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| Decided by:           | Chairman: Paolo Carozza;<br>Second Vice-Chairman: Felipe Gonzalez;<br>Commissioners: Sir Clare K. Roberts, Paulo Sergio Pinheiro, Florentin Melendez, Victor E. Abramovich.                  |
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| Represented by:       | APPLICANT: the Corporacion Colectivo de Abogados “Jose Alvear Restrepo”  |
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## I. SUMMARY

1. The Inter-American Commission on Human Rights (hereinafter “the Commission” or the “IACHR” received a petition on October 22, 2002 filed by the Corporación Colectivo de Abogados “José Alvear Restrepo” [Lawyers’ Collective Corporation “José Alvear Restrepo”] (hereinafter “the petitioners”), in which they claim that the Republic of Colombia (hereinafter “the State,” “the Colombian State,” or “Colombia”) is responsible for the denial of access to an effective judicial remedy to determine the rights of Sergio Emilio Cadena Antolínez due to the lack of compliance with judgment No. SU-1185/2001, handed down by the Constitutional Court on November 13, 2001, on the part of the Sala de Casación Laboral [Cassation Chamber of Labor] of the Supreme Court of Justice. On February 24, 2004, the Commission declared the case admissible in its Report 01/04.

2. The Commission declared admissible the claims on State responsibility for the violation of the rights to a fair trial and to judicial protection provided for by articles 8.1 and 25 of the American Convention on Human Rights (hereinafter the “Convention” or the “American Convention”) with prejudice to the victim, as well as of the general obligation to respect and guarantee protected rights, pursuant to article 1.1 of said treaty. At the merits stage, the petitioners also requested the IACHR to find the State responsible for the violation of the right to property provided for by article 21 of the Convention, as well as responsible for failing to enact domestic provisions to bring into effect the rights protected in the aforementioned treaty, with prejudice to the victim. The Colombian State, for its part, pleaded that the facts of the present case do not constitute violations of the American Convention and that therefore it owed no

reparations. It also pleaded the lack of IACHR jurisdiction regarding the complaints filed by the petitioners at the merits stage with respect to article 21.

3. After examining the positions of the parties, the Commission concluded that the State is responsible for the violation of Sergio Emilio Cadena Antolínez's right to judicial protection, provided for by article 25 of the American Convention on Human Rights, and for having failed to comply with the general obligation to respect and guarantee protected rights provided for by article 1.1 of said treaty. The Commission also found that the State was not responsible for the violation of articles 2, 8, and 21 of the American Convention.

## II. PROCESSING BEFORE THE COMMISSION

4. After processing petition No. 3491/2002, the Commission declared the case admissible in its Report 1/04.[FN1] It then registered the petition, pursuant to article 37.2 of its Rules of Procedure, as case number 12.448. Both parties were notified of Report 01/04 in a March 11, 2004 communication, by which the Commission, pursuant to article 38.1 of its Rules of Procedure, also granted the parties two months to submit their arguments on the merits.

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[FN1] IACHR, Report N°01/04 (P 3491/2002), Admissibility, Annual Report of the IACHR 2004. The IACHR found the case to be admissible because of the alleged violation of articles 8 and 25 in connection with article 1(1) of the Convention.

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5. In the same March 11, 2004 communication, the Commission placed itself at the disposal of both parties to the end of reaching a friendly settlement of the matter, pursuant to article 48.1.f of the American Convention, and requested them to reply to this offer at their earliest convenience. On March 23, 2004, the petitioners expressed their interest in seeking a friendly settlement, and this communication was forwarded to the State on March 24, 2004, granting it one month to submit its observations. The deadline expired without the observations having been received.

6. On April 28, 2004, the petitioners requested that the Commission declare the stage for the search for a friendly settlement closed, and on May 3, 2004 submitted their arguments on the merits of the case. Copies of both communications were forwarded to the State on May 4, 2004, granting it one month to submit its response.

7. On May 18, 2004, the State responded that at that moment it was not possible to advance towards the search for a friendly settlement. The relevant parts of this communication were forwarded to the petitioners on May 19, 2004. On May 21, 2004, the State submitted additional information on the case, which was transmitted to the petitioners on May 24, 2004, granting them one month to submit their observations.

8. On September 23, 2004, in response to a request made by the petitioners, the Commission convoked the parties to a hearing, which took place on October 25, 2004 during its 121st regular session at its headquarters in the city of Washington, D.C. At this hearing the

Commission again requested the State to submit its arguments on the merits. On November 30, 2004, the State requested a 30-day extension to submit its arguments, which was granted by the Commission on December 7, 2004. The deadline lapsed without the pleadings having been received.

9. On June 22, 2005 the State submitted its arguments on the merits, and their relevant parts were forwarded to the petitioners on June 29, 2005. The petitioners submitted their observations on July 12, 2005, whose relevant parts were in turn transmitted to the State, granting it one month to present its observations. The IACHR received the State's final observations on July 31, 2006.

### III. POSITION OF THE PARTIES REGARDING THE MERITS

#### A. Position of the petitioners

10. The petitioners claim that Mr. Sergio Emilio Cadena Antolínez, who had been an employee of the Banco de la República[FN2] between February 20, 1980 and January 13, 1997, was dismissed without just cause. They further contend that consequently, at the time of the facts, Mr. Cadena Antolínez was protected by article 8, paragraph 3 of a collective bargaining agreement that established the obligation of the Banco de la República to provide a retirement pension to those employees wrongfully dismissed who had a seniority of more than ten years. The letter of dismissal given to him by the bank acknowledged itself as debtor but stated that compliance with its obligation required first that Mr. Cadena Antolínez reach the established age "according to the law" to benefit from a pension. Mr. Cadena Antolínez then argued that the application of the aforementioned provision of the collective bargaining agreement was not conditioned by the age of the beneficiary.

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[FN2] Public corporation under its own regulations pursuant to the Bank's Organic Law No. 31 of 1992.

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11. The petitioners contend that Mr. Cadena Antolínez exhausted the governmental remedy in accordance with the Collective Bargaining Agreement of 1973, and sued in the 20th Labor Court of the Bogotá Circuit [Juzgado 20 Laboral del Circuito de Bogotá], which, in the first instance, ordered the Banco de la República to provide Mr. Cadena Antolínez with his pension payments. They state that this judgment was appealed by both parties and confirmed by the Superior Court of the Judicial District of Bogotá, which modified the amount of the allowance in favor of Mr. Cadena Antolínez. The Banco de la República then filed an extraordinary appeal before the Chamber of Cassation for Labor of the Supreme Court of Justice [Sala de Casación Laboral de la Suprema Corte de Justicia]. The Supreme Court found for the Banco de la República in a February 11, 2000 order, and dismissed all the plaintiff's claims.[FN3]

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[FN3] It was the opinion of the Chamber that the ad quem had not assessed all the evidence jointly and hence overlooked the age requirement for the payment, which had been acknowledged, to be made.

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12. The petitioners state that, in response to the judgment, Mr. Cadena Antol3nez filed an acci3n de tutela [petition for the protection of his constitutional rights] before the Jurisdictional Disciplinary Court of the Judiciary Council of Cundinamarca [Sala Jurisdiccional Disciplinaria del Consejo Seccional de la Judicatura de Cundinamarca]. His petition was denied,[FN4] and the decision was confirmed by the Jurisdictional Court of the Superior Council of the Judiciary [Sala Jurisdiccional del Consejo Superior de la Judicatura] on August 31, 2000. Mr. Cadena Antol3nez then appealed for review of the judgment denying his tutela petition before the Constitutional Court.

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[FN4] Petitioners' brief on the merits of May 3, 2004, p. 12.

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13. The petitioners assert that the Constitutional Court, in its judgment SU-1185/2001 of November 13, 2001, reversed the August 31, 2000 decision of the Jurisdictional Court of the Superior Council of the Judiciary, quashed the decision of the Labor Chamber of Cassation, and ordered that Mr. Cadena Antol3nez's rights to due process and equal treatment be protected. To the end of restoring Mr. Cadena Antol3nez's rights, the Constitutional Court ordered the Chamber of Cassation for Labor of the Supreme Court of Justice to "issue a new judgment that does not violate the constitutional rights and guarantees (...) provided for by the Constitution." The petitioners note that, despite the Constitutional Court's ruling, on May 16 the Labor Chamber of Cassation decided to uphold the original judgment handed down on February 11, 2000.[FN5]

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[FN5] It was the opinion of the Chamber that "Judgment SU-1185/2001 [...] no doubt disregards the effects of constitutional res judicata [...] and disregards constitutional provisions such as the one establishing that the Supreme Court of Justice is the highest court in ordinary jurisdiction [...] legal certainty, the judges, in their decisions, which are independent and autonomous, are bound only by the law [...] and due process is applied to all forms of judicial and administrative proceedings. Petitioners' brief on the merits of May 3, 2004, p. 13.

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14. In this respect, the petitioners contend that the State violated the right to effective judicial protection provided for by the Convention, when it completely and absolutely failed to comply with the final judgment handed down by the Constitutional Court, ordering the Chamber of Cassation for Labor of the Supreme Court of Justice to issue a new judgment.

15. The petitioners affirm that this failure in compliance led Mr. Cadena Antol3nez to file a motion for contempt in the Jurisdictional Disciplinary Court of the Judiciary Council of Cundinamarca, in which he also requested full compliance with the Constitutional Court's

decision N° SU-1185/2001 protecting his rights. On August 2, 2002, the Judiciary Council declared its lack of jurisdiction to hear the motion for contempt and referred the case file to the House of Representatives' Committee for Investigation and Indictment [Comisión de Investigación y Acusación de la Cámara de Representantes].[FN6] Thus, the petitioners considered that the motion for contempt was ineffective to restore Mr. Cadena Antolínez's rights,[FN7] and requested the IACHR to order the State to carry out a full, impartial, and effective investigation, for the trial and punishment of those responsible for the violations.[FN8]

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[FN6] Petitioners' brief on the merits of May 3, 2004, p. 28.

[FN7] Petitioners' brief on the merits of May 3, 2004, p. 28.

[FN8] Petitioners' brief on the merits of May 3, 2004, p. 32 and petitioners' brief of July 11, 2005, p. 12.

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16. The petitioners state that Mr. Cadena Antolínez appealed the decision of the Jurisdictional Disciplinary Court of the Judiciary Council of Cundinamarca, but it was declared inadmissible in an October 7, 2002 ruling. This decision was also appealed by the plaintiff, but the appeal was denied in a December 13, 2002 ruling.

17. The petitioners maintain that since the Constitutional Court's decision had not been complied with, Mr. Antolínez filed a petition on August 1, 2003 before the Constitutional Court, requesting that "it take the necessary measures to ensure compliance with its judgment." In response, the Constitutional Court issued a writ of mandamus on February 17, 2004, ordering the Banco de la República to comply, within 48 hours, with the January 22, 1999 judgment issued by the Labor Chamber of the Superior Court of Bogotá.[FN9]

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[FN9] It was the opinion of the Court that the mechanism for the safeguarding and protection of fundamental rights is exercised and processed in the constitutional jurisdiction, which is formed by all the judges of the Republic, who are hierarchically under the Constitutional Court "because said Court acts as the organ of last resort or closure of that jurisdiction, through the review of judicial decisions that respond to petitions for protection [amparo]; this authority is exercised by the Court freely and at its own discretion 'to the end of unifying jurisprudence [...] and lay solid foundations from which the rest of the administrators of justice may obtain inspiration when deciding matters of fundamental rights within the Colombian legal order.'" The Court also stated that "failure to comply with the decision entails a systematic violation of the Constitution (...) [...] it contravenes the value of constitutional res judicata and in doing so, legal certainty [...]". Writ of mandamus issued by the Constitutional Court on February 17, 2004, cited by the petitioners in the brief of May 3, 2004, p.15.

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18. Subsequently, the Supreme Court of Justice reacted in a Public Communiqué of the Full Court, stating that:

(...) [the Supreme Court] considers it necessary to warn about the dangers hovering over the legal order if the Nation resigns itself to having the Constitutional Court, aside from fulfilling its own specific duties, be the one to establish, at its own discretion and with no limits other than those set by its members, sometimes with a precarious majority, additional jurisdictional powers, granting itself authority to act as an all-mighty and omnipotent entity which may merge constitutional and legitimate exercise of jurisdiction, even to the point of replacing it.[FN10]

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[FN10] Petitioners' brief on the merits of May 3, 2004, p. 16.

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19. The petitioners further claim that the Banco de la República partially disbursed the retroactive payments owed in a legal deposit (No. A-2270552) made on March 18, 2004, a sum that only partially covered the obligation. They contend that adding the pension payments, without indexation, owed since Mr. Cadena Antolínez's dismissal, the sum would be approximately 462 million, whereas the sum deposited by the bank was \$343.593.072.00 in Colombian pesos. Therefore, they maintain that the Banco de la República did not properly fulfill the Constitutional Court's order to comply with Judgment SU-1185 de 2001, with prejudice to Sergio Emilio Cadena Antolínez, when it did not pay him the full amount of his pension for life, to which he was entitled from the moment of his retirement.

20. The petitioners state that in view of the fact that the Banco de la República did not properly obey the writ of mandamus issued by the Constitutional Court, Mr. Cadena Antolínez filed a motion for contempt on March 29, 2004 before the Constitutional Court. In their view, then, to the failure to comply with the judgment of November 13 should be added the inappropriate execution of the Constitutional Court's order of February 17, 2004. [FN11]

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[FN11] Petitioners' brief on the merits of May 3, 2004, p. 18.

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21. Subsequently, the parties and the IACHR learned that in response to Mr. Cadena Antolínez's complaint regarding the sum disbursed to him by the Banco de la República, the Constitutional Court issued an order of April 20, 2004, for full compliance with the judicial order for protection, by making the appropriate payment.[FN12]

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[FN12] The writ of mandamus of April 20, 2004 was obeyed by the Banco de la República on April 26, 2004 through its emission of check no. 418647. Petitioners' brief of July 11, 2005, p. 12, notes 40 and 41.

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22. It is the opinion of the petitioners that the contempt on the part of the Supreme Court of Justice regarding the judgment of the Constitutional Court and the orders it subsequently issued constitute a violation of the right to judicial protection.[FN13] In this respect they contend that the Inter-American Court's case law has established that more than six months' time to resolve

an amparo petition exceeds the principle of reasonable term.[FN14] Since the processing of the petition for the protection of constitutional rights filed by Mr. Cadena Antolínez took approximately four years, including its submission, decision, and compliance,[FN15] and 21 months elapsed between the contempt and the writ of mandamus, therefore, according to the criteria used by the Inter-American Court, these procedures violated the principle of reasonable term, causing amparo remedies to be illusory and ineffective due to unjustified delay.[FN16] Thus, they believe that Mr. Cadena Antolínez did not have access to a simple and prompt, and hence effective, recourse.[FN17]

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[FN13] Petitioners' brief of July 11, 2005, p. 7.

[FN14] I/A Court H.R., Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Judgment of August 31, 2001, paras. 132 and 134. Petitioners' brief of July 11, 2005, p. 8.

[FN15] The petitioners explained that pursuant to article 86 of the Colombian Constitution, under no circumstances may more than ten days transpire between the request for protection and its decision in the first instance; these terms are fixed and non-deferrable; the time period for the Constitutional Court to decide cases under review is three months; therefore the average length of a tutela proceeding from filing to decision regarding review is six months. They claimed that in Mr. Cadena Antolínez's case, one year transpired from the time the tutela was admitted for review and the decision of the Constitutional Court. Petitioners' brief of July 11, 2005, pp. 7 and 8.

[FN16] I/A Court H.R., Case of Ivcher Bronstein, Judgment of February 6, 2001, para. 137. Petitioners' brief of July 11, 2005, p. 9.

[FN17] I/A Court H.R., Bámaca Velásquez Case, Judgment of November 25, 2000, para. 191. Petitioners' brief of July 11, 2005, p. 9.

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23. The petitioners also maintain that the Inter-American Court has established that article 25 is closely linked to the general obligation of article 1.1 which assigns the duty to States to design and embody in legislation an effective recourse and also to ensure the due application of domestic law by its authorities.[FN18] For this reason, the State must adopt as part of its domestic law, pursuant to article 2 of the Convention, legislative and administrative measures, through a statutory law of tutela, to make the judgments of the Constitutional Court enforceable. [FN19]

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[FN18] I/A Court H.R., Case of Villagrán-Morales et al., Judgment of November 19, 1999, para. 237. Petitioners' brief of July 11, 2005, p. 9.

[FN19] Petitioners' brief of July 11, 2005, p. 10.

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24. In this respect, the petitioners maintain that due process of law does not exist in Colombian domestic legislation for the protection of the rights violated in this case, since there is no statutory law governing the petition for constitutional protection that has binding force and brings legal certainty to the petitioner.[FN20]

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[FN20] Petitioners' brief of July 11, 2005, pp. 10-12.

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25. Likewise, they contend that Mr. Cadena Antolínez demonstrated extraordinary diligence in filing motions for contempt, disciplinary actions, and compliance to bring effect to the judgments in his favor.[FN21] In this regard, the petitioners consider that the right to effective judicial protection requires that the States enforce domestic decisions in good faith and immediately, without requiring the affected parties to engage in any additional action to obtain compliance, or actions regarding criminal, administrative or other liability, or any other action entailing delays in immediate compliance with judgments favorable to fundamental rights.[FN22] They believe that the existence of a legal doctrine on unlawful acts of commission and of omission by public servants is insufficient and a statutory law on constitutional protection should exist, based on the criteria established by the Constitutional Court, in order to avoid unnecessary controversies and litigation, as in the instant case, and to provide legal certainty by rendering constitutional protection against unlawful acts by public servants effective. [FN23] They explain that the unnecessary litigation in the instant case occurred due to a conflict, i.e., contempt of the Supreme Court of Justice's Labor Chamber of Cassation of the Constitutional Court's judgment on tutela handed down on November 13, 2001, popularly known in Colombia as a "train crash." [FN24]

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[FN21] Petitioners' brief on the merits of May 3, 2004, p. 27.

[FN22] Petitioners' brief on the merits of May 3, 2004, p. 26.

[FN23] Petitioners' brief of July 11, 2005, p. 3.

[FN24] Petitioners' brief of July 11, 2005, p. 7.

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26. Regarding the contention made by the State in its brief on the merits that there is no damage requiring reparation, the petitioners maintain that the obligation to compensate arose at the time of the violation. In this respect, it further argues that the complaint regarding this case was made before the IACHR at the time the violation was being committed, and recalls that the Inter-American Court has held that:

The possibility of subsequent reparation under domestic law does not prevent the Commission and the Court from hearing a case concerning alleged violations of the American Convention that has already been filed. [FN25]

It is for this reason, they argue, that the State's pleading that it had duly carried out an investigation cannot be accepted in order to declare that the State has not violated the Convention.

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[FN25] I/A Court H.R., Case of Ricardo Canese. Judgment of August 31, 2004, para. 71. Petitioners' brief of July 11, 2005, pp. 1 and 2.

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27. The petitioners also consider that, since Mr. Cadena Antolínez's right to a pension was recognized in the tutela judgment, said pension became his property and hence his right to property was violated when the Labor Chamber of Cassation of the Supreme Court of Justice, from May 16, 2002, and for more than two years, did not fulfill the terms of the November 13, 2001 ruling of the Constitutional Court. They consider, in addition, that the State violated his right to property when the Banco de la República failed to properly execute the February 17, 2004 order of the Constitutional Court, when it subtracted \$118,000,000.00 from the pension for life to which Mr. Cadena Antolínez was entitled from the moment of his retirement; they contend that the full sum of his pension payments should have become part of his property (see supra, para. 19). [FN26] In their final pleadings, the petitioners did not refer to their initial complaint on the alleged violation of article 21 of the American Convention.

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[FN26] Petitioners' brief on the merits of May 3, 2004, p. 28.

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28. Based on the aforementioned, the petitioners consider that the facts alleged constitute a violation by the Colombian State of the rights to a fair trial, to property, and to effective judicial protection, provided for by articles 8.1, 21, and 25 of the American Convention, as well as of the general obligation to ensure respect for rights protected by the treaty, and, pursuant to articles 1.1 and 2 of the Convention, to adopt domestic legislation to give effect to the rights and freedoms provided for by it.

#### B. Position of the State

29. In its pleadings on the merits, the State considers that it did not violate conventional rights. Regarding the petitioners' claim regarding the lack of effectiveness of domestic remedies in Colombia, it is the opinion of the State that the independence and impartiality of the judicial branch is related to the separation of this branch from the other State powers; it is premised on an adequate process for the appointment of judges, with an established term of office and a guarantee against external pressures. For these reason it does not consider that there has been any kind of threat against the independence and impartiality of any of the judicial authorities who have intervened in the instant case.[FN27]

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[FN27] State's brief on the merits DDH. 32287 of June 20, 2005, pp. 1-4.

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30. Regarding the alleged violation of article 8 of the Convention, the State contends that the plaintiff was heard under the proper guarantees and within a reasonable period for the determination of his labor rights in ordinary labor jurisdiction before the 20th Labor Court of the Circuit of Bogotá, before the Superior Court of the Judicial District of Bogotá in the second instance, and in response to an extraordinary cassation appeal. Regarding the execution of the judgment of the Superior Court of Bogotá, the State claims that it was suspended at Mr. Cadena

Antolínez's request,[FN28] and that Constitutional Court ordered its execution in its ruling SU 1185 of 2001.

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[FN28] The State explained that pursuant to article 371 of the Code of Civil Procedure, the admission of an extraordinary cassation appeal does not prevent the execution of the judgment; “[...] however, within the period allowed for appeals, the appellant can, offering security, request that the execution of the judgment be suspended [...]” State brief on the merits DDH. 32287 of June 20, 2005, p. 5.

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31. Regarding the petitioners' allegation regarding the violation of guarantees of compliance with domestic rulings, provided for by article 25.2.c of the Convention, the State asserts that in response to his tutela petition, Mr. Cadena Antolínez was handed down a judgment of the first instance on July 19, 2000 by the Council for the Judiciary of Cundinamarca which denied his requests for protection, and a judgment of the second instance, issued by the Superior Council of the Judiciary on August 31, 2000, confirming the prior judgment. In this respect, it notes that the ordinary proceeding for tutela was exhausted in a full and timely manner, and that the requirements of article 25 of the Convention had been fully met at the moment that the August 31, 2000 judgment was handed down; the fact that the ruling did not favor Mr. Cadena Antolínez at the time does not entail a violation of the right to judicial protection.

32. The State also maintains that the Constitutional Court decided to review the judgment on tutela in a unified judgment [sentencia de unificación][FN29] on November 13, 2001 in favor of Mr. Cadena Antolínez, in which it reversed the judgment on tutela of the second instance. It further contends that subsequently, in a February 17, 2004 order, the same Court adopted the necessary measures for its execution and effectiveness. In response to Mr. Cadena Antolínez's claim regarding the sum disbursed to him by the Banco de la República in compliance with said order, the Constitutional Court issued another order, on April 20, 2004, for full compliance with the judicial order for protection. The State considers, therefore, that the aforementioned Court adopted the necessary measures to exercise its jurisdiction to ensure the effectiveness of its own rulings and in this way guarantee the effectiveness of Mr. Cadena Antolínez's fundamental rights.[FN30]

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[FN29] The State explained that a unified judgment is handed down by the Constitutional Court when it seeks the unification of jurisprudence, or when the topic is very important, or it is assumed that a jurisprudential precedent will be modified. In the instant case the matter of interest was the meaning of a collective labor agreement; in the Constitutional Court's opinion, the Supreme Court of Justice's disregard for this meaning when it changed its jurisprudence caused it to engage in an unlawful act that violated rights to equal treatment and due process. State's brief on the merits DDH. 32287 of June 20, 2005, p. 9.

[FN30] State's brief on the merits DDH. 32287 of June 20, 2005, pp.10 and 11.

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33. Therefore, the State considers that the grounds for the complainant's petition before the IACHR have been rebutted, since his complaints before the local courts culminated with a judicial decision favorable to his interests and the Constitutional Court had already taken steps to execute its own ruling, before the petition was lodged in an international forum. In this respect, it is the opinion of the State that judgment SU-1185 de 2001, as a ruling on tutela, has been fully complied with, given that Mr. Cadena Antolínez is currently enjoying the rights recognized as his by the January 22, 1999 judgment of the Labor Chamber of the Superior Court of Bogotá, and because the payment was made, with the adjustments ordered. It contends that consequently its obligations under article 25.2.c of the Convention have been fully met.[FN31]

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[FN31] State's brief on the merits DDH. 32287 of June 20, 2005, p.11. Also see document of confirmation submitted by the State on July 28, 2006.

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34. Regarding the petitioners' arguments regarding the absence of a statutory law for tutela, the State affirms that article 86 of the Constitution has sufficient provisions for tutela to be an effective tool for the protection of fundamental rights.[FN32] In its opinion, "since the tutela petition is a mechanism conceived for the immediate protection of fundamental constitutional rights, it is materially not possible to regulate fundamental rights by a statutory law, because this type of laws regulates the fundamental rights and duties of persons, pursuant to article 152 of the Constitution." [FN33]

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[FN32] Decree 2591 of 1991 which regulates the tutela petition and decree 1382 which assigns jurisdiction for the hearing of tutela petitions. State's brief on the merits DDH.GOI. No. 1309/0080 of January 13, 2006, p. 4.

[FN33] Article 152 of the Colombian Constitution provides that statutory laws regulate fundamental rights and duties. State's brief on the merits DDH.GOI. No. 1309/0080 of January 13, 2006, pp. 4 - 6.

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35. The State also disagrees with the petitioners' claims regarding the alleged violation of the right to private property, and affirms that the Commission did not declare this claim admissible, in its Report on Admissibility No. 1/04, and hence would lack jurisdiction to make any findings on violations of the right to property.[FN34] Moreover, in view of the payment made, the State considers that there is no "damage requiring reparation" in the instant case, and hence article 63.1 of the Convention is inapplicable. In this respect, it argues that if there are no violations of the Convention, there is no responsibility, and without the latter there is no obligation to repair, "because reparation would become unjust [...] and could become unlawful enrichment," and Mr. Cadena Antolínez already is in full possession of his right to a pension.[FN35] It further contends that a discussion of reparations is inappropriate because no injury was caused attributable to an action or omission of the Colombian authorities, since it was the same judiciary that, through the Constitutional Court, found and corrected the mistake.[FN36]

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[FN34] State's brief on the merits DDH. 32287 of June 20, 2005, p. 11.

[FN35] State's brief on the merits DDH. 32287 of June 20, 2005, pp. 12 and 13.

[FN36] State's brief on the merits DDH.GOI. No. 1309/0080 of January 13, 2006, p. 3.

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36. It is the opinion of the State that the claim made by the petitioners regarding a full, impartial, and effective investigation is inadmissible since failure in compliance and contempt are legally two different things. It affirms that in view of the fact that the House of Representatives' Committee for Investigation and Indictment was in the process of carrying out the appropriate investigations, the State was complying with its conventional duty to investigate, try, and punish.[FN37]

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[FN37] State's brief on the merits DDH. 32287 of June 20, 2005, p. 13.

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37. The State did not provide a response to the petitioner's claims regarding the alleged violation of article 2 of the American Convention.

38. Based on the foregoing arguments, the State considers that there are no merits justifying the continuation of the instant proceeding, since the State restored the petitioner's right. It requests the Commission to find that Colombia has not violated articles 8, 25, and 1.1 of the Convention, and that hence the recognition of a right to reparation would be inappropriate. Pursuant to article 48.b of the Convention, the State requests that the Commission close the record of the petition.[FN38]

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[FN38] The State reiterates all its pleadings in its brief on the merits DDH.GOI. No. 1309/0080 of January 13, 2006, p. 2. Also see State's brief on the merits DDH. 32287 of June 20, 2005, p.11 y brief of confirmation [escrito de ratificación] submitted by the State on July 28, 2006.

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#### IV. ANALYSIS OF THE MERITS: CONSIDERATIONS IN FACT AND IN LAW

39. Before examining the arguments on the merits of the instant case it is necessary to refer to the petitioners' claim regarding the alleged violation of the duty to adopt domestic legal provisions and the right to property, established by articles 2 and 21, respectively, of the Convention. The State has challenged the claim related to article 21, pleading that the IACHR is not competent to examine it since it did not admit said claim in its admissibility report; the State has not responded to the claim related to article 2.

40. The Commission notes that indeed the petitioners did not formally claim the existence of the alleged violations of articles 2 and 21 of the Convention in their initial petition, and that therefore these claims were not considered in the Report on Admissibility No. 1/04. However, it should be observed that conventional and procedural norms do not establish limits to the Commission's or the Court's exercise of jurisdiction based on the omission pointed out by the

State, since the claims are directly related to the facts object of the complaint. In the instant case, the Commission notes that the facts submitted in the petition, and conveyed by its Report on Admissibility No. 1/04, refer to the fact that Mr. Cadena Antolínez's property had been affected by the acts that are the subject of the instant report. The connection between the facts of the case with said claim is not based on factual circumstances different from those already considered by the IACHR when it decided the admissibility of the petition.

41. Likewise, regarding these arguments it is necessary to note that the norms establishing the requirements necessary for a petition to be admitted by the Commission – article 46.1 of the American Convention, article 2 of its Rules of Procedure in force at the time the petition was lodged, and article 28 of its Rules of Procedure currently in force – do not require the immediate specification of the articles considered to be violated in relation to the facts reported. As the Inter-American Court on Human Rights has established, as long as the petitioners set out in their original petition the facts on which they base their claims of violations of the Convention, and these are relevant to making a legal determination, they are under no legal obligation to specify precise provisions in the initial petition, nor are there impediments to the submission of additional legal arguments in subsequent pleadings based on the same facts. [FN39] Therefore, claims regarding the alleged violation of articles 2 and 21 of the Convention should be jointly considered with the original petition.

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[FN39] In the Hilaire Case, the Court established that “the proper interpretation is that, when there are additional arguments, with respect to rights, on the same essential facts as are pleaded in the petitioner's original complaint, such a pleading cannot be dismissed for the mere failure to invoke a specific article of the Convention.” See I/A Court H.R., Hilaire Case, Judgment of September 1, 2001, para. 42.

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42. In view of these considerations, and applying the principle of *iura novit curia*, which obligates international organizations to apply all appropriate legal provisions,[FN40] the Commission shall examine the parties' claims in fact and in law in their entirety in order to determine the extent of state responsibility and its impact on Mr. Sergio Emilio Cadena Antolínez's enjoyment of his human rights.

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[FN40] Permanent Court of International Justice, Case of the S.S. “Lotus,” Judgment of September 7, 1927, Series A No. 10, p. 31.

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43. In what follows the Commission shall examine the claims on the merits of case 12.448. First, it will establish the facts based on the evidentiary items provided by the parties in reference to Mr. Cadena Antolínez's labor situation, the circumstances of his dismissal, and the legal scope of the administrative and judicial remedies used to solve the dispute domestically. Second, the IACHR will give its opinion on imputability related to the proven facts in both cases and, lastly, on the responsibility attributable to the State with respect to the petitioners' claims on the alleged violation of his rights protected by the American Convention.

A. The State is responsible for failing to comply with its obligation to guarantee Sergio Emilio Cadena Antolínez's right to judicial protection

44. The petitioners contend that the State failed to comply with its obligation to guarantee effective judicial protection, with prejudice to Mr. Cadena Antolínez, when it did not ensure the effectiveness of, and compliance with, the domestic decisions within a reasonable term, and when it did not carry out a full, impartial, and effective investigation, pursuant to the provisions of articles 8 and 25 of the American Convention (see supra III.A Position of the Petitioners). The State, in turn, claims that there has been no violation of said rights and guarantees given that the tutela petition lodged by Mr. Cadena Antolínez was ruled in his favor and eventually led to the effectiveness of his claimed right. (See supra III.B Position of the State.)

45. The Commission notes that the petitioners alleged the existence of several facts that were not denied by the State. Indeed, the IACHR forwarded to the State the relevant parts of the January 14, 2003 complaint and also the Report on Admissibility No. 1/04 of March 12, 2004. In its initial response, the State provided information on the proceedings brought by Mr. Cadena Antolínez, and in its brief on the merits of June 20, 2006, made a list of the facts alleged.

46. In the instant case, the IACHR finds that the State's responses to the petition prove agreement of the parties on the chronology, features, and results of the administrative and judicial proceedings brought by Mr. Cadena Antolínez to safeguard his pension rights.

47. In view of the parties' claims, it is up to the Commission to determine if the judicial activity initiated by the organs of the State to protect Mr. Cadena Antolínez's rights has met the standards established by the American Convention regarding the rights to a fair trial and to judicial protection.

48. Article 25 of the Convention provides:

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.

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.

This rule establishes the obligation of the State to ensure the enjoyment of judicial guarantees in a prompt and simple manner, as well as the general obligation to provide an effective judicial remedy against the violation of fundamental rights, applying the principle of effectiveness of procedural instruments or mechanisms.

49. As the Inter-American Court of Human Rights has noted,

Article 25 in relation to Article 1(1) of the American Convention obliges the State to guarantee to every individual access to the administration of justice and, in particular, to simple and prompt recourse, so that, inter alia, those responsible for human rights violations may be prosecuted and reparations obtained for the damages suffered. As this Court has ruled, Article 25 “is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention.”[FN41]

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[FN41] I/A Court H.R., Case of Loayza-Tamayo, Reparations (art. 63.1 American Convention on Human Rights), Judgment of November 27, 1998, Series C No. 42, para. 169.

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50. In the instant case, Mr. Cadena Antolínez, having exhausted governmental remedies, as well as those of ordinary labor jurisdiction, filed a tutela petition to safeguard his pension rights. He filed an appeal before the Constitutional Court for review of the ruling against his rights.[FN42] On November 13, 2001 the Constitutional Court found for his claims.[FN43] On May 16, 2002 the Supreme Court decided not to comply with the Constitutional Court’s judgment, which then forced Mr. Cadena Antolínez to file a motion for contempt before the Council for the Judiciary, in which he requested compliance with the Constitutional Court’s decision. On August 2, 2002 the Judiciary Council, in turn, declared that it lacked jurisdiction to hear the motion for contempt and referred the case to the Committee for Investigation and Indictment of the House of Representatives. Subsequently Mr. Cadena Antolínez filed an appeal against the decision of the Disciplinary Chamber of the Superior Council of the Judiciary, which the latter declared inadmissible in its October 7, 2002 decision. This ruling, in turn, was appealed and this appeal was also declared inadmissible by a December 13, 2002 decision.

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[FN42] Labor Chamber of the Supreme Court, Judgment of July 19, 2000.

[FN43] Constitutional Court, Unified Judgment SU-1185/2001 of November 13, 2001.

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51. On August 1st of 2003, Mr. Cadena Antolínez requested the Constitutional Court to take steps to ensure compliance with its Unified Judgment SU-1185/2001. In response, the Constitutional Court issued a writ of mandamus ordering the Banco de la República to comply with the judgment handed down by the Labor Chamber of the Superior Court of Bogotá. The Banco de la República proceeded to partially comply, by depositing a sum that did not, however, include the proper adjustments. Consequently, on March 29, 2004, Mr. Cadena Antolínez filed a new motion for contempt before the Constitutional Court, which issued a new writ of mandamus on April 20, 2004, after which, on April 26, 2004, the defendant’s obligations as defined by the judgment were finally discharged.

52. The Commission notes that from the beginning of the process in 1997 until the proper disbursement of the payments, approximately eight years went by, and the judgment for protection issued on July 19, 2000 was not duly executed until nearly four years later. In

addition, the Unified Judgment SU-1185/2001, handed down by the Constitutional Court on November 13, 2001 was finally executed on April 26, 2004, two years and five months later. This delay was attributable to the conflict of jurisdiction or of the conflict between rulings of the high courts, known in Colombia as “train crashes.”

53. The instant case shows that the effect of the so-called “train crashes” is to create and perpetuate a situation of lack of definition of rights, be they recognized or denied by superior courts: the Supreme Court of Justice, the Council of State [Consejo de Estado] and the Constitutional Court. The conflict between these high judicial venues leaves the user of the judicial system under uncertainty as to which course of action to follow in those cases in which judicial decisions violate rights protected by the American Convention. In those cases in which they file a successful petition for tutela, the fulfillment of their rights is subject to additional lack of compliance and to further procedures.

54. It should be recalled that the obligation provided for by article 1.1 is an obligation that involves the duty to organize the state apparatus and, in general, all the structures through which the exercise of public power is manifested, in such a way that they are capable of legally ensuring the free and full exercise of human rights.

55. Under these circumstances, the lodging of an action for a prompt and simple remedy such as the tutela petition under Colombian law does not result in the protection of fundamental rights recognized by domestic law and by the Convention. Moreover, any decision admitting said remedy constitutes a failure of competent authorities to comply with their obligation to guarantee a ruling in favor of said action. Both circumstances constitute a violation of article 25 in connection with article 1.1 of the American Convention.

56. The State has argued that domestic courts have already implemented the necessary measures to make corrections and to give effect to the judgment for protection in favor of Mr. Cadena Antolínez. Although the Commission acknowledges the importance and effect of these measures (see *infra* IV.B.2), it is necessary to examine the actions of the courts during the process and their impact over time on the enjoyment of the rights provided for by article 25 of the Convention.

57. It is the opinion of the Commission that over nearly four years since Mr. Cadena Antolínez filed his tutela petition, and particularly the two years and five months that transpired until the proper execution of the writs of mandamus issued by the Constitutional Court exceed the concept established in article 25 of the American Convention of what constitutes access to a simple, prompt, and effective remedy for the protection of fundamental rights and the guarantee of compliance with any decision in which said remedy has been deemed to be admissible. In this regard the Inter-American Court has established in its jurisprudence that the fact that a judgment be in the enforcement stage of proceedings does not exclude the possibility of a violation of the right to an effective remedy since, although compliance with judgments requires the adoption of additional decisions and procedural steps, this does not warrant considerable delays in the compliance with a final judgment.[FN44]

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[FN44] I/A Court H.R., Case of Acevedo-Jaramillo et al. Judgment of February 7, 2006. Series C No. 144, para. 269.

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58. Therefore, in the instant case the Commission concludes that the State did not take the necessary measures to comply with its obligation to provide adequate judicial protection to Mr. Sergio Emilio Cadena Antolínez, pursuant to articles 25.1 and 2 in connection with article 1.1 of the American Convention.

59. The petitioners have also submitted claims regarding the alleged non-compliance of the State with its obligation to establish the individual responsibility of judicial officers involved in the facts related to the violation of the American Convention, examined above. In this respect the Commission notes that, given the features of the case, the effects of the so-called “train crash,” and the controversies surrounding the filing of tutela petitions against judgments, it is not appropriate, in the light of article 8 of the American Convention, to examine state responsibility for the alleged omission to investigate the conduct of the judicial officers involved in the interpretation of substantive norms, actions for protection and compliance.

B. In the case under examination the State complied with its duty to guarantee the right to property.

60. In their initial arguments, the petitioners claimed that in accordance with article 21 of the American Convention, there had been a violation of the right to property. The State, for its part, argued that this claim was not related to a damage requiring reparation, since the domestic courts took the necessary measures to have the pension and interest payments made, according to the adjustments ordered by the Labor Chamber of the Superior Court of Bogotá.

61. Article 21.2 of the American Convention provides that “no one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.”

62. It can be seen from the factual arguments of the parties that throughout the proceedings before the IACHR on the merits, Mr. Cadena Antolínez’s claim involved the determination and disbursement of pension payments, in accordance with his right to property under Colombian law and the American Convention. It can also be seen, from the more recent arguments, that due to the intense procedural activity of Mr. Cadena Antolínez – which he continued after submitting his petition before the inter-American system, and even after Report on Admissibility 1/04 was adopted on February 24, 2004 – and the Constitutional Court’s actions to obtain the execution of its writs of mandamus issued during the same period, the Banco de la República finally authorized the pension payments, starting on April 26, 2004.

63. Bearing this in mind – and without prejudice to the validity of the aforementioned grounds regarding the violation of articles 25.1 and 2 – the Commission finds that the State has complied with its obligation to disburse the pension payments owed to Mr. Cadena Antolínez, and that therefore there no longer exist any grounds to claim that there has been a violation of article 21 of the American Convention in need of remedy.

C. The duty of the State to adopt domestic legislative measures to give effect to the rights and freedoms provided for by the Convention.

64. The petitioners contend that the State failed to comply with its obligation to adopt domestic provisions to give effect to rights and freedoms pursuant to article 2 of the American Convention, when it failed to enact a statutory law for tutela petitions (see supra III.A). The State, for its part, claims that the subject matter does have a normative framework in the Constitution's provisions, particularly its article 86. (See supra, III.B.)

65. Article 2 of the American Convention provides:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

66. The Commission notes that in the instant case the conflict between the high courts, generated by the so-called "train crash," created uncertainty regarding the fulfillment of Mr. Cadena Antolínez's rights, due to failures in compliance and additional proceedings. This uncertainty continued for a time period incompatible with the obligation of State parties to provide access to simple, prompt, and effective remedies, such as tutela in Colombia.

67. Notwithstanding the above, the Commission does not find that, at least in the instant case, the failure to comply with these obligations necessarily occurred because of a legislative deficiency.

68. Therefore, the IACHR does not find that in the instant case there has been a failure to comply with the obligation of adopting domestic provisions to give effect to the rights and freedoms provided for by the American Convention.

## V. PROCEEDINGS SUBSEQUENT TO THE ADOPTION OF REPORT N° 57/07 PURSUANT TO ARTICLE 50 OF THE CONVENTION

69. On July 25, 2007, the Commission adopted Report 57/07 pursuant to Article 50 of the American Convention, in which it concludes that: (1) the State of Colombia is responsible for the violation of Mr. Sergio Emilio Cadena Antolínez's right to judicial protection enshrined in Article 25 of the American Convention on Human Rights, and of the general obligation to respect and ensure rights, pursuant to Article 1(1) of said treaty; and (2) since there has been reparation of the pecuniary damages caused to Mr. Cadena Antolínez, the Commission concludes that there is no violation of Article 21 in the instant case. The Commission also concludes that, based on the abovementioned grounds, there has been no violation of Articles 2 and 8 of the American Convention. Consequently it made the following recommendations to the State:

1. The adoption of the necessary measures to avoid future violations of the right to judicial protection provided for by the American Convention, pursuant to the obligation of prevention and guarantee of the fundamental rights recognized by the American Convention.

2. With respect to the non-pecuniary damage caused to Mr. Cadena Antolínez as a result of the violation of his right to judicial protection, it is the opinion of the Commission that the instant report constitutes in itself reparation.

70. The report was transmitted on August 9, 2007, to the State, which was given two months in which to adopt the recommendations contained therein. That same day, in keeping with Article 43(3) of its Rules of Procedure, the Commission notified the petitioners that it had adopted a report on merits and transmitted it to the State, and it requested them to set out their position with respect to submission of the case to the Inter-American Court.

#### Report of the State on compliance with the Commission's recommendations

71. By note DDHH.GOI. 51680/2828 of August 8, 2007, received at the IACHR on October 10, 2007, the State indicated that the Department of Human Rights and International Humanitarian Law of the Ministry of Foreign Affairs had confidentially transmitted Report 57/07 “to each of the judges who sit on the High Courts of the Republic, namely, the Supreme Court of Justice, the Constitutional Court, the Council of State, and the Superior Judicature Council.” The purpose in so doing was to bring the decision of the IACHR to their attention and, therefore, that they take it into account in similar situations in the future. The State also said that, nonetheless, “due to the independence of the judiciary which is recognized in the Colombian Constitution and international human rights treaties, it is important to underscore that the government cannot, with this note, guarantee which way future decisions will lean.”

72. Based on the above considerations, the Commission decided not to submit the case to the Court on November 8, 2007.

73. The Commission appreciates that the government has taken steps designed to bring about compliance with the recommendations of the IACHR. The Commission finds, nevertheless, that the recommendations have been partially implemented.

#### VI. CONCLUSIONS

74. In light of the foregoing analysis of fact and of law, the Commission reiterates its conclusions to the effect that the State of Colombia is responsible for the violation of Mr. Sergio Emilio Cadena Antolínez’s right to judicial protection enshrined in Article 25 of the American Convention on Human Rights, and of the general obligation to respect and ensure rights, pursuant to Article 1(1) of said treaty.

75. Since there has been reparation of the pecuniary damages caused to Mr. Cadena Antolínez, the Commission concludes that there is no violation of Article 21 in the instant case. Furthermore, based on the arguments expressed above, the Commission also concludes that there is no violation of Articles 2 and 8 of the American Convention.

## VII. RECOMMENDATION

76. Based on the arguments of fact and in law expressed above,

### THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS RECOMMENDS THAT THE COLOMBIAN STATE:

1. Adopt the necessary measures to avoid future violations of the right to judicial protection enshrined in the American Convention, pursuant to the obligation of prevention and guarantee of the fundamental rights recognized by the American Convention.
2. With respect to the non-pecuniary damage caused to Mr. Cadena Antolínez as a result of the violation of his right to judicial protection, it is the opinion of the Commission that the instant report constitutes in itself reparation.

## VIII. PUBLICATION

77. On March 14, 2008, the Commission adopted Report 21/08 --the text of which is included above-- in accordance with Article 51(1) of the American Convention. On March 25, 2008, the Commission transmitted this report to the Colombian State and the petitioners in keeping with Article 51(1) of the American Convention, and gave the State one month to provide information on implementation of the aforementioned recommendations.

78. On April 30, 2008, the State presented its report on compliance with the recommendations made by the IACHR in Report 21/08. The State reiterated that the report adopted under Article 51 was forwarded to the High Courts of the Republic in order to draw their attention to the decision of the IACHR and so that, they might as a result implicitly take it into account in similar situations in the future. The State also noted that it is giving attention to appropriate steps to avoid a repetition of the acts in question.

79. In light of the foregoing considerations and pursuant to Articles 51(3) of the American Convention and 45 of its Rules of Procedure, the Commission decides to reiterate the recommendation supra.

80. Finally, the Commission resolves to make this report public and include it in its Annual Report to the OAS General Assembly. In keeping with its mandate, the Commission will continue to evaluate the steps taken by the Colombian State in connection with the aforementioned recommendations until full compliance therewith is reached.

Done and signed in the city of Washington, D.C., on the 23rd day of the month of July, 2008.  
(Signed): Paolo G. Carozza, Chairman; Felipe González, Second Vice-Chairman; Sir Clare K. Roberts, Paulo Sérgio Pinheiro, Florentín Meléndez, and Víctor E. Abramovich, Commissioners.