrity have been impaired as a direct consequence of the illegal and arbitrary deprivation of liberty of Mr. Escué Zapata; the disregard of his whereabouts; his final death committed by State agents; the lack of investigations of the events and the subsequent impunity. As a consequence, according to the Commission's criterion, the victim's relatives have to be considered, in turn, as victims of the violation of the right to humane treatment established in Articles 5(1) and 5(2) of the American Convention in conjunction with Article 1(1) therein.

66. The representatives cast light on the facts of the case by explaining that, when searched by the militaries, Mr. Escué Zapata was kicked and hit, while the agents were asking where the firearms were and calling him *guerrillero*. Besides, they pointed out that in the minutes prior to the extrajudicial execution, during the way to the mountains, the victim "suffered the severity of the illegal detention, as an imminent threat of his life and integrity," and his body was found with apparent signs of torture. In such respect, the representatives observed that the State did not provide a satisfactory and convincing explanation of the events by means of adequate evidentiary elements. As a result, they alleged that the State violated the right to humane treatment to the detriment of Escué Zapata, as established in Article 5(2) of the Convention. As to the relatives, the representatives stated that they witnessed how the members of the National Army illegally assaulted and detained Mr. Escué Zapata. Furthermore, the relatives searched for the truth and justice of the events, without finding any answer on the part of the State. Likewise, the representatives indicated that the relatives had to wait more than 4 years to recover the mortal rests of the victim, once the National General Prosecutor's Office carried out the burial in 2002. According to the representatives, this has generated serious harm to the relatives and to the Community, which has spiritually suffered from the extrajudicial execution of one of its member. As a consequence, the representatives alleged that the State violated the right enshrined in Article 5(1) of the American Convention, in conjunction with Article 1(1) therein, to the detriment of the victim's relatives and the Community.

67. The State confessed that during the detention of Mr. Escué Zapata there was a moment of stress and assault on the part of the militaries against him. Likewise, the State acknowledged its responsibility for the violation of the right established in Article 5 of the Convention, in conjunction with Article 1(1) therein, with respect Mr. Escué Zapata (*supra* para. 11 and 15), for the maltreatment he suffered and of Article 5 in conjunction with Article 1(1) therein, with respect to the victim's relatives, for the mental and moral harm they could have experienced as a consequence of the detention and death of Mr. Escué Zapata, as well as for the delay in the investigation, prosecution and punishment of the responsible. However, the State denied that the relatives suffered from "the unknown whereabouts of Mr. Escué Zapata" since they found his body and they buried it.

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1. Every person has the right to have his physical, mental and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment. All persons deprived of their lives shall be treated with respect for the inherent dignity of the human person.

68. Therefore, the Court considers it is adequate to analyze in the present case if there was a violation of the right enshrined in Article 5 of the Convention, to the detriment of Mr. Escué Zapata, his relatives and the Community.

**A) With respect to Mr. Escué Zapata**

69. According to the evident furnished and the State's confession, the victim was hit by the militaries<sup>77</sup> while he was being accused of being guerrillero and pressed to confess such condition and the alleged possession of firearms. Furthermore, he was taken to the mountains and immediately before his execution, he was asked to run, which the victim did not want to do for fear of being executed, which in effect occurred after that (*supra* para. 38). Thus, apart from the physical maltreatment committed against the victim while he was detained, the victim fearly had to run for a while without knowing his destiny and the outcome of the military operation, fostered by a group of armed militaries and feeling fear for his safety.

70. Furthermore, the relatives of the victim pointed out that the body of Mr. Escué Zapata was found with signs of torture, fractures of inferior limbs, bumps on the body and the head totally destroyed.<sup>78</sup> On the contrary, Mr. Victorino Mestizo Martínez, Police inspector who removed the body, affirmed the inexistence of ecchymosis or other signs of bumps in the body and stated that the victim was apparently not tortured nor tied up.<sup>79</sup>

71. Regarding such facts, the Court notes according to the statements of the victim's relatives and the public officer mentioned above, as well as the statements rendered by some militaries,<sup>80</sup> it is clear that Mr. Escué Zapata was injured after he was taken from his home to the place of the execution. The type of injuries he suffered from or their seriousness cannot be considered proven. Notwithstanding, given the fact of the State's confession of the facts at issue and the lack of a proper investigation of the event,<sup>81</sup> the Court considered the facts are proven.

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<sup>77</sup> Cf. Statement rendered by Bertha Escué Coicue on December 4, 2002 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1905); Statement rendered by Omaira Escué Coicue on December 4, 2002 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1915); statement rendered by Marco Tulio Cañas Torres, on February 24, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2334); statement rendered by Francisco Javier Bedoya Aguirre, on March 18, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2402); statement rendered by Oscar Iván Arias Herrera on March 18, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, pages 2410 and 2411) and affidavit rendered by Bertha Escué Coicue on January 16, 2007 (record of the merits, Volume III, page 606).

<sup>78</sup> Cf. Statement rendered by Mario Pasu on May 17, 1999 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1781); statement rendered by Mr. Aldemar Escué Zapata on July 1, 1999 (record of Appendixes of the answer to the complaint, Prosecutor's file, Folder 1, page 1805); statement rendered by Etelvina Zapata in the public hearing before the Inter-American Commission held on October 17, 2002; statement rendered by Mr. Aldemar Escué Zapata on November 30, 2002 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1912); affidavit rendered by Mario Pasu, on January 16, 2007 (record of the merits, Volume III, page 645), affidavit rendered by Bertha Escué Coicue on January 16, 2007 (record of the merits, Volume III, page 606) and affidavit rendered by Ayénder Escué Zapata on January 16, 2007 (record of the merits, Volume III, page 652).

<sup>79</sup> Cf. statement rendered by Victorino Mestizo Martinez on December 13, 2002 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1873).

<sup>80</sup> Cf. Statement rendered by Oscar Iván Arias Herrera, on March 18, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, pages 2410 and 2411).

<sup>81</sup> The Court has established that the State is responsible, in its condition of guarantor of the rights enshrined in the Convention, for the observance of the right to humane treatment of every person under its custody. As a consequence, it is possible to consider that the State is responsible for ill-treatment exhibited by a person who has been in the custody of State agents, if the authorities are incapable of demonstrating that a proper

72. Consequently, the Court consider that the ill-treatment and injuries that Mr. Escué Zapata suffered involved a violation on the part of the State of the right to humane treatment as established in Articles 5(1) and 5(2) of the American Convention.

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73. As regards the obligation to guarantee the right enshrined in Article 5 of the American Convention, the Court pointed out that said obligation embodies the duty of the State to investigate possible acts of torture and other cruel, inhuman or degrading treatment.<sup>82</sup>

74. In the same sense, the Tribunal has previously stated that:

in the light of the general obligation to guarantee all persons under their jurisdiction the human rights enshrined in the Convention, established in Article 1(1) of the same, along with the right to humane treatment pursuant to Article 5 (Right to Humane Treatment) of said treaty, there is a state obligation to start *ex officio* and immediately an effective investigation that allows it to identify, prosecute, and punish the responsible parties, when there is an accusation or well-grounded reason to believe that an act of torture has been committed.<sup>83</sup>

75. In sum, the duty to investigate constitutes an imperative obligation of the state that derives from international law and cannot be disregarded or conditioned by domestic acts or legal provisions of any nature. As has been stated by the Court, in cases of serious breaches to fundamental rights the imperious need to avoid the repetition of said facts depends, to a great extent, on the avoidance of their impunity and satisfying the right of both victims and society as a whole to have access to the knowledge of the truth of what happened. The obligation to investigate constitutes a means to guarantee said rights, and failure to comply with it brings about the State's international responsibility.<sup>84</sup>

76. In this case, the evaluation of the duty to guarantee the right to humane treatment through a serious, complete and effective investigation of the events shall be done in Chapter X of this Judgment. It is enough to mention for the purposes of determining the violation of Article 5 of the Convention, in conjunction with Article 1(1) therein, that in case at hand, the State has not effectively guaranteed the right to humane treatment.

### **B) With respect to the victim's relatives**

77. This Court has affirmed, in several opportunities, that the relatives of the victim of violations of human rights may, in turn, be victims.<sup>85</sup> In this regard, the Court has considered that the violation of the mental and moral integrity of the next of kin due to the additional suffering is precisely a direct consequence of the violations committed against their beloved ones and as a result of the delay proceedings or omissions on the part of State

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investigation has been carried out followed by the prosecution of the responsible. *Cf. Case of "Street Children" (Villagrán Morales et al), supra*, note 34, para. 170, *Case of Baldeón-García v. Peru. Supra* note 38; Para. 120.

<sup>82</sup> *Case of the Pueblo Bello Massacre, supra* note 19; Para. 142; *Case of Bueno-Alves, supra* note 9, para. 88; *Case of Miguel Castro-Castro Prison v. Peru, supra* note 17, para. 344.

<sup>83</sup> *Cf. Case of Baldeón-García v. Peru supra* note 38, para. 156; *Case of Bueno Alves v. Argentina, supra* note 9, para. 89; *Case of Miguel Castro-Castro Prison v. Peru, supra* note 17, para. 345.

<sup>84</sup> *Cf. Case of Velásquez Rodríguez v. Honduras, supra* note 18, para. 174-7; *Case of Bueno Alves v. Argentina, supra* note 9, para. 90; *Case of Miguel Castro-Castro Prison v. Peru, supra* note 17, para. 347.

<sup>85</sup> *Cf. Case of Bámaca Velásquez v. Guatemala, Judgment of November 25, 2000. Series C No. 70, para. 160; Case of Bueno Alves v. Argentina, supra* note 9, para. 102, and *Case of the Rochela Massacre v. Colombia, supra* note 7, para. 137.



authorities to investigate.<sup>86</sup> Among the issues to be considered, it could be mentioned the closeness of the family relationship, the particular circumstances of the relationship with the victim, the degree to which a family member was a witness of the events, the way in which the family member was involved in the search for justice and the State's response to the steps undertaken.<sup>87</sup>

78. In the instant case, there is no controversy among the parties regarding the fact that the personal integrity of Mrs. Etelvina Zapata Escué (mother), Myriam Zapata Escué (daughter), Bertha Escué Coicue (companion) and Francya Doli Escué Zapata (sister) and Mr. Mario Pasu (father), Aldemar Escué Zapata, Yonson Escué Zapata, Ayénder Escué Zapata, Omar Zapata and Albeiro Pasu (brothers) has been violated by the claimed facts.

79. The Court only wishes to point out that the mother, wife, daughter and brother, Aldemar Escué Zaàta, were in the dwelling during the search carried out by State agents,<sup>88</sup> so that they witnessed the detention and the ill-treatment suffered by the victim. According to the State agents, the companion of the victim was begging them not to take him.<sup>89</sup> Furthermore, the relatives were the ones who, minutes later, found the body of Mr. Escué Zapata.<sup>90</sup> Besides, as the State acknowledged (*supra* para. 11 and 15) the delay in the investigation, prosecution and punishment of the responsible also provoked mental and moral damage to the victim's next of kin. However, though the Court positively values the fact that the State delivered the mortal rests of the victim to its relatives, it considers that

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<sup>86</sup> Cf. *Case of Bámaca Velásquez v. Guatemala*, *supra* note 85, para. 160, *Case of the Rochela Massacre v. Colombia*, *supra* note 7, para. 137; *Case of Miguel Castro-Castro Prison v. Peru*, *supra* note 17, para. 335.

<sup>87</sup> Cf. *Case of Bámaca Velásquez v. Guatemala*, *supra* note 85, para. 163; *Case of Bueno Alves v. Argentina*, *supra* note 9, para. 102; *Case of the Miguel Castro-Castro Prison v. Peru*, *supra* note 17, para. 335.

<sup>88</sup> Cf. Statement rendered by Etelvina Zapata, on September 22, 1994 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1740); statement rendered by Mr. Aldemar Escué Zapata on July 1, 1999 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1804); statement rendered by Etelvina Zapata in the public hearing held before the Inter-American Commission on October 17, 2002; statement rendered by Bertha Escué Coicue, on December 4, 2002 (record of Appendixes to the answer of the complaint, Folder 1, page 1905); statement rendered by Omaira Escué Coicue, on December 4, 2002 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1915); statement rendered by Mr. Aldemar Escué Zapata on November 30, 2002 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1913); statement rendered by Bertha Escué Coicue, on January 16, 2007 (record of the merits, Volume III, page 606); statement rendered by Marco Tulio Cañas Torres, on February 24, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2334); statement rendered by Francisco Javier Bedoya Aguirre, on March 18, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2403); statement rendered by Oscar Iván Arias Herrera on March 18, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2410), and statement rendered by Hidibrán Castro Quintero on March 17, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file Folder 1, page 2389).

<sup>89</sup> Cf. statement rendered by Marco Tulio Cañas Torres, on February 24, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's File, Folder 3, Page 2334); statement rendered by Hidibrán Castro Quintero, on March 17, 2006 (record of Appendixes to answer of the complaint, Prosecutor's file, Folder 3, page 2389); statement rendered by Francisco Javier Aguirre on March 18, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2403), and statement rendered by Oscar Iván Arias Herrera of March 18, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2410).

<sup>90</sup> Cf. Statement rendered by Mario Pasu on May 27, 1999 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1782); statement rendered by Mr. Aldemar Escué Zapata on July 1, 1999 (record of Appendixes of the answer to the complaint, Prosecutor's file, Folder 1, page 1805); statement rendered by Etelvina Zapata in the public hearing held before the Inter-American Commission on October 17, 2002; statement rendered by Mr. Aldemar Escué Zapata on November 30, 2002 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1912); affidavit rendered by Mario Pasu, on January 16, 2007 (record of the merits, Volume III, page 645), affidavit rendered by Bertha Escué Coicue on January 16, 2007 (record of the merits, Volume III, page 606) and affidavit rendered by Ayénder Escué Zapata on January 16, 2007 (record of the merits, Volume III, page 652).

the delay of 4 years, as from the burial of the rests for the purpose of investigation until its return, has also provoked an emotional detriment to the next of kin.

80. Based on the foregoing considerations and in view of the confession made by the State, the Tribunal considers that the victim's relatives mentioned in paragraph 78 of these Judgment, are victims of the violation of Article 5(1) of the American Convention, in conjunction with Article 1(1) therein.

**c) With respect to the Community**

81. The Court will not analyze the facts exposed by the representatives as a violation of the right to humane treatment committed against the members of the Paez Indigenous Community since they will not be considered victims in the complaint of the Inter-American Commission.

**VIII**

**ARTICLE 7 (RIGHT TO PERSONAL LIBERTY)<sup>91</sup> IN CONJUNCTION WITH ARTICLE 1 (1) (OBLIGATION TO RESPECT RIGHTS) OF THE AMERICAN CONVENTION**

82. The Commission pointed out that Mr. Escué Zapata was illegally deprived of this liberty and that, at the moment of his detention, did not receive any explanation about the reason why such measure was adopted nor the rights he had. According to the Commission, the arbitrariness of said deprivation of liberty was aggravated by the *modus operandi* of the Army agents, which acted with evident abuse of power and in an unreasonable, unforeseeable and out of proportion manner, since the victim was defenseless and unarmed. The detention of Mr. Escué Zapata, according to the complaint, was not carried out with the purpose of taking him before a judge or other authority to decide over the legality of the measure. Besides, the State, allegedly, did not offer to the victim a fast and effective remedy that would allow it to define the legality of the victim's detention and, furthermore, it deprived him of his liberty without any type of institutional control. Based on the foregoing considerations, the Commission alleged that the State violated the right to personal liberty enshrined in Articles 7(2), 7(3), 7(4), 7(5) and 7(6) of the American Convention, in conjunction with Article 1(1) therein, to the detriment of Mr. Escué Zapata.

83. The representatives reiterated the arguments submitted by the Commission, alleging, *inter alia*, that the alleged victim was illegally detained in view of the fact that there was no arrest warrant, that the detainee was not publicly requested and that there was no crime detected in the act. The alleged crime committed in the act, that is, the alleged possession of firearms, according to the representatives, has not been proved in the criminal proceedings, so they conclude that there was no reason to justify the victim's deprivation of liberty.

84. Furthermore, the State affirmed that Mr. Escué Zapata was detained after the members of the Army found a home-made grenade in his home. Nevertheless, the State acknowledged its international responsibility for the violation of the right to personal liberty as established in Article 7 of the American Convention, in conjunction with Article

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<sup>91</sup> Article 7 of the Convention, in its pertinent part, provides for:

1. Every person has the right to personal liberty and security
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

1(1) therein, to the detriment of the victim "for its illegal and arbitrary detention, which involved acts that injured the standards fixed by the [...] Court."

85. Regarding the evidence furnished by the parties and taking into account the State's confession, the Court considers it is a proven fact that on February 1, 1988, during the night, members of the National Army, without an arrest or search warrant or a confirmed situation of *in flagrante delicto*, detained Mr. Escué Zapata.<sup>92</sup>

86. Based on the foregoing, the Court considers that Mr. Escué Zapata was illegally detained by members of the National Army and as has been previously stated (*supra*, Para. 38), he was executed after a moment by his captors, without being necessary, thus, to determine if the victim was brought, without further delay, before the corresponding competent judicial authority; if he was informed of the reasons for his detention and, let alone, if the act of detention was unreasonable, unpredictable or out of proportion. It is evident that the detention of Mr. Escué Zapata constituted an illegal act, it was not ordered by a competent authority and its aim was not to bring the victim before a judge or another officer authorized by law, but to execute him,<sup>93</sup> thus, it is also not necessary to rule over the alleged arbitrariness of such measure. That is to say, his detention was of an obviously illegal nature, and it contradicted the provisions of Article 7(1) and 7(2) of the Convention.<sup>94</sup>

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87. The Court notes that in cases involving illegal or arbitrary detention of individuals, the State has the duty to investigate the case, in accordance with the guarantee established in Article 1(1) of the Convention, in conjunction with Article 7 therein. The evaluation regarding the obligation of guaranteeing this right through a serious, complete and effective investigation of the events shall be done in Chapter X of this Judgment. It is enough to say, for the purposes of the determination of the violation of the right to personal liberty, that in the instant case, the State has not effectively guaranteed this right.

## IX

### ARTICLE 11 (RIGHT TO PRIVACY)<sup>95</sup> IN CONJUNCTION WITH ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) OF THE AMERICAN CONVENTION

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<sup>92</sup> Cf. Statement rendered by Mr. Aldemar Escué Zapata on July 1, 1999 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1804); statement rendered by Hidelbran Castro Quintero, on March 17, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2389); affidavit rendered by Aldemar Escué Zapata on January 16, 2007 (record of the merits, Volume III, page 657) and action for inquiry of Evert Ospina Martínez of April 1, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 4, page 2550).

<sup>93</sup> Cf. Statement rendered by Oscar Iván Arias Herrera on March 18, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2411); resolution of the 21 Specialized Prosecutor's Office of the National Unit of Human Rights and International Humanitarian Law, on January 12, 2007 (record of the merits, Volume III, page 681) and statement rendered by Yolanda Prado Ruiz in the public hearing held before the Court on January 29 and 30, 2007.

<sup>94</sup> Cf. *Case of Gangaram Panday v. Suriname*. Judgment of January 21, 1994. Series C No. 16, para. 51 and *Case of La Cantuta v. Peru*, *supra* note 8, para. 109.

<sup>95</sup> Article 11 of the Convention, in its relevant part, provides that:  
[...]

2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.

88. The representatives alleged that "the violent and arbitrary entrance to the residence of Germán Escué and his family's constituted a violation of Article 11(2) [...] of the Convention," to the detriment of Mr. Escué Zapata and his relatives. Afterwards, in the final arguments, the representatives sustained that the "illegal and arbitrary search to the community's store" would also violate the "honor and dignity of Paez People."

89. The Commission did not allege a violation of such right.

90. The State denied the arguments submitted by the representatives by stating that "regardless of the fact that the State agents burst into the residence [...] in which Germán Escué Zapata was and detained him in an illegal and arbitrary manner, it has not been proved that this entrance has had another consequences." As to the alleged search of the community store, the State alleged that such arguments are based on "new facts not included in the Commission's application."

91. The Court observes that even though Article 11 of the Convention is called "Protection to the Privacy," such article has a wider content that includes the protection of the home, the private life, the family and the correspondence.

92. The Court has determined that the alleged victim, his next of kin or his representatives may invoke rights other than those asserted in the petition filed before the Commission, on the basis of the facts described therein.<sup>96</sup> Thus, the Court observes that the alleged violent entrance to the residence of the victim and his family appears in the complaint, so that it does not constitute a new fact and can, indeed, be analyzed by the Tribunal. However, the alleged search of the community store does not infer from the complaint nor was it analyzed in the Report 96/05 of the Commission. By the same token, the members of Paez People have not been designated as victims by the Commission. Thus, the facts will not be analyzed.

93. The Court observes that there is a controversy among the parties with respect to the facts. As it has been previously mentioned, the Commission and the representatives alleged that the entrance of the militaries to the residence was violent, since they have broken the door. The evidence they furnished demonstrates such fact.<sup>97</sup> Moreover, the State declared that the victim's brother, Mr. Aldemar Escué, was who "opened the door" in order for the militaries to enter. The evidence the State furnishes to sustain such fact involves the statements of Mr. Aldemar Escué and his companion Omaira Escué Coicue. The first of them stated that:

I [...] opened the door[,] since they were saying that if we did not open it, they would have to break it, that is why I opened the door.

Mrs. Omaira Escué Coicue confirmed that version of the facts by saying that:

They arrived and knocked the door and ordered us to open it because it was the Army, I got up because they said that if we did not open the door, they would have to take it down, so I said to Aldemar to open it. [W]hen we opened the door, they entered [...].

<sup>96</sup> Cf. *Case of "Five Pensioners" v. Peru*. Judgment of February 28, 2003. Series C No. 98, para. 155; *Case of Bueno Alves v. Argentina*, *supra* note 9, para. 121; y *Case of Acevedo-Jaramillo et al. v. Peru*, *supra* note 20, para. 280.

<sup>97</sup> Cf. Statement rendered by Hidelbran Castro Quintero on March 17, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2389); statement rendered by Bertha Escué Coicue on December 4, 2002 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1905); statement rendered by Etelvina Zapata Escué on September 22, 1994 (record of Appendixes to the application, Volume I, Exhibit 17, page 109); statement rendered by Etelvina Zapata Escué in the public hearing held before the Inter-American Commission on October 17, 2002 (record of Appendixes to the application, Volume I, Exhibit 3, page 36) and affidavit rendered by Bertha Escué Coicue on January 16, 2007 (record of the merits, Volume III, pages 605 and 606).

94. The Tribunal considers it is not relevant to the purpose of the instant case to determine if the militaries forced the door or if they threatened Mr. Aldemar Escué to let them in. The truth is that the State agents entered into the residence of Germán Escué Zapata and some members of his family, against the will of its occupants and without legal authorization to do that. Thus, the Tribunal has to determine if such facts constitute a violation of the rights enshrined in Article 112 of the Convention.

95. The protection of the private life, family life and residence from arbitrary or abusive interference implies an acknowledgment that there is a personal sphere which must be exempt from and immune to the abusive or arbitrary invasion or attacks by third parties or the public authority. In this regard, an individual's home and private and family life are intrinsically connected, because the residence is the space in which private and family life<sup>98</sup> can evolve freely. The Colombian Constitution, in force at the moment of the event, established in its Article 23 that:

No person can be disturbed in his private or family life, [...] nor can his residence be searched, but by virtue of a written order issued by competent authority, with the legal formalities and the reason previously defined by law [...].

96. Based on the foregoing, the Court considers that the act of the militaries constituted an arbitrary and abusive interference in the residence of Mr. Germán Escué Zapata. Thus, the Court considers that the State violated the right enshrined in Article 11(2) of the American Convention, in conjunction with Article 1(1) therein, to the detriment of Escué Zapata and his relatives who, has been proved, lived there at the time of the events, to wit: Bertha Escué Coicue, Myriam Zapata Escué, Etelvina Escué, Mario Pasu and Aldemar Escué Zapata.

97. Finally, the Court observes that the State has not investigated the mentioned facts, thus failing to comply with its duty to guarantee with respect to Article 11(2) of the Convention, in accordance with Article 1(1) therein.

## X

### **ARTICLE 8 (RIGHT TO FAIR TRIAL)<sup>99</sup> AND 25 (RIGHT TO JUDICIAL PROTECTION)<sup>100</sup> IN CONJUNCTION WITH ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) OF THE AMERICAN CONVENTION**

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<sup>98</sup> Cf. *Case of the Ituango Massacres v. Colombia*. Judgment of July 1, 2006. Series C N°. 14, para. 193 and 194.

<sup>99</sup> Article 8 of the Convention, in its relevant part, provides that:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

[...]

<sup>100</sup> Article 25 of the Convention, in its relevant part, provides that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

[...]

98. The Commission alleged that "the way the militaries acted [in the present case] required that the State officers in charge of the investigation make their best efforts to carry out an immediate and urgent search" in order to identify and punish the responsible of the events. With the lost of the case file, the Commission considered that a timely and detailed investigation was not possible. As to the analysis of the reasonable time, the complaint alleges that "18 years has passed since the events, and there is no judicial proceedings opened." Furthermore, the Commission mentioned that the proceedings before the Military Justice for almost a decade clearly compromised the independence and impartiality of the legal procedure. In view of that fact, the Commission pointed out that the State violated the rights enshrined in Articles 8(1) and 25 of the American Convention, to the detriment of the victim and his relatives.

99. The representatives reiterated the legal basis pointed out by the Commission and stated that "the State is responsible for not carrying out an investigation in 17 years as from the [facts], as well as for not guaranteeing the resources nor providing guarantees for the exercise of rights in favor of the victim's next of kin." According to the representatives' point of view, the investigation assigned to the military jurisdiction resulted in the violation of Article 8 and 25 of the Convention in two senses. In the first place, because no investigative judicial proceedings were, allegedly, carried out in the time the case was assigned to such jurisdiction. And in the second place, because such competence is neither independent nor impartial to hear the violations committed against Mr. Escué Zapata.

100. The State acknowledged "its international responsibility for the violation of the rights enshrined in Articles 8(1) [...] and 25(1) [...] in conjunction with [...] 1(1), of the American Convention," to the detriment of Mr. Germán Escué Zapata and his relatives. Furthermore, it acknowledged "the delay in the proceedings and in the resolution of the domestic investigation, prosecution and punishment of the alleged responsible during the time of the domestic proceedings, which was the result, among other factors, of: The initial loss of the case file, the reconstruction of the case file and the period of procedural inactivity." Without prejudice of the foregoing, the State observed that regardless of the period of time, the investigative body has made an effort to carry out the investigative judicial proceedings and that at the moment, the proceedings are being processed in accordance with "international parameters."

101. The Tribunal considers it is useful to analyze if the proceedings commenced in the domestic venue for the events of the instant case have respected the right to a hearing with the due guarantees and within a reasonable time, by a competent, impartial and independent tribunal and if it has developed the possibilities of a judicial remedy to guarantee the right to access to justice, truth and reparation.

**a) Reasonable time**

102. In relation to the reasonable time, this Tribunal has pointed out that the right of access to justice must ensure, within a reasonable time, the right of the alleged victims or his relatives to every efforts being made to learn the truth of the facts and to punish the responsible.<sup>101</sup> The Court finds that three elements should be taken into account to determine the fairness of the time incurred in the judicial proceedings: a) the complexity of

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<sup>101</sup> Cf. *Case of Bulacio v. Argentina*. Judgment of September 18, 2003. Series C No. 100, para. 114, *Case of the Ituango Massacres v. Colombia*, *supra* note 98, para. 289; *Case of Baldeón-García v. Peru*, *supra* note 38, para. 166.

the matter, b) the procedural activities carried out by the interested party, and c) the conduct of judicial authorities.<sup>102</sup>

103. Taking into account these three elements, as well as the State's confession, the Court finds that the period of 19 years that has taken for the domestic justice to investigate the instant case is totally unreasonable and constitutes a violation of the right enshrined in Article 8(1) of the American Convention to the detriment of Mr. EScué Zapata and his relatives.

#### **b) Military jurisdiction**

104. The criminal investigation over the death of Mr. Escué Zapata was in charge of the Court N° 34 in Military Criminal Proceedings for more than ten years.<sup>103</sup>

105. The Tribunal has established that in a Democratic Rule of Law the military criminal jurisdiction has a restrictive and exceptional scope: It can only be prosecuted military personnel who have committed some crime or felony that affects the legal interests of the military order. To such regard, the Court has stated that "When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, *a fortiori*, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to justice."<sup>104</sup> Due to these reasons and to the nature of the crime and the legal interest affected, the military criminal jurisdiction was not a competent court to carry out an investigation and, in its case, to prosecute and punish the perpetrators of the facts of this case.

106. In consideration of the foregoing, the Court considers that during the time that the military criminal justice learned the facts of the instant case, the State violated the right to a hearing before a competent, independent and impartial tribunal, enshrined in Article 8(1) of the American Convention. However, the Court notes that the procedure for the death of Mr. EScué Zapata is, at the moment, under the ordinary jurisdiction. That is, that the State itself has remedied the initial violation of this right. Nevertheless, the transfer of the proceedings to the ordinary jurisdiction and, in the case at hand, to the Nacional Unit of Human Rights and International Humanitarian Law of the General Prosecutor's Office of the Nation (UNDH) is not enough for the State to comply with its international commitments derived from the American Convention. In fact, the next investigation should be conducted using all available legal means and directed at determining the truth and the pursuit, capture, prosecution and punishment of all the masterminds and perpetrators of the facts, whatever the nature of their involvement in the case.<sup>105</sup> It is vital that the complexity of the matter, the context and the circumstances in which it occurred and the patterns that explain its commission must be taken into account when carrying out a due diligence in the investigative procedures. The judicial authorities should try, at least, *inter alia*: a) to

<sup>102</sup> Cf. *Case of Suárez-Rosero v. Ecuador*. Judgment of November 12, 1997. Series C No. 35, para. 72; *Case of La Cantuta v. Peru*, supra note 8, para. 196 and *Case of Vargas-Areco v. Paraguay*, supra note 36, para. 102.

<sup>103</sup> Cf. Ruling of the Court N° 34 to remit the investigation to the ordinary jurisdiction, of July 7, 1998 (Record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, pages 1764 and 1765).

<sup>104</sup> Cf. *Case of Castillo-Petruzzi et al. v. Peru*. Judgment of May 30, 1999. Series C No. 52, para. 128; *Case of La Cantuta v. Peru*, supra note 8, para. 142; and *Caso Almonacid-Arellano et al. v. Chile*, supra note 17, para. 131.

<sup>105</sup> Cf. *Case of Miguel Castro-Castro Prison v. Peru*, supra note 17, para. 256; *Case of Goiburú et al. v. Paraguay*, Judgment on Merits, Reparations and Costs on September 22, 2006. Series C No. 153, supra note, para. 117; and *Case of Servellón-García et al. v. Honduras*. Judgment of September 21, 2006. Series C No. 152, para. 119.

identify the victim; b) to recover and maintain the evidentiary material related to the facts; c) to identify the possible witnesses and obtain their statements; d) to determine the cause, manner, place and moment in which the crime was committed, as well as any other pattern or practice that could have caused it; and e) in case of deaths, to establish a difference among natural, accidental, suicidal deaths and murder.

**c) Effectiveness of the procedure**

107. With respect to the effectiveness of the judicial proceedings initiated by the State, the Court points out that within one year of the occurrence of the facts, in the military criminal preliminary stage, there were only five statements rendered by militaries who allegedly witnessed the events. The scene of the crime was not investigated and there was not autopsy of the body. The body was only removed, which resulted in the impossibility of collecting important signs to prove, among other facts, the inexistence of confrontation and the shots. The procedural case file got lost and all the proceedings carried out by the Criminal Penal Court N° 34 between 1992 and 1998 were oriented to the reconstruction of the proceeding, without submission of new evidence. Finally, up to the moment of the transfer of the procedure to the ordinary jurisdiction, it became evident that there were large periods of procedural inactivity.

108. In addition, even though the State tried to look for the lost file, there was no evidence that proved that an investigation was carried out in order to determine the circumstances and the responsible for such loss. Likewise, the ordinary judicial authorities initiated the reconstruction of the lost case file not until May, 1992 and they could not reconstruct key proceedings, such as the minutes of the body removal and the registry regarding the weapons warehouse, allegedly found in the victim's power.

109. By the same token, the State did only investigated the murder of the victim, and left unclarified other crime related facts, such as the illegal detention of Mr. Escué Zapata, the body injuries, the illegal search in his residence, the cooperation of former soldiers, the concealment of facts and the alleged participation of indigenous and land owners in the crime. The victim's relatives and some of the militaries who participated in the mission that detained Mr. Escué Zapata rendered their statement of the events. Notwithstanding, the judicial authorities did not proceed to investigate these allegations and the same are still unresolved.

110. However, the Court acknowledges that the State, especially through the National Unit of Human Rights and International Humanitarian Law of the General Prosecutor's Office of the Nation, as from the year 2002, has started to carry out several proceedings with the purpose of investigating the facts and punishing the responsible. Thus, according to the statement rendered by the witness Yolanda Prado, non- disputed fact, it has been ordered, approximately, 25 judicial inspections and "near 55 statements."<sup>106</sup> Likewise, according to recent information provided by the State, it was possible to determine the individualization, capture, deprivation of liberty and prosecution of the alleged responsible.<sup>107</sup>

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<sup>106</sup> Cf. Statement rendered by Yolanda Prado Ruiz in the public hearing held before the Inter-American Court on January 29 and 30, 2007; provision for the determination of the merits from the preliminary investigation, of September 15, 2006 (Record of Appendixes to the answer of the complaint, Prosecutor's File, Folder 5, pages 3037 to 3084).

<sup>107</sup> Cf. Provision for the determination of merits from the preliminary investigation, of September 152006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 5, pages 3037 to 3084); Resolution of the specialized Prosecutor's Office 21 of the National Unit of Human Rights and International Humanitarian Law, of January 12, 2007 (Records of the merits, Volume III, pages 681 and 682); official letter from the criminal investigation N°. 1479 UDH to the criminal judges of the Circuit (records of the merits, Volume IV, pages 1171



111. Based on the foregoing, though it positively values the recent investigative phase of the State, the Tribunal observes that the domestic procedures and proceedings have not constituted effective recourse to ensure the access to justice, to an investigation and the punishment of the responsible as well as recourse to repair the consequences of the violations committed. Based on the foregoing considerations and taken into account the partial confession made by the State, the Court concludes that Colombia violated the rights established in Articles 8(1) and 25 of the American Convention to the detriment of Mr. Germán Escué Zapata and his next of kin, Mr. Etelvina Zapata Escué, Myriam Zapata Escué, Bertha Escuñe Coicue and Francya Doli Escué Zapata and Mr. Mario Pasu, Aldemar Escué Zapata, Yonson Escué Zapata, Ayénder Escué Zapata, Omar Zapata and Albeiro Pasu.

## XI

### ARTICLE 21 (RIGHT TO PROPERTY)<sup>108</sup>

#### OF THE AMERICAN CONVENTION

112. The representatives alleged that the State violated the right established in Article 21 of the Convention, due to the fact that members of the Army allegedly burst into the residence of Mr. Escué Zapata and broke several objects and stole some work tools. Furthermore, the representatives pointed out that State agents have also stolen "collective goods which were property of the Community," which will violate the right enshrined in Article 21 of the Convention to the detriment of the Community.

113. The Commission, in its application, did not expose any fact or legal argument related to an alleged theft in the residence of the victim's family or in the communal store. Nevertheless, during the public hearing held before this Court, it stated that the "plundering of objects from the communal store" would be proven, which, according to its point of view, would correspond to a violation of the right to property to the detriment of the Paez Community. Finally, in its final written arguments, the Commission pointed out that the Office of the Attorney General would not have investigated "the destruction and the plundering of the communal store," but it did not allege a violation of Article 21 of the Convention.

114. The State denied these charges and mentioned that there is no evidence that proves there was a "misappropriation of goods in the residence [...] or some place else." Furthermore, it sustained that the alleged theft of goods from the communal store is a new fact which was not asserted in the Commission's application.

115. As to the alleged violation of the right to property with respect to the facts occurred in the residence, the Court notes that these facts were not alleged by the Commission in its application. The Commission just pointed out that the militaries "burst into" the residence, but it did not mention that once inside, they broke several objects and stole another ones.

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and 1172), and provision of the Second Court for the Santander Circuit of Quilichao of May 23, 2007 (records of the merits, Volume IV, pages 1184 to 1186).

<sup>108</sup> Article 21 (Right to Property) of the American Convention, in its relevant part, provides that:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

As a consequence and according to the case-law of this Tribunal,<sup>109</sup> these facts cannot be analyzed.

116. As to the alleged misappropriation of goods from the communal store, the Court notes that the Commission has neither alleged this fact in its application. The Commission included it in the public hearing and pointed out that the Commission was unaware of the evidence of such fact at the time of the submission of the complaint "since it corresponds to the reopening of the investigation of the Public Prosecutor's office in March, 2006." In such regard, the State asserted that "the evidence of the alleged misappropriation of goods from the communal store [...] was in the case file of the Commission since the beginning of the trial before it."

117. The Court considers that, by virtue of the procedural equality principle, the legal certainty and the right to defense of the State, the Inter-American Court cannot allege facts that imply a change within the factual framework of the case, unless they are related to supervening facts. The alleged theft of the communal store does not constitute a supervening fact; otherwise, it appeared in the records of the case at hand before the Commission issued the Report No. 96/05,<sup>110</sup> and before the Commission lodged its application before the Court (*supra* par. 1).<sup>111</sup> Thus, the Court will not analyze these allegations inasmuch as they constitute new facts.

## XII

### ARTICLE 23(1) (RIGHT TO PARTICIPATE IN GOVERNMENT)<sup>112</sup> IN CONJUNCTION WITH

#### ARTICLE 1(1)

#### (OBLIGATION TO RESPECT RIGHTS) OF THE AMERICAN CONVENTION

118. The representatives, since their initial brief, have sustained that the death of Mr. Escué Zapata violates the right enshrined in Article 23(1) of the Convention "in its two-fold dimension." With respect to what they called "individual dimension," they sustain that the

<sup>109</sup> Cf. *Case of the "Five Pensioners" v. Peru*, *supra* note 96, para. 153; *Case of Bueno-Alves v. Argentina*, *supra* note 9, para. 121; *Case of Miguel Castro-Castro Prison v. Peru*, *supra* note 17, para. 162.

<sup>110</sup> Cf. Statement rendered by Mario Pasu, on May 27, 1999 (record of the Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1782); statement rendered by Romelia Pasu Vargas on May 27, 1999 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1787); statement rendered by Romelia Pasu Vargas on December 4, 2002 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1907); complaint statement rendered by Etelvina Zapata before the Cauca Regional Prosecutor's Office, on February 5, 1988 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 2, page 2062); statement rendered by Etelvina Zapata, on September 22, 1994 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 1, page 1741), and complaint filed by Etelvina Zapata, on February 5, 1988, before the Inter-American Commission (Commission's file, page 191).

<sup>111</sup> Cf. Statement rendered by Hidelbran Castro Quintero, on March 17, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2389); statement rendered by Rubén Darío Aricapa García, on March 18, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 3, page 2407), and action for inquiry of Evert Ospina Martínez, of April 1, 2006 (record of Appendixes to the answer of the complaint, Prosecutor's file, Folder 4, page 2545).

<sup>112</sup> Article 23 of the Convention, in its relevant part, provides that:

1. Every citizen shall enjoy the following rights and opportunities:
  - a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
  - b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
  - c) to have access, under general conditions of equality, to the public service of his country.

"exercise of the right to participate in the conduit of public affairs" of Mr. Escué Zapata has been violated, whereas with respect to the "social dimension," they allege there was a violation of the political rights of Paez People "to designate who will govern and take care, in accordance with their traditions, usages and customs, of their political affairs, as well as the right to influence and participate, through their representatives, in the making of decisions that affect the collective life project."

119. The Inter-American Commission did not declare the violation of the rights to participate in government of Mr. Escué Zapata or the members of the Community in the Report that it adopted in conjunction with the Article 50 of the Convention (*supra*, para. 1), neither did it submit allegations in that regard in the application. Nevertheless, in the public hearing and later on, in its final arguments, the Commission alleged that "the murder of Germán Escué did not only prevent the person from exercising its authority within the indigenous government, but also prevented the [N]asa People from exercising its right to participate in the conduit of public affairs through its representatives."

120. The State alleged that the right to participate in government of Mr. Escué Zapata or of the members of the Community has not been violated since Mr. Escué Zapata "was not, by the time of the facts, a political authority of the *Indigenous Resguardo de Jambaló*."

121. The Court shall analyze the alleged violation of Article 23(1) of the Convention in conjunction with Article 4(1) therein, to the detriment of Mr. Germán Escué only, since it is a legal issue asserted by the representatives since the first brief. The alleged violation of the political rights of the Community or its members will not be analyzed, since it now includes new victims who have not been identified by the Commission in the proper procedural time.

122. The justification of the alleged violation of Article 23 to the detriment of Mr. Escué Zapata is based on the fact that with his death he was prevented from exercising its "authority in the indigenous government." According to the case-law of the Tribunal, "the arbitrary deprivation of life suppresses the human being and, consequently, in these circumstances, it is not in order to invoke the alleged violation [...] of other rights embodied in the American Convention."<sup>113</sup> In addition, the political rights established in Article 23 of the American Convention have, like the other rights safeguarded in the Convention, a unique legal content. In the instant case, it has not been mentioned, apart from the victim's death, another fact that violates the specific legal content of Article 23.

123. In consideration of the foregoing, the Tribunal concludes that the violation of the rights established in Article 23(1) of the Convention, to the detriment of Mr. Escué Zapata, has not been proved.

124. Without prejudice to the above mentioned, the Court acknowledges that the loss of a leader for the Paez People meant a "dismemberment and damage to the whole community; frustration in view of the great confidence people gave him to help them having a good standard of living and feelings of loss in view of the collective efforts made to, with the support of the Community, develop its mission as a special person."<sup>114</sup>

125. The Court will analyze this situation when determining the corresponding reparations, taking into account that the State itself pointed out that "the measures for reparations provided by the State, such as, the recovery of the historical memory of the victim, the publication of the Judgment and the non-repetition obligations[,] are focused to repair the society as a whole and inside of it, the members of *Vereda de Vitoyó*."

<sup>113</sup> Cf. *Case of Bámaca-Velásquez v. Guatemala*, *supra* note 85, para. 180 and *Case of La Cantuta v. Peru*, *supra* note 8, para. 119.

<sup>114</sup> Cf. Anthropological expert's opinion, rendered by Esther Sánchez de Guzmán, on January 19, 2007 (records of the merits, Volume III, page 611).

## XIII

## REPARATIONS

**(APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)**

126. It is a principle of International Law that any violation of an international obligation that has caused damage entails the duty to provide adequate reparation.<sup>115</sup> The Court has based its decisions on this particular subject pursuant to the provisions of Article 63(1) of the American Convention.<sup>116</sup>

127. Within the framework of the search carried out by the State (*supra* para. 11 and 12), in accordance with the above considerations on the merits and the violations of the Convention declared to be such in the preceding chapters, as well as in the light of the criteria embodied in the Court's case law in connection with the nature and scope of the obligation to make reparations,<sup>117</sup> the Court will now address the requests for reparations made by the Commission and the representatives, as well as the State's observations thereof, in order to adopt the measures required to redress the damage.

**A) Injured Party**

128. The Court will now determine who are to be considered "injured parties" under Article 63(1) of the American Convention and, accordingly, the beneficiaries of the reparations set by the Court.

129. There is no controversy among the parties with respect to the fact that Germán Escué Zapata and his next of kin identified in the Commission's application, must be considered injured parties to the present case. In such regard, the Court considers Mr. Germán Escué Zapata an "injured party," in his capacity of victim of the violations which have been proven to be committed to his detriment, as a result of which he is entitled to the reparations as may be set by the Court. Similarly, such next of kin of Mr. Germán Escué Zapata as were declared victims in the present Judgment, namely, Bertha Escué Coicue (permanent companion), Myriam Zapata Escué (daughter), Mario Pasu (father), Etelvina Zapata (mother), Ayénder Escué Zapata (brother), Imar Escué Zapata (brother), Francya Doli Escué Zapata (sister), Julio Albeiro Pasu Zapata (brother), Aldemar Escué Zapata (brother) and Yonson Escué Zapata (brother) will also be considered "injured parties."

130. Finally, the Court notes that the representatives mentioned that the violations of the human rights committed against Mr. Escué Zapata "adversely affected [...] the Indigenous Community of *Resguardo de Jambaló*." Nevertheless, the representatives did not request that the Community be considered an injured party. The State sustained that the

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<sup>115</sup> Cf. *Case of Velásquez-Rodríguez v. Honduras*, *supra* note 18, para. 25; *Case of Bueno-Alves v. Argentina*, *supra* note 9, para. 128, y *Case of the Rochela Massacre v. Colombia*, *supra* note 7, para. 226.

<sup>116</sup> Article 63.1 of the Convention provides 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 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.

<sup>117</sup> Cf. *Case of Garrido and Baigorria v. Argentina*. Reparations, (Article 63(1) American Convention of Human Rights). Judgment of August 27, 1998. Series C No. 39, para. 43; *Case of Bueno-Alves v. Argentina*, *supra* note 9, para 129, and *Case of the Rochela Massacre v. Colombia*, *supra* note 7, para. 228.

Community has not been considered victim in the Commission's application in accordance with Article 44 of the Convention, "and that it was neither mentioned, along the procedure."

131. As pointed out by the Court in the previous paragraphs, the members of the Indigenous Community were not identified as victims in the Commission's application, as a result of which they have not been victims in the present Judgment and, consequently, will not be considered "injured party" under the terms of Article 63(1) of the Convention. However, the Court emphasizes that several of the measures for reparations which also constitute guarantees for non-repetition are general in nature and thus, will influence in the Community's members.

### **B) Compensation**

132. The Court's case law has developed the concept of pecuniary damage and the cases in which compensation therefore is due.<sup>118</sup>

133. In the instant case, the Commission stated that the victims "were forced to make substantial economic efforts to search for justice at the domestic level and to overcome the physical, mental and moral trauma provoked by the acts of the Colombian State."

134. Moreover, the representative requested the Court to order the State to compensate the victim's next of kin on account of the expenses incurred, which would include "the funerary rites, transportation, costs for the removal of the body from the place of the execution up to the Community" as well as the additional expenses related to all the non-judicial proceedings carried out "with the purpose of filing a complaint for the events" and those expenses necessary to request justice from the authorities. The representatives also requested compensation for "the loss of the communal store of the Escué Zapatas." At the same time, they requested financial reparations for the family on account of the "travel expenses, food, photocopies, faxes, telephone calls and all type of documentation" related to the "search for the truth in the procedures, in the investigative activities and expediting of the proceedings", on which they were assessed by the Collective Lawyers' Association "José Alvear Restrepo." Lastly, they alleged that the family has incurred in financial expenses as a result of the suffering, anguish and insecurity, both mentally and emotionally, for the loss of the victim. They specifically mentioned that the family, specially the parents, "had to receive medical treatment [...] for the impact occasioned by the facts and in particular, for the way the victim was torture[d] and murder[e]d." They requested that the State pay a total sum of US\$ 50.000 (fifty thousand United States dollars) for the benefit of the victim's parents and siblings and the same amount of money for the benefit of the victim's permanent companion and daughter.

135. The State suggested a domestic method of negotiation between the parties in order to reach an agreement over the compensation "based on the verification of the damages suffered by the dead victim and his relatives" and in the case they do not come to an extra-judicial agreement, the State requested that the expenses alleged by the representatives be properly proven. Said agreement was not entered into or has not been informed to the Tribunal. Consequently, the Court will proceed to determine the corresponding compensation.

136. In the first place, the Court observes that they incurred the expenses related to the investigative activities and the expediting of the proceedings as referred to by the representatives in order to have access to justice. Thus, the Court will analyze them in the

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<sup>118</sup> Cf. *Case of Bámaca-Velásquez v. Guatemala*. Reparations, supra note 11, para. 43; *Case of La Cantuta v. Peru*, supra note 8, para. 213; and *Case of Miguel Castro-Castro Prison v. Peru*, supra note 17, para. 423.

chapter related to the costs and expenses of the Judgment and not in the present section which is related to the pecuniary damages.<sup>119</sup>

137. As to the request for compensation on account of the loss of the communal store, the Court has not ruled over these facts; consequently, it will not determine a compensation for such concept.

138. Having analyzed the information received by the parties, the facts of the case, and its case law,<sup>120</sup> the Court observes that despite that the receipts of expenses submitted were not sufficient, it can be assumed that the victim's next of kin of the incurred in different expenses due to the death of the victim and the consequences they suffered after the illegal detention and extrajudicial death of Mr. Escué Zapata.

139. Furthermore, in consideration of the evidence furnished, the Court takes into account that the victim's parents had to bear the majority of the expenses. The victim's mother declared before the Tribunal that the trips she made in the search for justice or even to collect the mortal rests of his son had to do it "by not feeling hungry."<sup>121</sup> In addition, the Tribunal emphasizes the financial difficulties the victim's companion had to face all alone with her daughter, and the fact that she had to bear all the expenses that were once shared with his companion.<sup>122</sup> Moreover, as Myriam Zapata Escué stated before the Tribunal, she and her mother had to bear the medical expenses she needed for the physical discomfort she felt and keep felling, such as headaches and dizziness.<sup>123</sup>

140. Based on the foregoing, the Court considers it appropriate to set, in equity, the amount of US\$ 7.000 (seven thousand United States dollars) as compensation for the concept of pecuniary damages, for the parents and siblings of Germán Escué Zapata. Said amount will be delivered to Mrs. Etelvina Escué Zapata so that she, according to her criterion, usages and customs, distributes the sum of money among her husband and children. Furthermore, the Court set, in equity, the amount of US\$ 5.000 (five thousand United States dollars) for the permanent companion of the victim and their daughter as compensation for the concept of pecuniary damage. Such amount shall be equally divided between both beneficiaries.

141. This Court finds that the award for lost income includes income that the victim would have received during his or her remaining life expectancy. That amount, therefore, is considered the property of the deceased victim, but is delivered to his or her next of kin.<sup>124</sup>

142. The representatives requested the amount of US\$ 16.354,08 (sixteen thousand three hundred fifty-four United States dollars and eight cents) for the loss of income corresponding to Germán Escué for his position of Cabildo Governor. The State requested

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<sup>119</sup> Cf. *Case of the Serrano-Cruz Sisters v. El Salvador*, *supra*, note 20 para. 152; *Case of Bueno-Alves v. Argentina*, *supra* note 9, para. 193 and 194, and *Case of the Yakye Axa Indigenous Community v. Paraguay*. Judgment of June 17, 2005. Series C No. 125, para. 194.

<sup>120</sup> Cf. *Case of Ximenes-Lopes v. Brazil*. Judgment of July 4, 2006. Series C N<sup>o</sup>. 149, para. 226, and *Case of the Rochela Massacre*, *supra* note 7, para. 251; and *Case of Servellón-García et al. v. Honduras*, *supra* note 105, para. 177.

<sup>121</sup> Cf. Statement rendered by Etelvina Zapata in the public hearing held before the Court on January 29 and 30, 2007.

<sup>122</sup> Cf. Statement rendered by Bertha Escué Coicue on January 16, 2007 (record of the Merits, Volume III, page 607) and statement rendered by Etelvina Zapata in the public hearing held before the Court on January 29 and 30, 2007.

<sup>123</sup> Cf. Statement rendered by Myriam Zapata Escué in the public hearing held before the Court on January 29 and 30, 2007.

<sup>124</sup> Cf. *Case of the Rochela Massacre v. Colombia*, *supra* note 7, para. 246.

the determination of the loss of income based on the farming activity Germán Escué was doing at that moment.

143. The Tribunal observes that according to the representatives' petition regarding the loss of income corresponding to Mr. Escué Zapata, the victim had an income equivalent to the minimum salary at that time. Furthermore, the representatives offered some estimates in order to update it. Nevertheless, these estimates do not fulfil its purpose and substantially depreciate the amount that would correspond to the victim for the loss of income. Based on the foregoing and considering that there is no other fact on which to base in order to determine the exact amount corresponding to loss of income, the Court set, in equity, the amount of US\$ 55.000 (fifty-five thousand United States dollars) as compensation for the loss of income of Germán Escué Zapata.

144. This amount shall be distributed among the victim's next of kin in the following manner:

- a) Fifty percent (50%) of the compensation shall be delivered to the victim's daughter, Myriam Zapata Escué;
- b) Twenty-five percent (25%) of the compensation shall be delivered to Mrs. Bertha Escué Coicue, victim's permanent companion at the time of the victim's death, and
- c) Twenty-five percent (25%) of the compensation shall be, equally, distributed between Mrs. Etelvina Zapata and Mr. Mario Pasu, the victim's parents.

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145. Therefore, the Court set, in equity, the value of the compensations for the concept of pecuniary damages in the following terms:

<b>COMPENSATION FOR THE CONCEPT OF PECUNIARY DAMAGES</b>	
<i>Beneficiaries</i>	<i>Amount</i>
Germán Escué Zapata	US\$ 55,000.00
Bertha Escué Coicue (lifelong companion)	US\$ 2,500.00
Myriam Zapata Escué (daughter)	US\$ 2,500.00
Etelvina Zapata (mother)	US\$ 7,000.00
<i>Total</i>	<i>US\$ 67,000.00</i>

146. The State should make the payment of these amounts for the concept of pecuniary damages directly to the beneficiaries within the period of one year, as from the time of service of notice of the present Judgment upon the State under the terms of paragraphs 144 *supra* and 189 to 194 *infra*.

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147. The Court must now determine the compensation for non pecuniary damages pursuant to the Court's case law.<sup>125</sup>

148. The State acknowledged that "even though [the] life of [Germán Escué] does not have a monetary equivalent [...] it is willing to carry out a series of acts leading to a total compensation for the past events," and it also suggested an extrajudicial compromise agreement in order to set the compensation for the account of non pecuniary damage. If the case a settlement is not reached, the State requests the Court to set the compensations taking into account the parameters of compensation applied in the cases of the Ituango Massacres and the Pueblo Bello Massacres. By the same token, it requested the Court to consider that "the mortal rests of the victim were delivered to his family and the victim had no Christian burial." The agreement mentioned by the State was not entered into or has not been informed to the Tribunal.

149. The case law of this Tribunal has repeatedly established that a judgment constitutes *per se* a form of reparation.<sup>126</sup> However, in view of the circumstances of the instant case, the suffering that the violations have caused to the victims and their next of kin, the changes in the standards of living of the victim's next of kin, and in light of the other non-pecuniary consequences they bore, the Court deems it appropriate to award compensation for non pecuniary damages, assessed on equitable grounds.<sup>127</sup>

150. As the Court has held in similar cases,<sup>128</sup> the non pecuniary damage sustained by Germán Escué Zapata is evident, since it is human nature that a person subjected to illegal detention, ill-treatment and extrajudicial execution suffers from deep pain, anguish, terror, impotence and insecurity. As a result, this damage need not be proven.

151. As to the relatives of Germán Escué Zapata, it has been established that they are victims of the violation of human rights, under the terms of paragraphs 80, 96 and 111 of this Judgment.

152. The testimonies of the next of kin of the victim rendered in this proceedings show how the facts of the case impacted on the different spheres of their lives: Physical, mental, family and financial health. In this sense, the victim's daughter stated before this Tribunal that when they told her what happened to this father "it was very sad everything I heard, it made me feel [...] very bad [...] the suffering of my father, my uncles, of my family" and since then, "when they talk about my father, I always feel bad; sometimes, it makes me cry; I have being crying alone, it has been very tough for me."<sup>129</sup> Furthermore, the victim's daughter had to work since she was 10 years of age in order to help her mother to deal with the difficulties she was facing. In her own words: "Working was very hard, on Saturdays

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<sup>125</sup> Cf. *Case of Cantoral-Benavides v. Peru*. Reparations. Judgment of December 3, 2001. Series C No. 88, para. 53 and 57. *Case of La Cantuta v. Peru*, supra note 8, para. 216; *Case of Miguel Castro-Castro Prison v. Peru*, supra note 17, para. 430.

<sup>126</sup> Cf. *Case of Suárez-Rosero v. Ecuador*. Reparations, (Article 63(1) American Convention of Human Rights). Judgment of January 20, 1999. Series C No. 44, para. 72; *Case of Bueno-Alves v. Argentina*, supra note 9, para. 203, and *Case of the Rochela Massacre v. Colombia*, supra note 7, para. 264.

<sup>127</sup> Cf. *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala*; Reparations (Article 63(1) American Convention of Human Rights). Judgment of May 26, 2001. Series C No. 77, para. 84; *Case of La Cantuta v. Peru*, supra note 8, para. 219; *Case of Miguel Castro-Castro Prison v. Peru*, supra note 17, para. 431.

<sup>128</sup> Cf. *Case of Neira-Alegría et al. v. Peru*. Reparations. Judgment of September 19, 1996. Series C No. 27, para. 57, *Case of the Rochela Massacre v. Colombia*, supra note 7, para. 256, and *Case of La Cantuta v. Peru*, supra note 8, para. 217.

<sup>129</sup> Cf. Statement rendered by Myriam Zapata Escué in the public hearing held before the Court on January 29 and 30, 2007.



and Sundays, we had no holidays to seat for a while and not work,"<sup>130</sup> and besides, the difficulties she faced to study since the school she went was two hours of way on foot.<sup>131</sup> The victim's mother also explained to the Court that after the death of her son she "felt very bad, [s]he [f]elt finished, she [h]ad no hungry, she had headaches and she was ill, [s]he was very exhausted."<sup>132</sup>

153. Furthermore, though the Court positively values the delivery of the victim's mortal rests to his next of kin and the Community, which made it possible to provide a burial according to the traditions, usages and customs of Paez People, it takes into account that the relatives had to wait four years until the State delivered the mortal remains of Mr. Escué Zapata. This long waiting had moral and spiritual repercussions in the relatives, inasmuch as according to Nasa culture,

Since the Nasa child is born, the umbilical cord is sowed in the Mother Earth [...] in order for the life to sprout. But when it dies, we also sow it, we do not bury it, and so there is the life. Taking him means to disrespect the culture, the Mother Earth. Taking off the bosom is cutting the womb of the woman who created him and saw him grow. It is a huge cultural violation, and it generates the desarmonization and uncontrol of the territory.<sup>133</sup>

154. Based on the foregoing, the Court deems it appropriate to set, in equity, the amount of US\$ 50,000.00 (fifty thousand United States dollars) as compensation for the non pecuniary damages caused to Mr. Germán Escué Zapata as a result of the violations of the human rights as determined in this Judgment.

155. As to the next of kin of Mr. Escué Zapata, the Court orders the payment of the following amounts:

- a) US\$ 25,000.00 (twenty-five thousand United States dollars) to the victim's daughter, Myriam Zapata Escué, for the suffering caused as a result of the loss of his father, increased as her suffering was aggravated by her condition of minor;<sup>134</sup>
- b) Us\$ 20,000.00 (twenty thousand United States dollars) to the victim's permanent companion, Bertha Escué Coicue, for the suffering caused as a result of the loss of her life companion.
- c) Us\$ 20,000.00 (twenty thousand United States dollars) to Mrs. Etelvina Escué Zapata and the exact same amount to Mr. Mario Pasu, the victim's parents, for the suffering caused as a result of the loss of their son, aggravated by the unsuccessful proceedings they carried out in the search for justice and,
- d) US\$ 5,000.00 (five thousand United States dollars) to each of the victim's siblings.

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<sup>130</sup> Cf. Statement rendered by Myriam Zapata Escué in the public hearing held before the Court on January 29 and 30, 2007.

<sup>131</sup> Cf. Statement rendered by Myriam Zapata Escué in the public hearing held before the Court on January 29 and 30, 2007.

<sup>132</sup> Cf. Statement rendered by Etelvina Zapata in the public hearing held before the Court on January 29 and 30, 2007.

<sup>133</sup> Cf. Statement rendered by Flor Ilva Trochez in the public hearing held before the Court on January 29 and 30, 2007.

<sup>134</sup> Cf. *Case of La Cantuta v. Peru*, *supra* note 8, *para.* 219.

156. Based on the foregoing, the compensation for non pecuniary damages set by the Court is as follows:

<b>COMPENSATION FOR THE CONCEPT OF NON- PECUNIARY DAMAGES</b>	
<b>Beneficiaries</b>	<b>Amount</b>
Germán Escué Zapata	US\$ 50,000
Bertha Escué Coicue (lifelong companion)	US\$ 20,000
Myriam Zapata Escué (daughter)	US\$ 25,000
Mario Pasu (father)	US\$ 20,000
Etelvina Zapata Escué (mother)	US\$ 20,000
Ayénder Escué Zapata (brother)	US\$ 5,000
Omar Zapata (brother)	US\$ 5,000
Francya Doli Escué Zapata (sister)	US\$ 5,000
Julio Albeiro Pasu Zapata (brother)	US\$ 5,000
Aldemar Escué Zapata (brother)	US\$ 5,000
Yonson Escué Zapata (brother)	US\$ 5,000
<b>Total</b>	<b>US\$ 165,000</b>

157. The amount set for the benefit of Mr. Escué Zapata shall be delivered to his relatives according to the paragraph 144 of his Judgment.

158. The State should make the payment of these amounts for the concept of non pecuniary damages directly to the beneficiaries within the period of one year, as from the time of service of notice of the present Judgment, under the terms of paragraphs 189 and 194 *infra*.

**C) Measures of satisfaction and guarantees of non repetition**

159. The Court highlights the measures that the State has been adopting for the benefit of the indigenous peoples, to wit, the dialogue and the creation of public policies aimed at protecting the rights of the indigenous peoples, activities to learn more about the indigenous culture and other legislative, judicial administrative measures aimed at guaranteeing the rights of these peoples. Notwithstanding, the Court deems it appropriate to set non monetary satisfaction measures for the next of kin of the victim, aimed at redressing non pecuniary damage and it will also order non repetition measures of public import or impact.

a) *Obligation to investigate the facts that amounted to the violations of the case at hand, and to identify, prosecute and punish those responsible*

160. The Commission pointed out that "given the particular [...] seriousness of the human rights violations occurred in the present case, a complete reparation requires the State investigate with due diligence the facts, in order to identify, prosecute and punish the responsible for the detention, torture and execution of Germán Escué Zapata."

161. Furthermore, the representatives requested the Court to "order the Colombian State to use all the means possible to carry out a serious, impartial and effective investigation within a reasonable time, in order to prosecute the responsible [...] and punish them in the appropriate form."

162. The State reiterated "its commitment to continue with the criminal proceedings in process in order to punish the responsible for the facts of the case at hand."

163. The Court positively values the State's will to continue with the criminal proceedings as well as the investigative proceedings carried out recently, which turned out in the prosecution of three militaries as alleged co-perpetrators of "aggravated murder" committed against the victim. Nevertheless and without prejudice to the foregoing, the Tribunal considers that such measure does not imply *per se* an effective punishment of the responsible. In addition, as has been mentioned, there are other facts related to said murder which have not been investigated (*supra*, para. 109).

164. The Court has established in this Judgment that the domestic proceedings initiated in the present case have not constituted effective recourses to guarantee a true access to justice for the victim's next of kin, within a reasonable time, comprising the enlightening of the facts, the investigation and, when appropriate, the punishment of the responsible and the reparations of the violations.

165. As has been stated by the Court, the State is under a duty to use all means available to fight the situation of impunity surrounding the instant case, as impunity fosters the chronic repetition of human rights violations and the total defenselessness of the victims and their next of kin, who are entitled to learn about truth of the facts.<sup>135</sup> Upon being acknowledged and enforced in a specific situation, this right to truth becomes a relevant means for redress.<sup>136</sup> Thus, in the instant case, the right to truth creates a fair expectation in the victims that the State is required to satisfy.<sup>137</sup>

166. Based on the foregoing, as well as the case law of this Tribunal,<sup>138</sup> the Court orders the State to carry out effectively the criminal proceedings in process and any future proceedings in order to determine the corresponding responsibilities for the facts of the case and to apply the appropriate legal provisions. Furthermore, Colombia, by means of its

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<sup>135</sup> Cf. *Case of Velásquez-Rodríguez v. Honduras*, *supra* note 18, para. 174; *Case of Bueno-Alves v. Argentina*, *supra* note 9, para. 90; *Case of Miguel Castro-Castro Prison v. Peru*, *supra* note 17, para. 440.

<sup>136</sup> In different testimonies, the victim's relatives requested the Court to order the State to administer justice, in this way. Cf. Affidavit rendered by Bertha Escué Coicue (records of the merits, Volume III, page 608), affidavit rendered by Mario Pasu (records of the merits, Volume III, page 647), affidavit rendered by Ayénder Escué Zapata (records of the merits, Volume III, page 652), affidavit rendered by Aldemar Escué Zapata (records of the merits, Volume III, page 659) and statement rendered by Myriam Escué Zapata in the public hearing held before the Court on January 29 and 30, 2007.

<sup>137</sup> Cf. *Case of Castillo-Páez v. Peru*, Reparations. Judgment of November 27, 1998. Series C No. 4, para. 90; *Case of La Cantuta v. Peru*, *supra* note 8, para. 222; *Case of Miguel Castro-Castro Prison v. Peru*, *supra* note 17, para. 440.

<sup>138</sup> Cf. *Case of Baldeón-García v. Peru*, *supra* note 38, para. 199; *Case of La Cantuta v. Peru*, *supra* note 8, para. 228; *Case of Miguel Castro-Castro Prison v. Peru*, *supra* note 17, para. 440 and 441.

competent institutions, must exhaust the lines of investigations with respect to the execution of Mr. Escué Zapata (*supra* para. 63 and 109) in order to establish the truth of the facts. The State must ensure that the victim's relatives have full access and capacity to act in all the stages and instances of said investigations and proceedings, in accordance with the domestic law and the rules of the American Convention. The results of such proceedings must be disclosed to the public by the State, so that the Colombian society and the Paez Indigenous Community in particular, can learn what really happened in the present case.

*b) Communal development fund in memory of Germán Escué Zapata*

167. The Commission requested the Court to order, as a satisfaction measure, "the designation of a street, a park or school of Jambaló Community after Germán Escué Zapata." Moreover, the representatives of the victim and his relatives suggested that "a monument is a way of reparation for the relatives of Germán Escué [Zapata] and the members of the Community to which he belonged, inasmuch as it sends a message to the society suggesting a disapproval of the facts and it also implies the recovery of the memory of an indigenous leader to praise with nostalgia, as a victim of human rights violations." The State undertook to "place a slab in the place to be determined, with the consent of the victim's relatives."

168. The Court positively values the State's will to place a slab in memory of the facts and the victim; notwithstanding, it suggests that the homage to the memory of Mr. Escué Zapata must be done through beneficial works for the benefit of the Community in which he exercised a kind of leadership. To that end, the Court considers the State must allocate, within a period of one year as from the service of notice of this Judgment, the amount of US\$ 40,000.00 (forty thousand United States dollars) to a fund named after Germán Escué Zapata, so that the Community can invest it in collective interests' service or works for its own benefit, in accordance with their consultations, decisions, usages, customs and traditions, independently of the public works put aside in the national budget for that region.

*c) Measures to guarantee the higher education of Myriam Zapata Escué*

169. The representatives highlighted the negative effects that the facts of the present case caused to the victim's daughter, who, with the death of his father, "lost many opportunities that could have had in her life." Considering the above, they requested a scholarship for higher studies as "reparation for the life project and a restitution of what Myriam could have." The State confirmed its will to comply with the granting of an university scholarship for the victim's daughter "in a well-known academic center chosen by common consent between the victim and the State."

170. The Court acknowledges the suffering of the victim's daughter and the difficulties that she has to overcome along her life in order to finish her primary and secondary studies; difficulties that are still evident in the stage where she shows her will and desire to study an university career.<sup>139</sup> Therefore and considering the parties' petitions, the State must grant to Myriam Zapata Escué a scholarship for university studies in a Colombian public university chosen by common consent between her and the State. The scholarship must cover all the expenses until the completion of the course of studies, the academic material as well as the lodging and subsistence. The State must, also, bear the expenses of the transportation from

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<sup>139</sup> Cf. Statement rendered by Myriam Zapata Escué in the public hearing held before the Court on January 29 and 30, 2007.

the city where the beneficiary will study until the Community in order to keep the ties with the community, the traditions, usages and customs as well as the permanent contact with her family without further difficulties. Said scholarship should be in force immediately as from the service of notice of the present Judgment, so that the beneficiary starts her studies in the next university period, if she wishes so.

*d) Mental and psychological treatment*

171. The representatives requested the Court "to order the adoption [...] the necessary and urgent measures to provide high level medical and mental treatment, and for the necessary time, to the [victim's] relatives," inasmuch as "despite the passage of time, their emotional state, mental health, mental integrity and general health condition are still affected." Moreover, the State confirmed that "it will be able to provide those services [to the family of Germán Escué Zapata] as long as the medical services do not affect the vision that the indigenous people have regarding the effects of ancestral medicines."

172. The Court considers, as in other cases,<sup>140</sup> that it is necessary to provide for a measure of reparation seeking to relieve the bodily and psychological suffering of the victim's relatives. To that end, the Court orders the State to provide the above-mentioned individuals, with their prior consent and for the necessary period of time from the date the notice of this Judgment is served upon them, free of charge, with any necessary medical, psychiatric and psychological treatment which shall comprise provision of medicines. The treatment must be provided taking into account the specific conditions and needs of each individual, specially their customs and traditions in order to provide the corresponding appropriate treatment.

*e) Publication of the Judgment*

173. The representatives requested the publication of the Judgment, previous consent of the relatives, in at least, two nationwide daily newspapers, included the newspaper "El Tiempo," as well as in a widely circulated newspaper of the Department of Cauca. They also requested that these publications be made in Spanish and in Nasa Yute, language of Paez people "so that every member of the community can have access to the information." Furthermore, the State took the responsibility of "publishing the [J]udgment as a measure of satisfaction for the victim's relatives and as a guarantee of non-repetition of such facts" and to publish it "in the language used by the Paez."

174. As ordered in other cases,<sup>141</sup> and as a measure of satisfaction, the State shall publish at least once in the Official Gazette and in another national daily newspaper, the paragraphs 1, 5, 11 to 13, 20, 34 to 39, 41, 69, 70, 72, 78, 80, 86, 96 and 111 of the present Judgment, without the corresponding footnotes, and the operative paragraphs therein. Likewise, the State should translate the mentioned paragraphs and the operative paragraphs into Nasa Yute and publish it in a widely circulated newspaper of the Cauca

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<sup>140</sup> Cf. *Case of La Cantuta v. Peru*, *supra* note 8, *para.* 238.

<sup>141</sup> Cf. *Case of Blanco-Romero et al. v. Venezuela*. Judgment of November 28, 2005. Series C No. 138, *para.* 101; *Case of Bueno-Alves v. Argentina*, *supra* note 9, *para.* 215 and *Case of La Cantuta v. Peru*, *supra* note 8, *para.* 237.

area, specifically one of the area in which the family of Germán Escué Zapata live. Said publications shall be made within six months following notice of this Judgment.

f) *Public act of acknowledgement of responsibility*

175. The representatives of the victim and the relatives requested a "public apology from the State, in which it should acknowledge the facts and accept the responsibility for the serious violations of human rights committed by its agents to the detriment of Germán Escué and his relatives."

176. The State pledged to carry out such act in the terms established by the Court and it also stated its will to carry it out in Resguardo de Jambaló, organized upon common agreement with the victim's relatives. Furthermore, it requested the Court to take into consideration "the petition made by the Commission in the public hearing regarding the apology from the State to Mrs. Etelvina Zapata and Myriam Zapata Escué, as a first step for the recovery of the historical memory of the victim and the satisfaction of his relatives."

177. As mentioned previously (*supra*, para. 20), the Court truly values the acknowledgement of responsibility made by the State during this proceedings, as well as the will displayed to carry out the public act of acknowledgement of responsibility. As established in other cases,<sup>142</sup> the Court finds that the State must make a public acknowledgement of liability, as a measure of reparation for the damage caused to the victim and his relatives, previously agreed upon by the relatives and the representatives, in relation to the violations declared in this Judgment. That public acknowledgement must be made in Resguardo de Jambaló, in a public ceremony and must count on the participation of the State's highest-ranking authorities. Furthermore, that act must be made in the presence of leaders of the Community<sup>143</sup> and the victim's relatives, if they wish so. The State must provide the means to facilitate the presence of these persons in the said act.<sup>144</sup> Also, the Colombian State must conduct this act in both Spanish and in Nasa Yute. In such act, the State should take into account the traditions, usages and customs of the members of the Community. To that end, the State shall carry out this activity within one year of notification of this Judgment.

g) *Creation of a Chair*

178. The representatives requested the creation of a Special Fund of University Scholarships, named after the victim, "for the members of Indigenous Communities who have been victims of human rights violations," as a way of honoring the memory and as "a means of guaranteeing the non-repetition of the similar events;" said chair "shall be composed by a Nasa Chair as life history of the elderly." The State, in addition, has informed that "it has been speeding up some approaches with the University of Cauca in order to create an university chair named after Germán Escué Zapata."

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<sup>142</sup> Cf. *Case of Carpio-Nicolle et al. v. Guatemala*, Judgment of November 22, 2004. Series C No. 117, para. 136; *Case of La Cantuta v. Peru*, *supra* note 8, para. 235; *Case of Miguel Castro-Castro Prison v. Peru*, *supra* note 17, para. 445.

<sup>143</sup> Cf. *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations, (Article 63(1) American Convention of Human Rights). Judgment of November 19, 2004. Series C No. 116, para. 100; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, *supra* note 20 para. 201; and *Case of the Serrano-Cruz Sisters v. El Salvador*, *supra*, note 20 para. 194.

<sup>144</sup> Cf. *Case of the Plan de Sánchez Massacre v. Guatemala*. Reparations, *supra* note 147, para. 100; and *Case of the Serrano-Cruz Sisters v. El Salvador*, *supra*, note 20 para. 194.

179. The Court accepts it and takes notes of the approaches that the State has been making.

*h) Other petitions of reparation*

180. The representatives requested the Court to order the State "the implementation of protection programs for leaders of indigenous communities, not just for their public safety but also to protect their ancestral culture, customs, and traditions of jurisdictional autonomy and world vision of such groups."

181. Furthermore, they requested the adoption of the necessary measures to grant to the Indigenous Community, within a reasonable time, the rights over the ancestral territory they own.

182. In addition, they requested the Court to order the State to create a plan that facilitates the restructuring of the Community's plan of life "leading to the recovery of their customs, usages and traditions, in order for the indigenous to cohabit accepting the indigenous form of development for all [...] without the State interference. Moreover, in relation to this issue, they requested that the mortal remains of Germán Escué be "sowed in the Mother Earth, in a place of Resguardo called 'Reserva de Vida Germán Escue,' recognized by the Government as a protected area, with the consent of the Indigenous Community of Jambaló." At last, they asked for "help" in order to restructure the 19 communal stores and the 19 communal enterprises they alleged to have lost as a consequence of the execution of Germán Escué; to rebuild the space for ceremonies of spiritual authorities; to recover the historical objects of Nasa People by means of the construction of a historic center in *Vereda de Vitojó* and the strengthening of the Communal Assemblies.

183. Finally, the representatives as well as the victim's daughter, requested in the public hearing that a "book about the life of [Germán Escué] be written<sup>145</sup> published in Spanish and in Nasa Yute; said petition was disputed by the State.

184. Furthermore, the Commission requested during the public hearing held before this Tribunal the Court to order the State to "foster the formation processes of young leaders in Resguardo de Jambaló."<sup>146</sup> Said petition was disputed by the State.

185. The Court considers that the representatives and the Commission's petitions are not related to the facts subject to analysis of the present case. Therefore, the Court decides not to grant them.

**D) Costs and Expenses**

186. As held by the Court in prior cases, costs and expenses are included within the concept of reparation as enshrined in Article 63(1) of the American Convention.<sup>147</sup>

<sup>145</sup> Cf. Statement rendered by Myriam Zapata Escué in the public hearing held before the Court on January 29 and 30, 2007.

<sup>146</sup> Myriam Escué also expressed her wish, during the public hearing, for the formation of "a group of young leaders in the Resguardo named after [his father's]. Cf. Statement rendered by Myriam Zapata Escué in the public hearing held before the Court on January 29 and 30, 2007.

<sup>147</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations*, supra note 117, para. 79; *Case of Bueno-Alves v. Argentina*, supra note 9, para. 216, and *Case of the Rochela Massacre v. Colombia*, supra note 7, para. 304.

187. The Court takes into account that the victims and its representatives incurred in expenses during the domestic and the international proceedings of the case. Furthermore, the representatives requested the Court to consider that the victim's next of kin incurred in "expenses related to the search for truth in the proceedings and in the activities of judicial investigation and expediting of the procedures." Moreover, they stated that the Lawyer's Collective Association "José Alvear Restrepo" has been representing the victim's relatives since 1997 at the domestic level as well as before the Inter-American Commission and his Court. They requested the reimbursement of US\$ 38,563.84 (thirty-eight thousand five hundred sixty-three United States dollars and eighty-four cents).

188. To such end, the Court, taking into account the evidence furnished and following its case law,<sup>148</sup> deems it appropriate to set, in equity, the amount of US\$ 12,000 (twelve thousand United States dollars), to be reimbursed by the State to Mrs. Etelvina Zapata for the expenses incurred in order to start proceedings before the domestic authorities, as well as for those arising from the proceedings started before the Inter-American system for the protection of human rights. Mrs. Zapata will distribute the amount reimbursed among its relatives and representatives, according to the help they provided along the proceedings.

#### **E) Method of Compliance with the Payments Ordered**

189. The compensatory amounts and the reimbursement of costs and expenses set in favor of the relatives who were declared victims herein shall be paid directly to them. Should any of these persons die before the pertinent above compensatory amounts are paid thereto, such amounts shall inure to the benefit of their heirs, pursuant to the provisions of the applicable domestic legislation.<sup>149</sup>

190. The amount to be paid to Mr. Escué Zapata shall be distributed among its relatives pursuant to paragraph 144 of this Judgment.

191. The State must discharge its pecuniary obligations by tendering United States dollars or an equivalent amount in the Colombian legal currency, at the New York, USA exchange rate between both currencies prevailing on the day prior to the day payment is made.

192. If, due to reasons attributable to the beneficiaries of the above compensatory amounts, they were not able to collect them within the period set for that purpose, the State shall deposit said amounts in an account held in the beneficiaries' name or draw a certificate of deposit from a reputable Colombian financial institution, in US dollars and under the most favorable financial terms allowed by the legislation in force and the customary banking practice in Colombia. If after ten years compensation set herein were still unclaimed, said amounts plus accrued interests shall be returned to the State.

193. The amounts allocated in this Judgment as compensation and reimbursement of costs and expenses shall be delivered to the beneficiaries in their entirety in accordance with the provisions hereof, and may not be affected, reduced, or conditioned on account of current or future tax purposes.

194. Should the State fall into arrears with its payments, Colombian banking default interest rates shall be paid on the amounts due.

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<sup>148</sup> Cf. *Case of the Pueblo Bello Massacre v. Colombia*, *supra* note 19, para. 390; *Case of Bueno-Alves v. Argentina*, *supra* note 9, para. 219 and *Case of La Cantuta v. Peru*, *supra* note 8, para. 243.

<sup>149</sup> Cf. *Case of Myrna Mack-Chang v. Guatemala*, *supra* note 8, para. 294; *Case of Bueno-Alves v. Argentina*, *supra* note 9, para. 222 and *Case of La Cantuta v. Peru*, *supra* note 8, para. 247.



195. In accordance with its consistent practice, the Court retains the authority deriving from its jurisdiction and the provisions of Article 65 of the American Convention, to monitor full compliance with this Judgment. The instant case will be closed once the State has complied in full with all the provisions herein. Within a term of one year as from the date notice the Judgment is served, the State shall submit to the Court a report on the measures adopted in order to comply with the Judgment.

#### **XIV**

#### **OPERATIVE PARAGRAPHS**

196. Therefore:

**THE COURT,**

**DECLARES,**

Unanimously that:

1. It accepts the acknowledgment of international responsibility made by the State, under the terms of paragraphs 11 to 21 of this Judgment, and establishes the violation of the rights to life, humane treatment and personal liberty as enshrined in Articles 4, 5(1), 5(2), 7(1) and 7(2) of the American Convention on Human Rights, in relation to the obligation to respect rights as set forth in Article 1(1) thereof, to the prejudice of Mr. Germán Escué Zapata, under the terms of paragraphs 34 to 42, 69 to 76 and 82 to 87 of this Judgment.

2. It accepts the acknowledgment of international responsibility made by the State, under the terms of paragraphs 11 to 21 of this Judgment, and establishes the violation of the rights to humane treatment, as enshrined in Article 5(1) of the American Convention on Human Rights, in relation to the obligation to respect rights as set forth in Article 1(1) thereof, to the prejudice of Mrs. Etelvina Zapata Escué, Myriam Zapata Escué, Bertha Escué Coicue and Francya Doli Escué Zapata and Mr. Mario Pasu, Aldemar Escué Zapata, Yonson Escué Zapata, Ayénder Escué Zapata, Omar Zapata and Albeiro Pasu, under the terms of paragraphs 77 to 80 of this Judgment.

3. The State has violated the right to inviolability of private residence, enshrined in Article 11(2) of the American Convention on Human Rights, in relation to the obligation to respect rights as enshrined in Article 1(1) thereof, to the prejudice of Mr. Germán Escué Zapata and his next- of- kin, Mrs. Etelvina Zapata Escué, Myriam Zapata Escué and Bertha Escué Coicue and Mr. Mario Pasu and Aldemar Escué Zapata, under the terms of paragraphs 88 to 97 of this Judgment.

4. The State violated the right to a fair trial and judicial protection, enshrined in Articles 8(1) and 25, respectively, of the American Convention on Human Rights, in relation to the obligation to respect rights as enshrined in Article 1(1) thereof, to the prejudice of Mr. Germán Escué Zapata and his next of kin, Mrs. Etelvina Zapata Escué, Myriam Zapata Escué, Bertha Escué Coicue and Francya Doli Escué Zapata and Mr. Mario Pasu, Aldemar

Escué Zapata, Yonson Escué Zapata, Ayénder Escué Zapata, Omar Zapata and Albeiro Pasu, under the terms of paragraphs 42, 73 to 76, 87 and 97 to 111 of his Judgment.

5. The Court will not analyze the alleged violation of Article 21 of the American Convention on Human Rights, under the terms of paragraphs 112 to 117 of this Judgment.
6. The State has not violated Article 23 of the American Convention on Human Rights.
7. This Judgment is in itself a form of redress.

**And Decides:**

Unanimously that:

8. The State must pay the amounts set in this Judgment as compensation for pecuniary damages, non pecuniary damages, and reimbursement of costs and expenses within one year as from notice of this Judgment, under the terms of paragraphs 189 to 194 thereof.
9. The State must conduct effectively the necessary criminal proceedings, still in process and all future investigations so that those responsible for the facts of the instant case be identified and punished as provided by law, under the terms of paragraph 166 of this Judgment.
10. The State must allocate the amount established in paragraph 168 of this Judgment, within one year as from notice of this Judgment, to a fund named after Germán Escué Zapata, so that the Community of Jambaló can invest it in works or services of collective interest for their benefit, under the terms of paragraph 168 therein.
11. The State must grant to Myriam Zapata Escué, as soon as practicable, a scholarship for university studies, under the terms of paragraph 170 of this Judgment.
12. The State must provide, free of charge, the specialized medical, psychiatric and mental appropriate treatment required by Mrs. Etelvina Zapata Escué, Myriam Zapata Escué, Bertha Escué Coicue and Francya Doli Escué Zapata and Mr. Mario Pasu, Aldemar Escué Zapata, Yonson Escué Zapata, Ayénder Escué Zapata, Omar Zapata and Albeiro Pasu, under the terms of paragraph 172 of this Judgment.
13. The State must publish once, within six months, in the official gazette and in another newspaper with national circulation, and also in a newspaper of widely circulation of the Department of Cauca, the chapter on the proven facts in this judgment, without the corresponding footnotes, and the operative paragraphs of the judgment, in the terms of paragraph 174 hereof.
14. The State must organize a public act to acknowledge international responsibility for the facts of this case, within one year as from notice of this Judgment, in the terms of paragraphs 177 thereof.
15. This Court shall monitor the full compliance with the Judgment and shall deem the instant case closed once the State has fully complied with the provisions therein. Within a term of one year as from the date notice the Judgment is served, the State shall submit to the Court a report on the measures adopted in order to comply with the Judgment.

Judges García Ramírez and Ventura Robles informed the Court of their separate opinions, which accompany this Judgment.

Sergio García Ramírez  
President

Cecilia Medina Quiroga

Manuel E. Ventura Robles

Diego García-Sayán

Leonardo A. Franco

Margarette May Macaulay

Rhadys Abreu Blondet

Diego Eduardo López Medina  
Judge *ad hoc*

Pablo Saavedra Alessandri  
Secretary

So ordered,

Sergio García Ramírez  
President

Pablo Saavedra Alessandri  
Secretary

**SEPARATE OPINION OF JUDGE GARCIA RAMÍREZ REGARDING THE JUDGMENT  
OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS  
IN THE CASE OF ESCUÉ-ZAPATA V. COLOMBIA, OF JULY 3, 2007**

1. In the Order of this case as well as in other cases examined during the 76<sup>th</sup> Period of Regular Sessions (July 2007), such as the *Case of Cantoral-Huamaní and Garcia-Santa Cruz v. Peru* (Judgment of July 10, 2007), the Inter-American Court has shown its criterion regarding some interesting lines of thought with the connection that exists between the general duty to guarantee the rights and freedoms established in Article 1(1) of the American Convention, the Articles that the Convention recognizes as "substantive rights" (for example, Article 4: Life; Article 5: Humane Treatment; Article 7: Personal Liberty, among others) and those that refer to the so-called "procedural rights" or even better, "instrumental rights" (for example, Article 8: Access to justice in general; Article 25: Right to judicial protection of the fundamental rights, without prejudice of other rights which are also "procedural" or "instrumental" enshrined in articles assigned to the "substantive" category, such as the case of Article 4(6): Extraordinary means for amnesty, pardon, or commutation of sentence; and 7(6): Judicial control over the lawfulness of the detention, corresponding in general to *habeas corpus*). In previous occasions I have made reference to these issues and other issues related to them; for instance, according to my "Overview of the criminal due process of (procedural) law in the case law of the Inter-American Court" ("*Panorama del debido proceso –adjetivo- penal en la jurisprudencia de la Corte Interamericana*"), published in *Latin American Constitutional Law Yearbook*, Konrad Adenauer Institute, Uruguay, year 12, Volume II, 2006, pages 1111 and subs.

2. Since the first rulings on adversarial issues, the Court has highlighted that Article 1(1) of the American Convention vests a duty of protection in the State – or, if preferred, a double obligation -, with regard to the human rights enshrined in the Convention: a) on the one side, to respect the rights and liberties; b) on the other side, to guarantee its full and free exercise. This second duty, commonly called "obligation to guarantee", implies, among other things, that the State "makes justice" within the domestic level. It is worth mentioning that there is a duty prior to - naturally: for the need of concept-both statements: The obligation to "recognize" the rights and liberties established in the Convention, even though that recognition derives from the inclusion of such rights and liberties in the domestic body of law, or even if it results from the direct application of such recognition to the domestic body of law.

3. The foregoing means, with regard to the possible criminal consequence of the violations committed (regularly, the violations of human rights are gathered in criminal definitions, taking into account the fact they imply an intense infringement of the legal interests of the higher hierarchy), that the State investigate such violations and prosecute the responsible (obligation of means). This investigation serves the ends immediately related to the victim, as a way of redress (furthermore, they provide satisfaction to the relatives) and aims at the prevention of future violations that could multiply sheltered by impunity: Non-repetition of violations. The compliance with the duty of guarantee corresponds, thus and in certain manner, to what in other order is called "general prevention."

4. Up to the present, the Court has not declared, in general, the violation of Article 1(1) of the Convention, apart from other violations and without any connection thereto. The Court has found that the violation of the obligations to respect and guarantee is analyzed in connection with the violation of some other right established

in Part I of the Convention. When a right established in the Convention is violated, it is evident the disregard of the duties (some of them) established in Article 1(1). There is, thus, a double simultaneous infringement: of Article 1(1) and of the rule that takes in the violated right. Conversely, the Court has suggested that there can be a violation of Articles 8 and 25 - also related to, of course, Article 1(1)- without necessarily invoking, to declare it, a violation of "material" rights.

5. However, the State's obligation to guarantee a right or liberty, as established in Article 1(1), is satisfied in the light of the above mentioned Articles 8 and 25, to wit, "read" - that is to say, understood or applied- in conjunction with- the article to which the "substantive" right, whose violation corresponds to investigate, refers to. Logically, Articles 1(1), 8 and 25 and the statement or statements referred to by the violated "material" rights are connected. This explanation is not different, of course, from the jurisprudence of the Inter-American Court, though it is not always expressly stated or shown by the terms used by the Tribunal when it declares the existence of violations and establishes the corresponding reparations (which are, in fact, "legal consequences", they are not, strictly and only, reparations, of the regulatory provisions of the violation of the facts of the case at trial).

6. With regard to the above mentioned linkage to the provisions of the Convention, there is a detailed *Separate Opinion* of the Judge Cecilia Medina Quiroga, concerning the Judgment of the *Case of Moiwana Community v. Suriname*, of June 15, 2005. In such opinion- to which I adhered- her author stated that the Court "should have declared the violations of the Articles 4 and 5, in relation to the failure to comply with the obligation to investigate, because this was part of the obligation to guarantee against the deprivation of life and the adverse effects on personal integrity that were alleged in the case" (para. 5 of the *Opinion*).

7. Article 8 of the American Convention recognizes, under the title "Right to a Fair Trial"- which does not exhaust or describe in full the content of such provision- the right to access to justice, to request legal protection, to claim for rights and liberties, which also the jurisprudence of the Court refers to as due process of law. Our case-law does not, still, offer a precise connotation of such access, frequently invoked, nor even a rigorous delimitation between the right to access and the right to due process of law (rather than recognizing and detailing a series of rights comprised by that). Notwithstanding, it is clear that:

a) everyone can turn to the established State instances to search for justice under the terms of Article 8(1), to assert, claim or recover a right; and the State is obliged to established sufficient, proper and efficient instances to that end and to provide a good service. This right (petition and, in its case, legal action or contribution to the legal action, is independent from the substantive right invoked, as the procedural doctrine has been established it a long time ago); and

b) the State must satisfy its obligation to guarantee, in accordance with the already mentioned *supra*, in compliance with the obligation established in Article 8 and, if applicable, Article 25. If a violation is not investigated and the State duly protects the individual, the State is infringing on these provisions. The Court will so declare.

8. Therefore, it is reasonable that, when declaring the infringement of Articles 8 and 25, it is worth mentioning the infringement that derives from the duty to investigate, an aspect of the obligation to guarantee established in Article 1(1) (it could also be said that there has been an infringement of the "material" right and prove that, if there

is lack of proper investigation, Article 8 was also infringed). If the Court does not have jurisdiction, because on the time, over the case to declare the violation of a "material" right, it can, however, refer to the infringement of an "instrumental" right as long as the obligation to investigate as a result of the illegal act (not subject to the competence of the Court) derives from a body of law different from the ACHR and said obligation remains in force, since it is still pending in the stage recognized by the Court's jurisdiction.

9. There is still the possibility, though, that Article 8(1) has been violated directly without being subjected to the Court's jurisdiction or without the declaration of the Court regarding the existence of violation of "material" rights established in the Convention. This situation is proposed whenever:

a) the plaintiff turns to the State to assert a right different from the ones established in the convention and the State disregards its petition. In the case in point, the denial of access constitutes, in itself, a violation of Articles 8(1) and the Court should so declare, in conjunction, of course, with Article 1(1) (the right of access to justice is protected, as any conventional rights, by the duty of the State to respect and guarantee) and without any mention to other rights and liberties enshrined in the Convention.

b) it has been argued the violation of a "material" right of the Convention, but the Court does not provide the elements to declare that said violation effectively existed, though there are elements to establish that, having invoked an illegal act attributable (hypothetically) to the State, the State fails to comply with its duty to investigate.

Therefore, the Court could not refer in its Judgment to the infringement of Article 8 in conjunction with the "violation" of certain "material" right, but only, respectively, to the violation of such as a result of: i) the plaintiff's claim of rights not established in the Convention or ii) the "alleged" violation (not proved before the Court) of a Conventional right.

10. In the *Case of Escué-Zapata v. Colombia*, it was not outlined the possibility or the adequacy of applying Articles 8 and 25, pointing out the existence of different violations according to each of them or asserting that only one of them has been infringed. Nevertheless, in different occasions it has been noted the existence of two different points of view regarding this issue: one of them asserts the infringement of Articles 8 and 25; the other one, considers the violation of Article 8, not of Article 25. To such respect, I would like to comment:

a) Article 8, more comprising, establishes the ordinary access to justice and enumerates its terms, the general (8(1)) as well as the one referring to the criminal prosecution (in broad sense) (8(2)), whose guarantees have been projected by the Court's jurisprudence in other ways of judicial or parajudicial protection, where applicable. This elaboration, which I think it is reasonable, contributes to outline and improve the protection of the person demanding justice.

b) Article 25, with a broader sense, deals with a crucial aspect of the access to justice. The effective recourse for the protection of fundamental rights (not of any rights, such as the example of Article 8) that in the Mexican tradition (reflected in the words of Article 25 of the Convention) corresponds to the writ of amparo. It is understood that the proceedings related to the defense of fundamental rights must comply with the guarantees established in Article 8.

c) furthermore, the Convention foresees other recourses for the protection of rights, which I referred to *supra* 1, that provide more specific and detail procedural safeguards. Each one of these "instrumental" media of protection has an inherent entity, characteristic nature and possible separate application.

11. Inasmuch as it exists the possibility of conceptual delimitation between the broad guarantee of access to justice provided for by Article 8(1) and the specific guarantee that Article 25 offers to the fundamental rights through a procedural but also specific media, attention should be paid, in each case and according to the facts submitted before the Court, to which is the article of the Convention that has been infringed. It could be Article 8 and 25 but it could happen that the violation is reduced to Article 8 only. In such a case, the protection of the Convention shall be unfolded over the individual and protection shall be provided to the individual, paying attention to the purpose of the Convention.

Sergio García Ramírez  
Judge

Pablo Saavedra Alessandri  
Secretary

Judge Medina Quiroga adhered to the present Opinion of Judge García Ramírez.

Cecilia Medina Quiroga, Judge;

Pablo Saavedra Alessandri  
Secretary

**CONCURRING OPINION**  
**CASE OF ESCUÉ-ZAPATA V. COLOMBIA**

I have concurred with my colleagues to approve, unanimously, the present Judgment in the *Case of Escué-Zapata v. Colombia*, but I think it is necessary to clarify my position regarding an issue that was considered in the deliberation of this case and during the last three years in several cases submitted to this Court.

It refers to the application and interpretation of Articles 8(1) and 25 of the Convention in conjunction with Article 1(1) and, thus, regarding the nature and reason for being of said rules.

Chapter I of the American Convention (List of Duties) enumerates the duties of the States Parties to such instrument: Article 1 (Obligation to Respect Rights) and Article 2 (Duty to Adopt the Provisions of the Domestic Law). They are general rules that cover all the rights protected in Chapter II (Civil and Political Rights). These protected rights have their own ontological nature, they protect individual legal interests, capable of being violated by the State Party by certain events that lead to the violation of Article 1(1) and, if applicable, Article 2, that are general rules, as I mentioned early. This is not the nature of Articles 8 and 25, that also have a separate ontological content, not of rules of general application of the Convention and thus, can be infringed by the State, together with other rights, in conjunction with, always, Article 1(1) that establishes the general obligation of States Parties to respect and guarantee the rights included in Chapter II of the Convention.<sup>1</sup>

Article 1(1) of the Convention provides that:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

Article 8(1) points out:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

Whereas, Article 25 provides that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by

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<sup>1</sup> Cf. IACHR, *Case of the Constitutional Court v. Peru*. Judgment of January 31, 2001. Series C No. 71; IACHR, *Case of Cantos v. Argentina*. Judgment of November 28, 2002. Series C No. 97; IACHR, *Case of Almonacid-Arellano et al. v. Chile*. Judgment of November 26, 2006. Series C No. 154; IACHR, *Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru*. Judgment of November 24, 2006. Series C No. 158.



this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

b) to develop the possibilities of judicial remedy; and

c) to ensure that the competent authorities shall enforce such remedies when granted.

The Court, besides, has declared the violation of Article 1(1) of the Convention, regardless of other violations of other articles.<sup>2</sup> Furthermore, it has been considered and declared the violation of Articles 8(1) y 25 in an autonomous manner, without taking into account Article 1(1) of the Convention.<sup>3</sup> Furthermore, the Court has applied Articles 8(1) and 25 in conjunction with other Articles of the Convention other than Article 1(1).<sup>4</sup>

As a consequence, to pretend that the Court consider that Articles 8(1) and 25 cannot be declared as violated by the Tribunal, independently, as an autonomous violation, but only in conjunction with other substantive right that may not be Article 1(1), is to affirm that the American Convention does not protect the right to Justice and it would mean giving Articles 8(1) and 25 the character of general provisions that, as Article 1(1) does, would cover all the Convention, which would result in the denaturalization of the content of Articles 8(1) and 25.

To modify the Court's jurisprudence regarding his issue, after more than 20 years of exercising its judicial functions is, apart from inappropriate and unnecessary, confusing. This is to introduce an element of distortion in the deliberation of future cases.

Manuel E. Ventura Robles  
Judge

Pablo Saavedra Alessandri  
Secretary

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<sup>2</sup> Cf. IACHR, *Case of "Street Children" (Villagrán-Morales et al.) v. Guatemala*; Judgment of November 19, 1999. Series C No. 63.

<sup>3</sup> Cf. IACHR, *Case of Baena-Ricardo et al. v. Panama*. Judgment of February 2, 2001. Series C No. 72; IACHR; and *Case of Las Palmeras v. Colombia*. Judgment of November 6, 2001. Series C No. 90.

<sup>4</sup> Cf. IACHR, *Case of Servellón-García et al. v. Honduras*. Judgment of January 21, 2006. Series C No. 152; IACHR, *Case of Vargas-Areco v. Paraguay*. Judgment of September 26, 2006. Series C No. 155.