In the Case of Tibi,

the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), pursuant to Articles 29, 31, 37(6), 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure") and to Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), issues the instant Judgment.

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* The instant Judgment is issued pursuant to the Rules of Procedure adopted by the Inter-American Court of Human Rights in its XLIX Regular Session, through its November 24, 2000 Order, which entered into force on June 1, 2001, and in accordance with the partial amendment adopted by the Court in its LXI Regular Session, through its November 25, 2003 Order, in force since January 1, 2004.

I. INTRODUCTION OF THE CASE

1. On June 25, 2003 the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed before the Court an application against the State of Ecuador (hereinafter "the State" or "Ecuador"), which originated in application No. 12.124, received by the Secretariat of the Commission on July 16, 1998.

2. The Commission filed the application pursuant to Article 61 of the American Convention, for the Court to decide whether the State abridged Articles 5(1) and 5(2) (Right to Humane Treatment), 7(1), 7(2), 7(3), 7(4), and 7(6), (Right to Personal Liberty), 8(1), 8(2),

8(2)(b), 8(2)(d), 8(2)(e), 8(2)(g) and 8(3) (Right to Fair Trial), 21(1) and 21(2) (Right to Property) and 25 (Right to Judicial Protection) of the American Convention, all of them in combination with Article 1(1) (Obligation to Respect Rights) of that same convention, to the detriment of Daniel David Tibi (hereinafter "Daniel Tibi", "Tibi" or "the alleged victim"). The Commission also pointed out that the State did not grant Mr. Tibi the possibility of filing a remedy against the mistreatment allegedly received during his detention or against his protracted preventive detention, which the Commission argues abridged domestic legislation, and there was no prompt and simple remedy that he could file before a competent Court to protect himself from the violations of his basic rights. All this, according to the Commission, constitutes a breach of the obligation set forth in Article 2 of the American Convention, which require the State to give domestic legal effect to the rights embodied in Articles 5, 7, 8 and 25 of said Convention.

3. According to the facts stated in the application, Daniel Tibi was a gem merchant. He was arrested on September 27, 1995, while he was driving his car down a street in the city of Quito, Ecuador. According to the Commission, Mr. Tibi was detained by officers of the Quito police force without a court order. He was then taken by plane to the city of Guayaquil, approximately 600 kilometers from Quito, where he was placed in jail and was illegally detained for eighteen months. The Commission adds that Daniel Tibi asserted that he was innocent of the charges against him and that he was tortured several times, beaten, burned, and "asphyxiated" to force him to confess to his participation in a drug trafficking case. The Commission also states that when Mr. Tibi was arrested they seized goods that were his property, worth one million French francs, which were not returned to him when he was released, on January 21, 1998. It is the understanding of the Commission that the circumstances surrounding the arrest and arbitrary detention of Mr. Tibi, in the framework of the Ecuadorian law on narcotics and psychotropic substances [Ley de Sustancias Estupefacientes y Psicotrópicas] reveal numerous violations of the obligations imposed on the State by the American Convention.

4. The Commission also asked the Court to order the State to provide effective reparations, including compensation for pecuniary and non pecuniary damages suffered by Mr. Tibi. It also asked the State to adopt such legislative or other measures that may be required to ensure respect for the rights enshrined in the Convention regarding all persons under its jurisdiction, to avoid violations similar to those committed in this case in the future. Finally, the Commission asked the Court to order the State to pay reasonable and justified costs and expenses due to processing of the case under domestic venue and before the inter-American system.

II. COMPETENCE

5. The Court us competent to hear the instant case. Ecuador has been a State Party to the American Convention since December 28, 1977, and it accepted the adjudicatory jurisdiction of the Court on July 24, 1984. On November 9, 1999, Ecuador ratified the Inter-American Convention to Prevent and Punish Torture (hereinafter "Inter-American Convention against Torture").

III. PROCEEDING BEFORE THE COMMISSION

6. On July 16, 1998, through his attorney, Arthur Vercken, Daniel Tibi filed a complaint before the Inter-American Commission based on the alleged violation, by Ecuador and to his detriment, of Articles 5(1), 5(2) and 5(4); 7(1), 7(2), 7(3), 7(4), and 7(6), 8(1), 8(2)(a), 8(2)(b), 8(2)(c), 8(2)(d), 8(2)(e), 8(2)(f), 8(2)(g), 8(2)(h) and 8(3); 10; 11(1), 11(2) and 11(3); 21(1), 21(2) and 21(3); and 25(1), 25(2)(a), 25(2)(b) and 25(2)(c) of the American Convention.

7. The Commission opened the case on May 7, 1999, forwarded the pertinent sections of the complaint to the State, and requested its comments, pursuant to the Rules of Procedure of the Commission that were in force at the time. It specifically asked the State, in accordance with Article 37 of the Rules of Procedure of the Commission, with the aim of processing said communication as appropriate, to provide –together with information on the facts- any relevant factors to assess whether in that case the domestic remedies had or had not been exhausted.

8. On August 12, 1999, the State answered the request for information, stating that domestic remedies had not been exhausted, as the criminal proceeding was still pending, and it asserted that there were effective domestic remedies, such as an appeal to the court of cassation, which the petitioner could file against the judgment issued by the respective criminal court, and a motion for review, which could be requested at any moment once a writ of execution of the judgment had been issued, if he were found guilty in that judgment. The State pointed out that while there were irregularities in the processing of the first instance of the criminal trial, they had been corrected, as the petitioner was able to resort to available remedies to recuse the judges. On September 27, 1999 the State submitted additional information to the Commission regarding the reasons for Mr. Tibi's detention and the evidence that it was based on, regarding non-liability of the police in this matter, and regarding non-exhaustion of domestic remedies, based on the fact that there was still no definitive court ruling, that is, a non-appeable judgment. On October 8, 1999, the Commission forwarded the information supplied by the State to the petitioner, and requested his comments on it.

9. On December 9, 1999 the petitioner, in response to a query by the Commission, argued that he had no available remedies to exhaust. He added that he had already been found innocent and that, furthermore, only the inter-American system could offer an "impartial and apolitical" examination of his situation. Finally, he added that, despite having appointed an attorney in Ecuador to seek the return of his property, it had not been returned to him.

10. On October 5, 2000, during its 108th Regular Session, the Commission adopted Report No. 90/00, in which it found the case admissible under No. 12.124, and it decided to consider the merits. Specifically, in said Report the Commission pointed out that:

[t]he argument of the State regarding the existence of instances yet to be exhausted refers to a drug trafficking case in which the proceeding against the petitioner was provisionally dismissed on September 3, 1997. However, this case has been under consideration since 1995, for which reason the Commission concluded that there [wa]s unjustified delay, applying the exception set forth in Article 46(2)(c) [of the Convention]. The Commission noted that the State does not specify which instances have already been exhausted, nor in which instance the case is currently ongoing.

11. Said report mentioned, regarding return of the belongings "seized" when the petitioner was detained, that the State had not specified the procedures that he should follow to obtain their return, but rather it asserted that he had never requested their return after his release. The Commission mentioned that on September 23 or 29, 1998, in the judgment issued by the Second Criminal Judge of the Guayas, Alternate Judge for the Eighteenth Criminal Court of the Guayas, an order was issued for the return of Mr. Tibi's belongings, "prior confirmation by the Sixth Chamber of the High Court of Justice of Guayaquil, to which this ruling will be forwarded in consultation to request a summary review." The Commission noted that, at the time of the admissibility report, on October 5, 2000, there had been no decision on said request for a summary review, and it concluded "that it is a case of unjustified delay [,] for which reason […it deemed that] domestic remedies had been exhausted regarding the right to private property, set forth in Article 21 of the American Convention." Said report was forwarded to the petitioner and to the State by the Commission on October 26, 2000.

12. On October 30, 2000 the Commission made itself available to the parties for purposes of attaining a friendly settlement. On November 17, 2000 the petitioner stated that he was interested in a friendly settlement. On November 28, 2000 the Commission informed the State of the petitioner's interest in reaching a friendly settlement, and requested its comments on the matter. The State expressed no interest in seeking a friendly settlement. Therefore, the Commission prepared the report on the merits of the case.

13. On October 2, 2001 the State forwarded a brief to the Commission on the merits of the case, in which it argued that the human rights violations of which Mr. Tibi accused Ecuador had not existed, as it was proven that the State had acted in accordance with the law. Ecuador also forwarded information on the circumstances and conditions of Mr. Tibi's detention.

14. On November 14, 2001, the Commission held a public hearing on the merits of the case. At this hearing, the State requested that it be authorized to answer certain questions in writing after the hearing. Therefore, on November 15, 2001 the Commission sent the questions to the State and requested the respective answers. On January 11, 2002, the State sent its reply to the questions posed by the Commission. On the 18th of that same month and year, the Commission forwarded said communication by the State to the petitioner, and asked him to submit his comments.

15. On December 12 and 14, 2001, respectively, the petitioner informed the Commission that the Center for Justice and International Law (hereinafter "CEJIL") and the Clínica de Derechos Humanos of the Pontificia Universidad Católica del Ecuador (hereinafter "Clínica de Derechos Humanos PUCE") would represent him.

16. On March 4, 2002 the petitioner submitted his comments on the brief by the State, in which the State answered the Commission's questions (supra para. 14). On April 1, 2002 the Commission forwarded said communication to the State and asked it to submit its comments. The State made no comments.

17. On March 3, 2003, during its 117th Session, the Commission adopted Report No. 34/03 on the merits of the case, and recommended to the State that it:

1. Provide full reparation, which involves the respective compensation and rehabilitation for the torture of Daniel David Tibi, and erasing any [...] criminal [...] record if it exists [...].
2. Take the necessary steps to make the legislation on amparo effective.

18. On March 25, 2003 the Commission forwarded to the State the aforementioned report, and asked it to report, within two months of the date when the report was forwarded, on the steps taken to comply with the recommendations. That same day, the Commission informed the petitioner that it had issued Report No. 34/03 on the merits of the case, and asked him to submit, within one month, his position on the pertinence of submitting the case to the Inter-American Court. The two-month period granted to the State ended on May 25, 2003, without the State having sent its comments. The Commission decided to submit the instant case to the Court.

IV. PROCEEDING BEFORE THE COURT

19. The Commission filed its application before the Court on June 25, 2003.

20. Pursuant to Articles 22 and 33 of the Rules of Procedure, the Commission appointed as its delegates Marta Altolaguirre and Santiago Canton, and as legal advisor it appointed Christina Cerna [FN1]. The Commission also stated that the original petitioner was Arthur Vercken.

[FN1] During the processing of the instant case, the Commission made some changes in the appointment of its representatives before the Court.
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21. On August 4, 2003 the Secretariat of the Court (hereinafter "the Secretariat"), after a preliminary examination of the application by the President of the Court (hereinafter "the President"), forwarded it to the State, with its appendixes, and informed the State of the deadlines to reply to it and to appoint its representatives in the proceeding. The Secretariat, under instructions by the President, also informed the State of its right to appoint an ad hoc Judge.

22. On August 4, 2003, pursuant to the provisions of Article 35(1)(e) of the Rules of Procedure, the Secretariat forwarded the application to CEJIL and to the Clínica de Derechos Humanos PUCE, as representatives of the alleged victim and his next of kin (hereinafter "representatives of the alleged victim and his next of kin" or "representatives"). [FN2]

[FN2] During processing of the instant case, the representatives made some changes in the appointment of their representatives before the Court.
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23. On August 29, 2003 the State appointed as its Agents Juan Leoro Almeida, Ambassador of Ecuador before the Republic of Costa Rica and Erick Roberts, and as Deputy Agent Rodrigo Durango Cordero. It also appointed Hernán Salgado Pesantes as ad hoc Judge.

24. On September 30, 2003 the State sent a brief in which it filed preliminary objections. On October 2, 2003 the Secretariat informed the State that it would process said brief when Ecuador submitted its reply to the application and its comments on the written brief containing pleadings, motions, and evidence submitted by the representatives of the alleged victim, pursuant to Article 37(1) of the Rules of Procedure.

25. On October 3, 2003, after an extension requested by the representatives, they submitted their pleadings, motions, and evidence (hereinafter "brief containing pleadings and motions"). They asked the Court to find that the State had violated Articles 1(1) (Obligation to Respect Rights); 2 (Domestic Legal Effects); 5(1), 5(2) and 5(4) (Right to Humane Treatment); 7(1), 7(2), 7(3), 7(4), and 7(6) (Right to Personal Liberty); 8(1), 8(2), 8(2)(b), 8(2)(d), 8(2)(e), 8(2)(g) (Right to Fair Trial); 17(1) (Rights of the Family); 21(1) and 21(2) (Right to Property), and 25(1) (Right to Judicial Protection) of the American Convention. They also asked the Court to adjudge that the State abridged Articles 1, 6 and 8 of the Inter-American Convention against Torture. They furthermore asked the Court to find a violation of the right to humane treatment to the detriment of Beatrice Baruet, Sarah Vachon, Jeanne Camila Vachon, Lisianne Judith Tibi, and Valerian Edouard Tibi, for their suffering. Finally, they requested certain reparations and the payment of costs and expenses.

26. On October 31, 2003 the State filed two preliminary objections, replied to the application, and submitted comments on the pleadings and motions, after having requested an extension, which was granted by the President. The objections filed by the State were the following: "Non-exhaustion of domestic remedies" and "Lack of ratione materiae jurisdiction of the Inter-American Court to hear on violations of the Inter-American Convention to Prevent and Punish Torture."

27. On December 18, 2003 the Inter-American Commission submitted, in English, its comments on the preliminary objections filed by the State. The following day, the Secretariat informed the Commission that it would not process said brief until it received the translation into Spanish. The Commission submitted the translation into Spanish on January 6, 2004. In said brief, the Commission asked the Court to find the first preliminary objection inadmissible, and it made no statement on the second preliminary objection filed.

28. On December 19, 2003 the representatives submitted comments on the preliminary objections filed by the State and they asked the Court to reject the two preliminary objections and to continue processing the instant case, in the merits stage.

29. On June 11, 2004 the President issued an Order in which, pursuant to Article 47(3) of the Rules of Procedure, it authorized Elsy Magdalena Peñafiel Toscano, Blanca López and Gloria Antonia Pérez Vera to submit their testimony trough affidavits submitted before a notary public, and also authorized Alain Abellard, Laurent Rapin, Brigitte Durin and Michel Robert, all of them offered by the representatives, the former three as witnesses and the latter as an expert witness, to submit their testimony and expert opinion through statements before a notary public. The President ordered the substitution of expert witness Alberto Wray, offered by the representatives, by César Banda Batallas, pursuant to Article 44(3) of the Rules of Procedure, and authorized rendering of his statement before a notary public. The President also granted a non-extendable

five-day period, beginning on the date when the affidavits were forwarded, for the Commission and the representatives to submit such comments as they deemed pertinent regarding the statements of Elsy Magdalena Peñafiel Toscano, Blanca López and Gloria Antonia Pérez Vera, and for the Commission and the State to send their comments on the statements by Alain Abellard, Laurent Rapin and Brigitte Durin and on the expert opinions of Michel Robert and César Banda Batallas. The President also summoned the Commission, the representatives of the alleged victim and his next of kin, and the State to a public hearing to be held at the seat of the Court, beginning on July 7, 2004, to hear their arguments on the preliminary objections and merits, reparations, and costs, and to hear the testimony of Daniel Tibi, Beatrice Baruet and Juan Montenegro, and the expert opinions of Santiago Argüello Mejía, Ana Deutsch and Carlos Martín Beristain, offered by the Commission, the representatives, and the State, as appropriate. The parties were also informed that they had up to August 9, 2004 to submit their final written pleadings.

30. On June 25, 2004, after an extension granted, the representatives submitted the sworn statements of Alain Abellard and Michel Robert, and the replies of Laurent Rapin to a questionnaire sent to him by the representatives. On the 30th of that same month and year, they sent the statement rendered before a notary public by César Banda Batallas. They stated that they had been unable to communicate with Brigitte Durin, former French consul in Ecuador, for which reason they did not attach her statement. They sent the sworn statements of Frederique Tibi, the alleged victim's current common-law spouse, and of Eric Orhand and Blandine Pelissier, his friends, who had not been included as witnesses in the brief containing pleadings and motions nor in the final list of witnesses. The statements of Michel Robert, Frederique Tibi, Blandine Pelissier and Eric Orhand were sent in English. The Spanish-language version was submitted on June 28, 2004.

31. On July 1, 2004 the Commission stated that it had no comments on the statements by Alain Abellard and Laurent Rapin, on the expert opinion of expert witness Michel Robert, or on the new testimony submitted to the Court by the representatives by means of affidavits. The State made no comments on said statements.

32. On July 2, 2004 the State extemporaneously sent the statements rendered before a notary public (by means of affidavits) by Elsy Magdalena Peñafiel Toscano and Gloria Antonia Pérez Vera, after granting an extension until June 25, 2004. The State also reported that it was unable to supply the statement of Blanca López, for which reason it withdrew said witness.

33. At a public hearing on July 7 and 8, 2004, the Court heard the statements of the witnesses and the expert opinions of the expert witnesses offered by the Inter-American Commission, the representatives and the State. The Court also heard the pleadings on preliminary objections and merits, reparations, and costs, of the Inter-American Commission, of the representatives and of the State.

There appeared before the Court:

on behalf of the Inter-American Commission on Human Rights:

Santiago A. Canton, Delegate;
Andrea Galindo, legal advisor;
Lilly Ching, legal advisor, and
Elizabeth Abi-Mershed, legal advisor;

on behalf of the State of Ecuador:

Rodrigo Durango Cordero, Deputy Agent;

on behalf of the representatives of the alleged victim and his next of kin:

Viviana Krsticevic, representative;
Oswaldo Ruiz Chiriboga, representative;
Soraya Long, representative, and
Roxana Altholz, representative.

Witness offered by the Inter-American Commission on Human Rights and by the representatives of the alleged victim and his next of kin:

Daniel David Tibi.

Witness offered by the representatives of the alleged victim and his next of kin:

Beatrice Baruet.

Witness offered by the State of Ecuador:

Juan Montenegro.

Expert witness offered by the Inter-American Commission on Human Rights:

Carlos Martín Beristain.

Expert witnesses offered by the representatives of the alleged victim and his next of kin:

Ana Deutsch, and
Santiago Argüello Mejía.

34. On July 7, 2004, during the public hearing, the representatives submitted a compact disc.

35. At that same public hearing before the Court, witness Juan Montenegro submitted documents regarding the case, and expert witness Santiago Argüello Mejía submitted a written expert opinion entitled “Dictamen en el caso Daniel Tibi vs. Ecuador. (Sistema Penitenciario). Corte Interamericana de Derechos Humanos”.

36. On July 11, 2004 the representatives submitted comments on the statements of Elsy Magdalena Peñafiel Toscano and Gloria Antonia Pérez Vera. They argued that both statements were identical, that the State itself had pointed out that they were "joint" statements, and that they contradicted them "regarding both form and substance." Therefore, they asked the Court to disallow them.

37. On July 12, 2004 the Commission submitted its comments on the statements by Elsy Magdalena Peñafiel Toscano and Gloria Antonia Pérez Vera. It pointed out that they were identical, that they were submitted in an untimely manner, that they did not reflect direct knowledge of any facts, and that they did not fulfill the formal and substantive requirements.The Commission asked the Court to disallow these statements.

38. On July 27, 2004 the Secretariat, under instructions by the President, asked the State to submit, as evidence to facilitate adjudication of the case, no later than August 9, 2004, the following information: documents pertaining to new rulings issued in the criminal proceeding; steps taken in regards to the judicial amparo remedy filed on October 2, 1997; copy of the ruling on the inquiry in connection with the September 23, 1998 judicial decision; steps taken to return Mr. Tibi's seized property; medical traumatological and dermatological reports, if Mr. Tibi was thus examined; steps taken, if any, regarding the alleged torture suffered by Mr. Tibi; draft medical interview by Juan Montenegro with Mr. Tibi on September 19, 1997; copy of the disciplinary proceedings against judges Rubio Game and Angelita Albán, for the alleged delays in processing of the criminal proceeding against Mr. Tibi; copies of the visas granted to Mr. Tibi by the Dirección de Extranjería; visitors' book at the Centro de Rehabilitación Social de Varones of Guayaquil; legislation on minimum wages; official exchange rate tables for Ecuadorian currency in regards to the United States dollar and legal provisions regarding the benefits granted to workers in the private sector, as well as the Political Constitution of Ecuador, the Criminal Procedures Code, and the Law on Narcotics and Psychotropic Substances; in all cases, those in force at the time of the facts. The Secretariat also asked the State to resend those documents that were illegible. The Secretariat, under instructions by the President, also asked the Commission and the representatives to submit, as evidence to facilitate adjudication of the case, no later than August 9, 2004, some of the documents requested of the State and to resend those documents that were illegible. The Secretariat also asked the Commission and the representatives to submit the birth certificates or other suitable documents of Lisianne Tibi, Sarah Vachon, Jeanne Camila Vachon and Valerian Edouard Tibi. It also asked them to submit the birth certificate of Oceane Tibi Conilh de Beyssac and information on her.

39. On August 9, 2004 the Commission submitted its final written pleadings.

40. On August 9, 2004 the representatives of the alleged victim and his next of kin submitted their final written pleadings together with several appendixes. That same day the representatives submitted some of the evidence to facilitate adjudication of the case requested by the President (supra para. 38).

41. On August 12, 2004 the Commission submitted part of the evidence to facilitate adjudication of the case requested by the President (supra para. 38).

42. On August 12, 2004 the State submitted its final written pleadings. It did not submit the documentary evidence requested to facilitate adjudication of the case.

V. PRELIMINARY OBJECTIONS

43. The state filed the following preliminary objections: 1) non-exhaustion of domestic remedies and 2) lack of ratione materiae jurisdiction of the Inter-American Court to hear cases regarding violations of the Inter-American Convention to Prevent and Punish Torture.

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FIRST PRELIMINARY OBJECTION

Non-exhaustion of domestic remedies

Pleadings of the State

44. The State argued that:

a) it raised the objections at the appropriate procedural stage before the Commission, stating that domestic remedies had not been exhausted, because the criminal proceeding against Daniel Tibi was pending before the courts in the city of Guayaquil. Therefore, the petition should not have been admitted by the Commission, nor should it be admitted by the Court. Subsequently, the State pointed out that the criminal proceeding was suspended;
b) the "amparo de libertad" is not a remedy proper, but rather a complaint filed before the superior court judge above the one who issued the confinement order, to review the lawfulness of the deprivation of liberty. This "amparo de libertad" was not the suitable and effective remedy;
c) the habeas corpus remedy was not exhausted before the Justice of the Peace of the County where Daniel Tibi was detained, as set forth in Article 93 of the Political Constitution of Ecuador. This was the remedy which should have been exhausted and which could have been suitable;
d) the civil action against the State, set forth in Article 22 of the Political Constitution of Ecuador should have been exhausted; this action can be filed for liability due to judicial error, inappropriate administration of justice, acts that have caused the imprisonment or arbitrary detention of an innocent person, and violation of the provisions of Article 24 of that same Constitution, regulating guarantees of due process. The Ecuadorian Civil Procedures Code also provides for the action for damages;
e) the motion of appeal remedy, which could have been effective, was not exhausted. The petitioner could have filed it against the judgment issued by the judge or senior judge who heard his case;
f) it cannot be said that there was unjustified delay in processing of the case, as the Inter-American Commission and the representatives asserted, since the Commission did not allow the State to solve the conflict before engaging international Justice.

Pleadings of the Commission

45. The Inter-American Commission pointed out that:

a) Articles 46 and 47 of the American Convention set forth that the Commission, as the main body of the system, has the responsibility of establishing admissibility or inadmissibility of a petition;
b) a decision on admissibility adopted by the Commission must be considered definitive before the Court, since the State had access to the necessary guarantees before the Commission, for purposes of an appropriate and effective defense;
c) Mr. Tibi was not released immediately after the provisional discontinuance, as set forth in Ecuadorian legislation (Article 246 of the Criminal Procedures Code), as there was a mandatory consultation of drug-related cases;
d) on January 14, 1998 the High Court of Guayaquil upheld the provisional discontinuance of the proceeding and quashing of the indictment, issued by the lower court on September 3, 1997, and ordered the release of Mr. Tibi, who was released on January 21, 1998. If at the time of Mr. Tibi's release there had been criminal proceedings pending, it is unlikely that he would have been allowed to leave the country and return to France;
e) on July 15, 1998 the Commission received the complaint, which was forwarded to the State on May 7, 1999. On October 5, 2000 the Commission ruled on admissibility. "The State d[id] not explain which 'criminal proceedings' were allegedly pending against Mr. Tibi on July 15, 1998;"
f) the two courts that heard the case dismissed the charges against Daniel Tibi, because his conduct had not been linked to them or to the case. Therefore, Mr. Tibi and the other persons covered by the dismissal were excluded from the following stage of the criminal proceeding (full trial). The High Court of Guayaquil should have issued a "definitive" order quashing the indictment, instead of upholding the "provisional" discontinuance;
g) Mr. Tibi filed two judicial amparo remedies to challenge the lawfulness of the detention: the first one, on July 1, 1996, which was rejected, and the second one, on October 2, 1997, but the judicial authorities never replied to this request. The amparo remedies were ineffective, as they did not lead to his release, nor did they lead the Ecuadorian authorities to conduct an investigation of the complaint regarding human and constitutional rights;
h) the cassation remedy and the motion for review mentioned by the State in its pleadings before the Commission are only effective in regards to a non-appealable judgment. In the instant case, the charges against Mr. Tibi were dismissed;
i) in the proceeding before the Commission, the State did not refer to the constitutional habeas corpus remedy or to the need to file an action for damages or motion of appeal during the admissibility stage. Therefore, it is not in order for it to do so before the Court;
j) in regards to Daniel Tibi's property that was seized when he was detained, the State did not specify what procedures should have been followed for it to be returned. The State itself argues that Mr. Tibi never requested this after his release. Once the dismissal of the accusation was upheld, an order was issued to return the property and "to date [September 15, 2003] the issue has not been resolved, [...which entails] an unjustified delay;" and
k) the State has submitted contradictory pleadings regarding the rule of exhaustion of domestic remedies. In its pleadings before the Commission and the Court, it asserted on the one hand that the decision on admissibility was prior to completion of the criminal proceeding, and on the other hand, in its reply to the application before the Court, it argued that the criminal proceeding continued until the provisional dismissal was upheld. Pursuant to the jurisprudence of

the Court, when a party has adopted an attitude that is beneficial to that party or detrimental to the opposite party, it cannot subsequently adopt another position that contradicts the former one (estoppel principle).

Pleadings of the representatives of the alleged victim and his next of kin

46. The representatives of the alleged victim and his next of kin argued that:

a) the Commission has the authority to decide on exhaustion of domestic remedies and to establish admissibility, pursuant to Articles 46 and 47 of the American Convention. Once said procedure has been conducted, the principle of procedural preclusion applies, and if a case is found admissible "this decision is 'definitive' and 'indivisible';"
b) the State contradicts itself in its arguments regarding the preliminary objection, since on the one hand it asserted that domestic remedies had not been exhausted, because there was a pending decision of the courts in the criminal proceeding against Mr. Tibi, and in the substantive arguments in that same brief it pointed out that the criminal proceeding against Mr. Tibi ended on January 21, 1998, within a reasonable time;
c) in regards to the criminal proceeding pending and the discontinuance, the legal provisions that regulate it do not have the effect that the State wishes to assign to them. Suspension of the proceeding does not impede resorting to international venue. There was no ordinary or extraordinary appeal against the judgment that upheld the provisional discontinuance;
d) Daniel Tibi filed two "amparo de libertad" or judicial habeas corpus remedies, pursuant to Article 458 of the Criminal Procedures Code in force at the time of the facts, and these remedies were ineffective;
e) Mr. Tibi was not under the obligation to exhaust the constitutional habeas corpus remedy;
f) the action for damages is not an adequate remedy to decide the situation of the alleged victim, aside from the fact that this argument was not raised by the State during the early stages of the proceeding before the Commission. "A civil action, the aim of which is to obtain financial reparations, cannot be deemed to be appropriate to solve the situation of the victim and to redress the violations of his human rights;" and
g) this preliminary objection must be rejected, as it was not submitted clearly during the early stages of the proceeding before the Commission. Furthermore, the State tacitly waived it, by not specifying which remedies had to be exhausted. The waiver is irrevocable. Therefore, the State cannot submit new arguments before this Court.

Considerations of the Court

47. The Convention grants the Court full jurisdiction on all matters pertaining to a case that it is hearing, including procedural matters on which the possibility of the Court exercising its jurisdiction is based. [FN3]

[FN3] See Case of Herrera Ulloa. July 2, 2004 Judgment. Series C No. 107, para. 79; Case of Juan Humberto Sánchez. June 7, 2003 Judgment. Series C No. 99, para. 65; and Case of the 19 Tradesmen. Preliminary Objection. June 12, 2002 Judgment. Series C No. 93, para. 27.

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48. Article 46(1)(a) of the American Convention sets forth that for a petition or communication submitted to the Inter-American Commission to be admissible pursuant to Articles 44 or 45 of the Convention, it is necessary for domestic remedies to have been filed and exhausted, according to generally recognized principles of international law.

49. The Court has asserted criteria that must be taken into account in the instant case. First of all, the respondent State can explicitly or tacitly waive the right to argue non-exhaustion of domestic remedies. [FN4] Second, for it to be on time, the objection of non-exhaustion of domestic remedies must be raised during the admissibility stage of the proceeding before the Commission, that is, before any consideration of the merits; if this is not the case, it will be presumed that the State tacitly waives resorting to it. [FN5] Third, the Court has pointed out that non-exhaustion of remedies is a matter of pure admissibility and that the State that raises this objection must specify the domestic remedies that must be exhausted, as well as show that these remedies are effective. [FN6]

[FN4] See Case of Herrera Ulloa, supra note 3, para. 81; Case of the Mayagna (Sumo) Awas Tigni Community. Preliminary Objections. February 1, 2000 Judgment. Series C No. 66, para. 53; and Case of Loayza Tamayo. Preliminary Objections. January 31, 1996 Judgment. Series C No. 25, para. 40.

[FN5] See Case of Herrera Ulloa, supra note 3, para. 81; Case of the Mayagna (Sumo) Awas Tigni Community. Preliminary Objections, supra note 4, para. 40; and Case of Castillo Petruzzi et al. Preliminary Objections. September 4, 1998 Judgment. Series C No. 41, para. 56.

[FN6] See Case of Herrera Ulloa, supra note 3, para. 81; Case of the Mayagna (Sumo) Awas Tigni Community. Preliminary Objections, supra note 4, para. 53; and Case of Durand-Ugarte. Preliminary Objections. May 28, 1999 Judgment. Series C. No. 50, para. 33.

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50. This Court also deems that Article 46(1)(a) of the Convention states that domestic remedies must be filed and exhausted in accordance with generally recognized principles of International Law, which means that these remedies must not only exist formally, but must also be appropriate and effective, as derived from the exceptions set forth in Article 46(2) of the Convention.

51. In the brief in which it filed the preliminary objections, replied to the application and made comments on the pleadings and motions, the State argued that the applications for review, the constitutional habeas corpus and the action for damages against justices, judges, officials and employees of the courts had not been exhausted.

52. By not arguing non-exhaustion of applications for review, the constitutional habeas corpus and the action for damages against justices, judges, officials and employees of the courts during the admissibility procedure before the Inter-American Commission, the State tacitly waived a means of defense that the American Convention established in its favor and incurred in an implicit admission of the non-existence of said remedies or of their timely exhaustion. [FN7] Given the above, the State could not submit an argument regarding said remedies for the first

time in the brief in which it filed its preliminary objections, replied to the application and made comments on the arguments and motions.

[FN7] See Case of Herrera Ulloa, supra note 3, para. 83; Case of the Mayagna (Sumo) Awas Tigni Community. Preliminary Objections, supra note 4, para. 56; and Case of Castillo Petruzzi et al.. Preliminary Objections, supra note 5, para. 56.

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53. In regards to the State's argument that during the procedure on admissibility before the Commission there was still a criminal proceeding pending against Mr. Tibi, and that the cassation remedy and motion for review had not been exhausted, it must point out that the Commission stated in Admissibility Report No. 90/00, of October 5, 2000, that the argument of the State regarding the existence of non-exhausted instances refers to a proceeding in regards to drug-trafficking, in which a provisional discontinuance was ordered on September 3, 1997. However, this case had been before the inter-American system for the protection of human rights since 1998, and for this reason the Commission found that there had been unjustified delay in this case, for which the exception set forth in Article 46(2)(c) of the Convention was applicable. The Commission noted that the State did not specify which instances had not been exhausted, nor in which instance the proceeding was then.

54. In the same Admissibility Report, the Commission pointed out that Daniel Tibi filed two judicial amparo remedies. The first one was rejected, and there was no reply regarding the second one. The Commission deemed that the judicial amparo remedy was sufficient and suitable to protect the rights set forth in Articles 5 and 7 of the American Convention. In regards to Article 21 of the Convention, the Commission found that there was an unjustified delay.

55. The Court finds no reason to reexamine the reasoning of the Commission, which is consistent with the significant provisions of the Convention, and therefore it dismisses the first preliminary objection filed by the State.

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SECOND PRELIMINARY OBJECTION

"Lack of ratione materiae jurisdiction of the Inter-American Court to hear cases regarding the Inter-American Convention to Prevent and Punish Torture"

Pleadings of the State

56. The State argued that:

a) the Court has no jurisdiction to apply said instrument because the alleged facts that gave rise to the application supposedly took place in 1995 and Ecuador ratified the Inter-American Convention against Torture in 2000, by publishing the ratification in the official gazette, Registro

Oficial, on January 13, 2000. Therefore, at the time of Daniel Tibi's detention, said Convention was not part of the Ecuadorian legal system; and
b) the State cannot be punished for obligations that it has not undertaken and that did not exist at the time of the alleged facts; there could, instead, be violations of Article 5 of the American Convention.

Pleadings of the Commission

57. The Commission argued that:

a) it will not refer to said preliminary objection because neither the Article 50 of the American Convention report nor the application before the Court had referred to the Inter-American Convention against Torture; and
b) it asked the Court to dismiss this objection.

Pleadings of the representatives of the alleged victim and his next of kin

58. The representatives of the alleged victim and his next of kin stated that:

a) Ecuador ratified the Inter-American Convention against Torture on November 9, 1999 and it entered into force for the State on December 9 of that year, independently of the date on which the State published it in its Official Gazette, pursuant to Article 22 of the Inter-American Convention against Torture;
b) pursuant to the Vienna Convention on the Law of Treaties, the provisions of the treaty do not establish obligations of a State Party in regards to an act or fact that took place prior to the entry into force of the treaty;
c) they did not ask the Court to rule on the violations that took place before December 9, 1999; and
d) the State has begun no investigation with the aim of identifying and punishing those responsible for the torture inflicted on Mr. Tibi. There is no evidence, either, of any investigation regarding the abuse, mistreatment, and death threats received by the victim from other inmates. Therefore, the State abridged Articles 1, 6 and 8 of the Inter-American Convention against Torture, which refer to the obligation of the State to prevent, investigate and punish torture, an obligation which to date has not been fulfilled. The Court has jurisdiction to rule on these violations.

Considerations of the Court

59. Before considering the instant objection filed by the State, this Court deems it necessary to specify that it refers to an argument regarding a time-related aspect of its jurisdiction (ratione temporis) rather than an objection regarding the subject matter of the case (ratione materiae).

60. The representatives of the alleged victim and his next of kin asked the Court to find the State responsible for the alleged lack of prevention, investigation, and punishment of the torture, as well as for the deficient definition of the crime of torture. They did not ask the Court to rule

on violations of the Inter-American Convention against Torture committed before it entered into force in Ecuador.

61. The State ratified the Inter-American Convention against Torture on November 9, 1999. That Convention entered into force for this State, pursuant to Article 22 of said Convention, on December 9, 1999.

62. The facts in the instant case that took place before December 9, 1999 are not under the jurisdiction of the Court according to the terms of this instrument. However, the Court would retain jurisdiction to rule on acts or facts in violation of said Convention that occurred after that date. [FN8]

[FN8] See Case of the Goméz Paquiyauri Brothers. July 8, 2004 Judgment. Series C No. 110, para. 114; Case of Maritza Urrutia. November 27, 2003 Judgment. Series C No. 103, para. 95; and Case of Bámaca Velásquez . November 25, 2000 Judgment, Series C No. 70, para. 223.

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63. The Court has jurisdiction to hear the facts of the sub judice case in light of the American Convention.

64. For the aforementioned reasons, the Court dismisses the second preliminary objection raised by the State.

VI. EVIDENCE

65. Before examining the evidence tendered, the Court, in light of Articles 44 and 45 of the Rules of Procedure, will state certain considerations that apply to the specific case, most of which have been developed in the jurisprudence of this Court.

66. The principle of adversarial proceedings applies to probatory matters, and among other things this entails respect for the rights of the parties to defense. This principle is reflected in Article 44 of the Rules of Procedure, regarding when evidence must be offered, therefore to be equality between the parties. [FN9]

[FN9] See Case of the Goméz Paquiyauri Brothers, supra note 8, para. 40; Case of the 19 Tradesmen. July 5, 2004 Judgment. Series C No. 109, para. 64; and Case of Molina Theissen. Reparations (Art. 63(1) of the American Convention on Human Rights), July 3, 2004 Judgment, Series C, No. 108, para. 21.

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67. The Court has pointed out previously that the proceedings before it are not subject to the same formalities as domestic judicial actions, and that the inclusion of specific items in the body of evidence must be done paying special attention to the circumstances of the concrete case and ensuring respect for legal certainty and procedural balance among the parties. [FN10] The Court

has also taken into account that international jurisprudence has avoided a rigid determination of the quantum of evidence necessary as grounds for a ruling, [FN11] bearing in mind that international courts have the authority to appraise and assess evidence based on the rules of competent analysis. This criterion is especially valid in regards to international human rights courts, which have ample flexibility to assess the evidence tendered before them in accordance with the rules of logic and based on experience. [FN12]

[FN10] See Case of the Goméz Paquiyauri Brothers, supra note 8, para. 41; Case of the 19 Tradesmen, supra note 9, para. 65; and Case of Molina Theissen . Reparations, supra note 9, para. 23.
[FN11] See Case of the Goméz Paquiyauri Brothers, supra note 8, para. 41; Case of the 19 Tradesmen, supra note 9, para. 65; and Case of Molina Theissen . Reparations, supra note 9, para. 23.
[FN12] See Case of the Goméz Paquiyauri Brothers, supra note 8, para. 41; Case of the 19 Tradesmen, supra note 9, para. 65; and Case of Molina Theissen . Reparations, supra note 9, para. 23.

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68. Pursuant to the above, the Court will now examine and assess the set of items that constitute the body of evidence in this case.

A) DOCUMENTARY EVIDENCE

69. The Inter-American Commission contributed documentary evidence when it filed its application brief (supra para. 19) [FN13].

[FN13] See file with appendixes to the application, volume I, appendixes 1 to 12, leaves 043 to 199; volume II, appendixes 13 to 29, leaves 201 to 523; and volume III, appendixes 30 to 54, leaves 526 to 664.

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70. The representatives of the alleged victim and his next of kin submitted several appendixes as documentary evidence, together with the brief containing pleadings and motions (supra para. 25) [FN14].

[FN14] See file with appendixes to the brief with arguments and motions, appendix 01 to 27, leaves 666 to 840; and, appendixes 28 to 38, leaves 842 to 1071.

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71. The State sent the brief filing preliminary objections, replying to the application and commenting on the arguments and motions, to which it attached several appendixes as documentary evidence (supra para. 26) [FN15].

[FN15] See file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaves 1072 to 1564.

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72. Witness Juan Montenegro and expert witness Santiago Argüello Mejía supplied various documents during the public hearing (supra para. 35), [FN16] and the representatives submitted a compact disk (supra para. 34). [FN17]

[FN16] See documents submitted by witness Juan Montenegro and expert witness Santiago Argüello Mejía on July 7, 2004 (file with preliminary objections and merits and reparations, volume III, leaves 710.b to 713 and leaves 722.b to 727).

[FN17] See compact disk submitted by the representatives of the alleged victim and his next of kin on July 7, 2004 (file with documents submitted by the representatives during the public hearing on Preliminary objections and merits, reparations and costs).

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73. The representatives (supra para. 30) [FN18] and the State (supra para. 32) [FN19] forwarded the sworn statements of Alain Abellard and Michel Robert, the replies to the questionnaire sent by the representatives to Laurent Rapin and the statements made before a notary public (affidavits) by César Banda Batallas, Magdalena Peñafiel and Gloria Pérez, pursuant to the President's June 11, 2004 Order (supra para. 29). The representatives also forwarded the sworn statements rendered by Eric Orhand, Frederique Tibi and Blandine Pelissier (supra para. 30). [FN20] The Court will now summarize the significant parts of said statements.

[FN18] See sworn statements and statements made before a notary public (affidavits) submitted by the representatives (file with preliminary objections and merits and reparations, volume III, leaves 564 to 567, 570 to 572.a, 572.b to 574, 575 to 590, 601 to 602 and 632 to 648).

[FN19] See statements made before a notary public (affidavits) submitted by the State (file with preliminary objections and merits and reparations, volume III, leaves 681 to 692).

[FN20] See additional sworn statements submitted by the representatives (file with preliminary objections and merits and reparations, volume III, leaves 591 to 599 and 607 to 608).

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a) Testimony of Alain Abellard, a journalist

He is a journalist, he has worked for "Le Monde" as the journalist in charge of the American region, from 1994 to 2003, and he is currently editor of that same newspaper. He has written several articles on prison conditions and detention of French citizens in Latin America, specifically in Ecuador, Venezuela, Colombia, Bolivia, and Guatemala.

In 1997 he was contacted by a friend of Daniel Tibi, who mentioned the case to him. He was able to talk directly over a cell phone to Daniel Tibi, who was at the Centro de Rehabilitación Social de Varones of Guayaquil (hereinafter "Penitenciaría del Litoral"), in Guayaquil, Ecuador.

Over the next two years, the witness wrote five articles on the prison situation in Ecuador, specifically on conditions at the Guayaquil penitentiary and on the detention of Mr. Tibi. His sources were Daniel Tibi and other inmates, members of the French diplomatic corps, Ecuadorian journalists, including the editor of the Ecuadorian newspaper "Hoy", attorneys and authorities in that same country.
In 1998 he visited the Penintenciaría del Litoral, where he was able to interview between twenty and thirty prisoners and to visit all cell-blocks in the prison, in addition to the clinic and the punishment area. The conclusions of that investigation were published in an article under the title "Midnight Express en Equateur". In this article he asserted that arbitrariness, lack of sanitary conditions, ignored epidemics and widespread corruption were daily events for the 2,800 detainees in the Guayaquil prison. He called the conditions in that prison infernal, which reflects the Ecuadorian judicial system.
He underlined that the case of Daniel Tibi exemplifies the level of corruption and the weakness of the judiciary in Ecuador. He pointed out that if Mr. Tibi had paid some money to the officials who dealt with the case, he would have been released. Mr. Tibi's arrest was an outcome of the indiscriminate way in which the war against drugs is waged. Policemen receive payments based on the number of persons they detain. This created a perverse incentive that leads to detention of innocent persons, who are subsequently denied their basic procedural rights. His investigation showed that rights are "bought and sold" in prisons in Ecuador.

b) Testimony of Michel Robert, a physician

He studied "Etiopathy", which is a scientific method to analyze and establish the causes of pathological phenomena. Said methodology uses ancestral techniques of bone repositioning to treat common injuries, trying to suppress the symptoms instead of treating them superficially, with the aim of returning the functions of the body through manipulation.
The treatment he gave Mr. Tibi began in June 1998 and continued until December of that year. During the nine sessions in which Daniel Tibi attended the treatment, he noticed that he suffered severe physical problems, such as: lack of mobility of the back and neck, eyesight problems, face wounds, loss of texture and elasticity in the skin which reflected a degree of malnutrition, pain from the lumbar region down to both legs, the upper part of his back had severe tension points, and he suffered acute headaches. The patient could not sleep. He also noticed several scars on his legs from cigar burns, round and deep. He deemed that Mr. Tibi's physical problems, which included beatings, malnutrition, stress, and bad posture, were the direct result of prison conditions.
The treatment applied to Daniel Tibi focused on increasing flexibility and mobility of the spinal cord through manipulation. He taught him relaxation techniques, with the aim of improving his sleep. Through the treatment, the mobility of the back and neck improved, but he was unable to fully restore the mobility field due to the severe damage suffered. The headaches only diminished.
He recommended immediate psychological treatment for Daniel Tibi, taking into account that there were drastic changes in his emotions.

c) Testimony of Laurent Rapin, French Ambassador to Ecuador at the time of the facts

He was the French Ambassador to Ecuador from April 1993 to July 1997. He heard about Daniel Tibi's detention through his family and his attorney, and also through the Ecuadorian authorities. He does not recall the date of the official notification to the French Embassy by the Ecuadorian State. He was never informed that he had been tortured, and he pointed out that this point could be corroborated by Mrs. Durin, French Honorary Consul in Guayaquil at the time, but he certified that the conditions of detention were precarious and difficult.
Personally, together with the consul and other officials of French institutions, he regularly addressed Ecuadorian authorities to request that normal and legal trial procedures be implemented in the case of Daniel Tibi. As a consequence of the separation among the branches of government, the decision was up to the judges, who did not answer his request. The main object of his official actions had to do with delays in the proceeding.
He deemed that keeping Mr. Tibi in prison without trial for such a long period was a time-related denial of justice.

d) Testimony of expert witness César Banda Batallas, an attorney

In criminal proceedings for crimes defined in the Law on narcotics and psychotropic substances [Ley de Sustancias Estupefacientes y Psicotrópicas] (hereinafter "LSEP") in force in 1995, actio popularis was allowed to file complaints of violations. In those cases, the law did not accept bail bond, suspended sentence, pre-release, controlled release, or the benefits of the law on commutation of sentence and on pardon.
The police report and the statement and the pre-trial statement rendered by the indictee in the presence of the district attorney constitute a "grave presumption of guilt," provided that the corpus delicti is verified. The judge must follow the rules of competent analysis in the appraisal of the facts and the evidence. In practice, this was not done. The narcotics police report had full evidentiary value.
In 1995, the LSEP incurred in "many unconstitutionalities," such as excessive breadth of the spectrum of criminal definitions, criminalization of consumption, and accumulation of sentences. During the nineties, the narcotics police in Ecuador had structural flaws, such as the lack of appropriate legal guarantees. Furthermore, there were problems due to the high number of drug-related trials in the criminal judiciary of Ecuador, overcrowding and precarious living conditions in the prisons. Some trials lasted at least two years, and there were heavy prison sentences of twelve to sixteen years.
Provisional detention was established to investigate, before beginning the criminal law action, whether a crime had been committed. This detention could not surpass 48 hours. If a person was provisionally detained for a period longer than that set forth in the law, he must be released ex officio by the judge. However, in practice, the detainee had to request release. Preventive incarceration, a personal precautionary measure, was not subject to a specific maximum duration. It continued indefinitely.
At the time of the events, the Criminal Code set forth the cases of immediate release of those accused of a crime, but excluded those accused of crimes punished by the LSEP.
Ecuadorian legislation in force at the time of the facts set forth that persons authorized to conduct detentions should identify and present the order issued by a competent authority, which should specify the reasons for the detention and explain the rights of the detainee.
In regards to the order of preventive incarceration, notification had to be personal. In practice, once the court order to investigate an alleged crime had been issued, the summons did not take

place personally, but rather was taken to the prison and the copy of the court order to investigate an alleged crime was deposited in the file and the indictee did not receive a copy.

During the substantiation of the proceeding, the preliminary examination statement by the accused should be heard by the judge within 24 hours of the time when the accused was brought before him. This period could be extended another 24 hours, if the judge deemed it necessary. In practice, the first statements were made before the district attorney and the agent of the judiciary police, and the judge was rarely involved in hearing said statements.

According to the Ecuadorian legislation in force at the time of the facts, the stages of the criminal proceedings had a certain maximum duration: 1) the indictment, no more than 60 days; 2) the intermediate stage, no more than 19 days; after this time, the judge issued either an order of dismissal or one to begin the full trial, and these orders could be appealed within three days of when they were notified; 3) the full trial stage was processed before the criminal court; and 4) an appeal was in order when, after the judgment had been issued by the respective court, the parties filed a cassation remedy, for which they had three days time; if they did not do so, the sentence was executed.

In no case should the judge admit the co-accused as witnesses; their statements should have no evidentiary value.

There are variants of dismissal in Ecuadorian law. Provisional dismissal is ordered if the judge deems that it has not been shown that there was a crime, or if it has been shown that there was one, those guilty have not been identified, or there is insufficient evidence of participation of the indictee. Once provisional dismissal of the criminal proceeding has been ordered, the proceeding is suspended for five years. When provisional dismissal of the charges against the accused has been ordered, the proceeding is suspended for three years. Termination (definitive dismissal) of the proceeding and of the charges against the accused is ordered when the judge finds that the existence of the crime has not been absolutely proven, or that there are reasons to justify exonerating the accused of liability.

After these maximum periods have elapsed, the Judge can order, ex officio or in response to a request by a party to the proceeding, its termination and shelving of the case. Throughout the proceeding, the accused must enjoy the presumption of innocence. In practice, presumption of guilt does not “vanish” in drug-related cases, and it is almost impossible to obtain termination. When the judge orders provisional or definitive dismissal, he must immediately release the accused if he is under preventive incarceration, pursuant to Article 246 of the Criminal Procedures Code. If the Public Prosecutor’s Office appeals the order of dismissal, release is granted on bail, whatever the alleged crime. However, the system imposed by the LSEP was different, as it established mandatory consultation to the High Court, with a prior mandatory and favorable report by the Prosecutor’s Office. This rule did not allow those benefiting from an order of dismissal to obtain immediate release.

The number of court-appointed defense counsel was insufficient for the number of cases pending in the districts of Quito and Guayaquil, for which reason their actions and their influence in each of the proceedings was practically null. On the basis of Article 54(5) of the Criminal Procedures Code, the defense counsel of the accused was excluded while procedural statements were made.

Ecuadorian legislation does not set forth the obligation of the State to put accused foreigners in contact with the consulate of their country of origin.

The expert witness referred to the differences between the “amparo de libertad” or judicial habeas corpus and the constitutional habeas corpus.

The crime of torture is not defined in the Ecuadorian Criminal Code. There are definitions of crimes against prisoners and detainees, but they only punish certain acts of torture committed in the prisons of the Republic. The existing definitions of crimes are not in agreement with the requirements set forth in the Inter-American Convention against Torture, and even less so with the obligation undertaken by the State to punish those acts in the terms required by said convention. On the other hand, he referred to inaction of the judicial authorities and of the Public Prosecutor's Office, even in cases of crimes that should be prosecuted ex officio. He also pointed out that if a forensic medical examination was delivered directly to a judge and it contained unequivocal indications that a crime had been committed, the judge was under the obligation to begin an investigation, ex officio, under the inquisitorial system of the criminal proceeding at the time. Furthermore, when an inmate reported to the Director of the prison or to the National Director of Prisons that he had suffered mistreatment by other inmates or by the prison staff, an investigation should be opened.

In actual practice, the statement of the accused, obtained through his preliminary examination statement, had evidentiary value in his favor, without detriment to the fact that other evidence should be obtained to corroborate the preliminary examination statement. These facts were subjected to a final overall examination, applying the rules of competent analysis to impose punishment. In the practice of drug trials, given the instructions to "sink" those accused of drug trafficking, such a statement had little or no weight, and was generally disregarded. The procedural statement has value against the person rendering it, due to the presumption of guilt imposed by the exceptional system of the LSEP.

In proceedings substantiated pursuant to the LSEP, the Criminal Court orders seizure and deposit of the goods, money and other valuables used to commit the crimes of resulting from them. All monies should be deposited in Ecuador's Central Bank, within 24 hours of the seizure, in a special account of the Consejo Nacional de Sustancias Estupefacientes y Psicotrópicas (CONSEP). Once the writ of execution had been issued ordering the confiscation or once the criminal action or the sentence had been extinguished, the Board of Directors of CONSEP definitively disposed of those goods. When a provisional dismissal was ordered, the State had to return to the accused, ex officio, the goods seized, ordering said return in the order of dismissal. However, in actual practice it was necessary to ask the judge to order their return, which was hardly ever granted. The policemen took over the goods seized from the accused in drug-related trials. The fact that the Eighteenth Criminal Judge of the Guayas ordered return of the property seized from Mr. Tibi and that the Consejo Nacional de Sustancias Estupefacientes y Psicotrópicas (CONSEP) did not comply with this order, is illegal and arbitrary.

e) Testimony of Gloria Antonia Pérez Vera, an official of the Social Work Department of the Penitenciaría del Litoral

The witness is an Ecuadorian national and an official of the Social Work Department of the Centro de Rehabilitación Social de Varones of Guayaquil, in Ecuador.

She is somewhat familiar with the life and conduct of then detainee Daniel Tibi, given the number of inmates in the Centro de Rehabilitación de Varones of Guayaquil. She met him circumstantially, due to the rounds that she often took in the 34 cell blocks, the central aisle and the inmates' lunchroom.

In the Department where the witness worked she never received written or verbal complaints about Daniel Tibi, while he was there as a detainee. She is not aware of any reports of physical

or psychological mistreatment against him. When the inmates are in poor health conditions or have suffered physical or psychological mistreatment, they come by their own means or through third parties to request help from the social work department, to receive care from the Medical Department or in various hospitals or clinics. The various countries' consulates and embassies establish a relationship with the social work department to deal with health cases, family relations and communications, and help with provisions. That was not Daniel Tibi's case.
Mr. Tibi was kept in the high and low attenuated cell blocks, in two-person cells, with drinking water, electrical light, and toilet. These are more comfortable and hygienic facilities, where the inmates receive preferential treatment, especially if they are foreigners.
The Social Work Department intervenes in penitentiary policy to foster craftsmanship and commercial activities as a means for personal and family livelihood, as well as the development of social, cultural, and recreational activities. However, she has no record of Mr. Tibi having carried out any such activities.

f) Testimony of Elsy Magdalena Peñafiel Toscano, an official of the Social Work Department of the Penitenciaría del Litoral

This statement was made in the same terms as the previously mentioned one.

g) Testimony of Frederique Tibi, current common-law spouse of Daniel Tibi

She met Daniel Tibi in September 1999. After several months, she decided to live with him. At the time, Daniel talked to her constantly about what happened to him in Ecuador and some of his hopes of rebuilding his life and recovering his property. He also stated to her that he planned to write a book and make a movie.
Over the years, she has noticed that Mr. Tibi's mental and emotional state has worsened. Sometimes he is irritable and others he is euphoric. Due to the above, she feels that she is living with two different persons.
While Daniel Tibi was in prison, he took on certain behaviors and habits that he still retains, such as accumulating things around his bed, getting angry often, and having violent outbursts that have caused problems to the witness and the children. Given the mentality of French society, Mr. Tibi's image has been damaged by the time he spent in prison.
Currently, she is afraid that Daniel Tibi may hurt himself. She is aware that he has stomach cancer, and she feels that he is discouraged.

h) Testimony of Blandine Pelissier, a friend of Mr. Tibi

She has known Daniel Tibi and his family since 1980. Since then, they have had a close friendship.
Before traveling to Ecuador, Mr. Tibi was a happy, optimistic, adventurous person; he liked to enjoy life and was generous, helpful, trusting, and loved by people. He had a natural talent to fix things with his hands and he was kind to children.
In 1997, she heard that Daniel Tibi had been imprisoned in Ecuador. When Tibi returned to France, he was extremely thin, the left side of his face was injured, his cheekbone was sunken, his left eye was asymmetrical in regards to the right eye, and he also had multiple cigar burns on his arms and legs.

Mr. Tibi is no longer the same person she met years ago. She finds that he was mentally and emotionally affected by his incarceration in Ecuador.

i) Testimony of Eric Orhand, a friend of Daniel Tibi

In 1986, while he was working at a ski resort in France, he met Daniel Tibi and became his friend. Daniel was an enthusiastic and happy person, extroverted and generous; he treated others very well, and it was therefore easy for him to make friends. The witness viewed the alleged victim as a person who was very close to his family, with warm relations with his siblings and his mother.
He went with Mr. Tibi when he moved to Ecuador. For several weeks they visited various parts of the country. Afterwards, the witness returned to France. Between 1992 and 1995, he saw the alleged victim a couple of times, when he traveled to France on vacations.
In 1997 he received a letter from Beatrice Baruet, informing him of Daniel Tibi's detention and stating that she needed money. When he talked to her she was desperate, for which reason he contacted friends and relatives to send money to Ecuador. He was able to communicate with the alleged victim in prison, and realized that he was terrified and thought that he was going to die there. Both Mr. Tibi and Beatrice Baruet sent him documents, photographs, and press reports in connection with his case, which he organized for the press and for certain members of the Ecuadorian and French diplomatic corps.
When Mr. Tibi returned to France, the witness saw him as a survivor of a concentration camp; before going to prison he was strong, muscular, and healthy, and when he returned he was ill, weak, and tired. The witness deems that Mr. Tibi will never forget or overcome what happened to him in Ecuador, despite his hope of obtaining justice.

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74. The representatives filed several appendixes with the final written pleadings and part of the evidence requested to facilitate adjudication of the case (supra para. 40). [FN21]

[FN21] See file with appendixes to the written pleadings of the representative of the alleged victim and his next of kin, appendixes 1 to 7, leaves 1899 to 2063; and file with evidence to facilitate adjudication of the case submitted by the representatives of the alleged victim and his next of kin, single volume, appendixes 1 to 14, leaves 2064 to 2349.
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75. The Commission submitted part of the evidence to facilitate adjudication of the case requested by the Secretariat, under instructions by the President (supra para. 41). [FN22]

[FN22] See file with evidence to facilitate adjudication of the case submitted by the Inter-American Commission, single volume, leaves 1565 to 1897.

B) TESTIMONY AND EXPERT OPINIONS

76. On July 7 and 8, 2004 the Court heard the statements of witnesses Daniel Tibi, Beatrice Baruet and Juan Montenegro, and of expert witnesses Carlos Martín Beristain, Ana Deutsch and Santiago Argüello Mejía, offered by the Inter-American Commission, the representatives and the State, in turn (supra para. 33). The Court will now summarize the significant parts of said testimony and expert opinions.

a) Testimony of Daniel Tibi, alleged victim

A French national, he currently lives in Sceaux, France. At the time of the facts he lived in the city of Quito with his family and children, and he had lived there for several years. He had a gem business that was doing well. The family decided to live in Quito because it had "seduced" them. They liked Ecuador. Everything was going perfectly. They were happy. But one day everything changed.

The day of the facts his captors, in civilian dress and armed, made him get on a car that was not an official one. To detain him, they told him that it was migration control, but they gave him no document or order of a competent authority. He was not informed of his right to an attorney and to consular assistance. He accepted, in good faith, going with them to the migration department, where they verified his status as a resident of Ecuador. Then they asked him to go with them to INTERPOL's offices to corroborate other matters, to which he agreed. After an hour the officers asked him to present everything he had with him. He had a briefcase with tools, the material he worked with, and gems. They made a list of all his things. Then they told him that he had to go to Guayaquil to render testimony, and that he would be back in a couple of hours. They put him on a plane. Afterwards, in Guayaquil, they took him to a barracks where there were several policemen, a public prosecutor, and a police colonel, Abraham Correa, and a police lieutenant. There he was interrogated about whether he knew a number of persons whose photographs they showed him. He only recognized one person who had offered him a business deal with leather jackets, which the witness never accepted. At the barracks he was never shown an arrest warrant, no attorney was present, and he was not informed of his right to hire one. Up to then he did not know why he had been detained. However, they made him sign a statement that he allegedly recognized one individual. He was only allowed to communicate with his wife on the fourth day after his detention. Then he was taken to the Penitenciaría del Litoral, where he was deprived of liberty for 843 days and nights. He was taken to that penitentiary without being informed of the reasons for this. During the time he was in prison he was never visited by any State-appointed attorney. In the course of the criminal investigation against him, he never received the arrest warrant nor was he notified of the charges against him, and he did not appear before a judge.

When he arrived at the Penitenciaría del Litoral he was placed in a cellblock called the "quarantine," a "horrible" place, where he remained 45 days. There were 250 to 300 inmates in the "quarantine," some of them lying on the ground while others had certain privileges because they paid to sleep in "biombos" and had protection. The place was roughly 20 meters long by 10 meters wide. The prisoners were not allowed to go out to the lunchroom or to walk in the courtyard. The witness had to buy food from other prisoners. The air was "pestilential," it smelled of feces, drugs and sweat of overcrowded people.

Subsequently, he was transferred to the lower attenuated cellblock, where he remained ninety days in the corridors. He slept on a bench when there was room, or on the ground; then by force he was able to remain in a cell. He continued buying food, as the penitentiary kitchen was like a

"garbage dump." Beatrice provided him with the money to pay for the food. She visited him 72 times during his incarceration. She traveled from Quito to Guayaquil and from this city to Quito, sometimes by bus and other times by plane. She visited him while she was pregnant, and then she went with their daughter.

In March he made a statement before a notary. After making it he was taken to the Director's office. He was taken to an office where two armed men in civil dress came and told him that "if he wanted to get out he had to sign a statement in which he acknowledged that he was part of the 'banda de los camarones'." He refused. Afterwards they began to beat him, they handcuffed him, and they dragged him on the ground to another place in the same building. There they began to torture him, they tore his pants and burned him with cigarettes to force him to sign the statement. Since he continued to refuse, they beat him until he fainted. This happened six or seven times in the course of a month and a half. Once he received electric discharges on the testicles, and other times he was submerged in a pail of water as if to drown him. He felt panic and thought he was going to die. When he was burned with the cigarettes, he felt a pain that attacked his nerves. It was unbearable and it made him faint. During that period he feared for the life of his wife and his two daughters, because they were alone. He wanted to file a complaint about the torture. He discussed this with other detainees, who told him not to do so because they would surely kill him. So he decided not to, but resolved to file the complaint once he was free.

During his detention, the witness had access to a physician three times, but they only examined him, and he never received treatment. Once he asked the French Consul in Ecuador to ask the Director of the prison to take him to the hospital, but that time the agents of the State sought to apply the "flight law" ["ley de fuga"], which consists of killing the detainees pretending that they sought to escape. In September and October 1997 he was examined by a physician. The physician examined him while standing, for five minutes, and ordered no treatment. At the time of this examination Mr. Tibi had a jaw injury, because at the last torture session he had been beaten with a stick that sunk his face and broke his teeth. Due to this situation, he had to go to another detainee, who had a dental service business and made him a prosthesis.

Through the attorney of another detainee he was able to see the court order to investigate the alleged crime, which had been the basis for including him in the investigation. Many individuals were listed in that document. Only two lines referred to him. Eduardo Edison García León said in his statement that the witness had twice sold him up to fifty grams of cocaine. The witness explained that the judge never received the statement that he and Eduardo Edison García León made before the same notary public who went to the prison in March. In these statements, they pointed out that the police report was false and that the statement had been made under duress.

In regards to the proceeding, the witness found out that the case against him had been dismissed, and then he filed two judicial amparo remedies. In the first one, the judge in charge of the case "received" it and "heard" it. He then rejected the judicial amparo. Subsequently, he filed a second judicial amparo remedy before the High Court, and he stated his case to minister Milton Moreno, pointing out that he could request amparo for his release because the proceeding against him had been dismissed for lack of any evidence of the crimes alleged; however, he remained in prison. His petition was rejected.

One night in the Penintenciaría del Litoral is like hell. A normal human being cannot bear it. Those who had no cells spent the time in the aisles, climbing the walls, moving from one cell-block to another and trying to steal through the cell bars. They also went into the cell-blocks to smoke crack. One could buy anything in this prison, there were drug deals, cocaine, alcohol and

weapons. People went around armed. It was a place where one had to be wary, both of those outside and those inside.

He often had problems with the other inmates, because they saw him as a foreigner and wanted to take money from him. However, the guards never intervened. This kept him in a state of fear. Due to a fight he was taken to the punishment cell. There he was confined between four walls; the floor was a garbage dump; there was a hole in the bottom and water coming out of the wall; there was no light or ventilation; he had access to no food. For a long time he remained isolated, because he was afraid of the aggressions of other inmates. He always tried to get along peacefully, which was difficult because there was no separation between the more dangerous criminals and those who had not been sentenced. The guards also sought to extort him for any reason.

When he was able to buy machinery to make frames and pictures, he was able to earn some money. He had many financial problems with his wife, due to the expenses she had to incur to visit him together with their daughter.

At the time of the detention, they took from him a suitcase with gold and gems that were his property, as he bought and sold gems. This is why he had with him, that day, samples of emeralds, diamonds, sapphires, rubies, with a purchase price of US$135,000 (one hundred and thirty-five thousand United States dollars). The agents also took away his wallet with 250,000 sucres (two hundred and fifty thousand sucres), his credit card, his checkbook, everything that he had with him, including his daughter's identification card. His credit cards were used while he was detained, and when he returned to France he found that he was in a "state of prohibition" to have a bank account, because it had been emptied and there was a US $6,000 (six thousand United States dollars) overdraft. He took several steps to recover his property. The last one was to go to the Ecuadorian Embassy in France, where he submitted to the Ecuadorian Consul a request to recover his belongings. The Consul said that it would be processed through the Ecuadorian Ministry of Foreign Affairs, but nothing more happened. Before his detention, he sometimes earned US$5,000 (five thousand United States dollars) a month, sometimes US$10,000 (ten thousand United States dollars) as a gem merchant, and he stated that he had no registration for his trade activities. He had no fixed income but he enjoyed a very good standard of living. Both he and his family could go on vacations whenever they wanted to, they could travel anywhere in the world; he had no problems and no reason to be concerned.

Regarding his family relations, at the time of his detention his relationship with his daughter Sarah was very good, they shared many things, such as music, and he helped her to study. He also has a son, from a previous relationship, called Valerian Edouard, but during the time he was detained he was never able to see him, and now he feels that the relationship between them has changed; he believes that the youth no longer trusts his father.

His wife took their daughter Lisianne to the prison, for Mr. Tibi to meet her. Afterwards she took her every weekend and during vacations, even if he had to pay the guards for them to remain with him in the prison a full weekend or even about fifteen days. He felt desperation seeing his newborn daughter and his wife in the cell.

Before being detained he was a "very happy" person, calm, with no problems, who had a family, a home, and everything was going well, until one day everything broke down, and he found himself in a situation that completely transformed him; he became very mistrustful, and now it is very difficult for him to have normal relations with people. He feels persecuted, he cannot work, and he cannot live normally. His marriage suffered. He cannot have a normal relationship with his former spouse nor with his daughters, in other words, the whole family suffered harm. He has

no communication with his son Valerian Edouard. His work plans in Ecuador were to live calmly, peacefully, with his gems and his works of art. He had bought a piece of land on the beach and he planned to build a tourist complex and live peacefully with his family.
At the time of his detention, his property included the gems (which were almost all of what they seized), the land that he had bought, which was worth US$80,000 (eighty thousand United States dollars) and the bank accounts with US$300,000 (three hundred thousand United States dollars).
While he was in prison, his former spouse had to work. He also received help from his family, who sent him money, but when this was not enough he began to sell everything they had, to pay for the trips, the expenses and the attorneys.
Before moving to Ecuador, he spent ten years outside France. After his release, he returned to this country, where he feels that he is undergoing a second punishment. He did not want to live there. He left France because he wanted to live in another country, life there was not for him, and when he returned he found a country that he did not know, he was unable to work and was in very poor conditions physically. For his family, this also meant the end of a dream, as they were happy living in Ecuador and they returned to a country that they did not know and did not like.
When he arrived in France he underwent facial surgery, they operated on his face, the malar, the nose, and also a disk hernia; he had holes in the abdominal walls, a crushed vertebra. He had aged about twenty years. Now he cannot make any physical efforts, and he needs to undergo another operation. He suffered hepatitis. The physicians have told that this was surely a consequence of the conditions of his detention. He also has stomach cancer.
Justice has not been done in his case. For him, justice entails not detaining a person the way they detained him, that is, based only on a police report that mentions his name in two lines without having corroborated anything, destroying families, lives, without anyone worrying about the damage done. His honor in Ecuador and France has suffered, because up to now there has been no official information that his case was dismissed, and therefore, he has not been found innocent. For this reason many people think, to date, that he is guilty.
The “moral damage” that he suffered must be redressed through public acknowledgment of what happened, by means of an official acknowledgment in the printed media and on television, stating that his rights were violated and that he was detained in an arbitrary manner; the judgment finding him innocent and that he never participated in criminal activities must also be published. He also wants the State to acknowledge its incompetence in applying the country’s laws, and that there was a major injustice in his case; to acknowledge that things must change to improve treatment of unsentenced detainees, that the State must accept its responsibility for everything that happened to him, and must take steps to avoid recidivism of these actions.

b) Testimony of Beatrice Baruet, who was the alleged victim’s spouse

She currently lives in France; she met Mr. Tibi in Ecuador in 1992 and she was his common-law spouse for seven years. When she met him he was a pleasant, happy and generous person. She fell in love with him because he was very charitable.
During the time they lived together in Ecuador, their plans were to remain in that country. He had a job as a professor at the French secondary school, where she earned approximately US$2,000 (two thousand United States dollars) a month, and Mr. Tibi had an emerald and painting business.
Before the detention, the relationship between the alleged victim and her daughters Sarah and Jeanne was good, normal, they lived together and were a family. Valerian Edouard, Mr. Tibi’s

son, spent some vacations with them in Ecuador, although afterwards he returned to France because he missed his mother.

She was not informed when Daniel Tibi was detained, until Daniel himself called to tell her that he was at the Cuartel Modelo in Guayaquil, that he did not know why, and asked her to contact a lawyer for him to find out what was going on. She then contacted an attorney in Guayaquil and they went to the Cuartel Modelo, where they did not find him and they were told that he was not there. For this reason, they went to other places in Guayaquil where he might be found, such as the penitentiary, the military hospital, the police, but no one gave them information on Daniel Tibi. The whole weekend passed without finding out anything about him. A few days later, a woman called her and told her that Mr. Tibi was at the Penitenciaría del Litoral.

When Mr. Tibi was detained, she was three months pregnant, so she went to visit him every weekend, and when she had school vacations. Sometimes she went by plane and other times on the bus, depending on the financial resources she had at the time. During the visits to the prison she met Eduardo Edison García León, who said: "excuse me, Ma'm […], because I did not want to say [what] I said". This was the man who mentioned Mr. Tibi in his statement, linking him to the case, but he himself explained that he did these because he was threatened.

The alleged victim's detention conditions were extremely bad, difficult, humiliating for the prisoners and for the visitors. There was a multitude around her asking her for money "and for everything." There was no security within the jail. Therefore, when she went to visit she stayed in Daniel's cell and only went out to the courtyard sometimes, during visiting hours, so that her baby could get some air. During her visits she saw much violence in the prison. One day when she had taken her daughter Jeanne Camila, who at the time was six, there as a "fight with machetes." The girl saw the fight and would not return to the prison. She also began to suffer nightmares and fear on the street. The worst area of the penitentiary was the so-called "quarantine," where Mr. Tibi spent some time, which was a single room with about two hundred people, and there were not enough beds for all of them. Prison conditions were bad; there were no bathrooms, and medical assistance was not adequate.

She took her daughter to the prison, when she was three weeks old, for Mr. Tibi to meet her. She did so often. The alleged victim's detention affected his relationship with the daughters; the oldest girl had to stay in France those two and a half years with her grandparents, because she had neither the time nor the spirit to care for her well. Due to Mr. Tibi's detention, she had to leave her daughters all this time. The older one, Sarah, went from being a child to an adolescent, without her being able to help her. She had a good relationship with her daughter Jeanne Camila, since they were alone together and supported each other. What was difficult for Jeanne Camilla was that almost every weekend she had to leave her with her neighbor, while the witness went to Guayaquil. For two and a half years she did not do anything special with her daughters, because whatever part of her salary was left after paying the rent, electricity and food was spent on Mr. Tibi.

The impact of Daniel's detention on her life and on that of her family has been very great. Everything changed for them. Their project of living together in Ecuador came to an end.

Daniel Tibi's physical and mental conditions changed; from being a healthy, strong man, with enough weight, he became a "ghost;" he had lost much weight, his face had changed, the eye and the bone were displaced; he had burns on his legs, pain throughout the body, he was in very bad shape. Mr. Tibi changed as a consequence of the time he spent in prison; he changed with her and with the girls; it was very difficult.

Justice in this case would not only be acknowledgment of Daniel Tibi's innocence, but also guarantees that these facts will not take place again.

c) Expert opinion of Juan Montenegro, a physician

He lives in the city of Guayaquil. He works for the forensic medical service in that city, as Head of the Department of Forensic Medicine. He is in charge of issuing forensic medical expert reports regarding physical injuries, aggressions against sexual liberty, psychiatric assessments, and forensic medical autopsies requested by the respective authorities.

On September 19, 1997 he examined Mr. Tibi in response to a request by the Eighteenth Criminal Judge of the Guayas, included in a formal petition made on September 18 of that year, in which he was ordered to conduct a "detailed and extensive" forensic medical examination of the detainee, and the results should be forwarded as soon as possible. This petition was due to a written request by Mr. Tibi's defense attorney, in which he stated that he was in ill health and required judicial authorization to transfer him to a private clinic. Therefore, the judge issued an order for the forensic medical service of the National Police in Guayaquil to conduct an assessment and establish whether it was truly necessary to transfer him to a "health clinic." The examination showed that Mr. Tibi had injuries in his upper and lower extremities, in the thorax, and that the left side of his face was asymmetric due to compression of a facial bone. Since he found flaying associated with inflammatory and infectious processes in the upper and lower extremities and the thorax, which were infected and had purulent material, he recommended that they be treated by a dermatologist. The flaying could have been caused by any trauma or by friction due to scratching, and it was infected. There was multiple flaying in the front and lower thorax, and in the upper and lower limbs. He does not recall the exact number. He described these wounds as covering approximately half a centimeter, but some were larger than others, and their color was reddish "turning brownish," because almost all of them were infected. He did not find lesions due to burns or electricity. If he had been informed that these injuries were due to acts of torture, he would have reported this to the authority who requested the examination, but he does not recall Daniel Tibi having informed him of this; instead, he commented to him that the injury in the malar region was caused by a cellmate and that the skin injuries were due to the climate and the presence of insects in the area. He cannot assert or deny that the Daniel Tibi's injuries were caused by torture. His examination of Mr. Tibi lasted twenty to twenty-five minutes. He used the necessary technical means for a general examination: a densitometer and a stethoscope. The polyclinic at the rehabilitation center has no advanced technology to conduct examinations.

In medicine, no examination to establish the seriousness of a person's condition has to be extensive; "the simpler [,…] more concrete and faster, the more that life can be saved. We cannot risk making an extensive report [on] the patient's life." The detention center does not have the technical equipment to ascertain whether there is an ulcer. However, he did not deem it necessary to request that Daniel Tibi be transferred to a health center to conduct the necessary examinations, because he did not tell him that he had a stomach ulcer.

The report on Mr. Tibi and the subsequent assessment were sent to the judge in charge of the case the same day he was examined. He issued no recommendation or medical treatment for the inflammatory and infectious processes, because forensic physicians cannot take this kind of steps, but only report to whoever issued the request. The only recommendations he made at the time were for Mr. Tibi to be seen by two specialists, one a dermatologist and the other a

traumatologist. He felt that the assessment by a traumatologist was necessary in regards to Mr. Tibi's problems with his lower left extremity. He did not deem an assessment by a neurologist necessary, because there were no latent neurological pathologies or problems. He did not deem that the injuries to the left malar bone and the eye and cheekbone were severe, because he considered it to be a facial asymmetry, a deformity.
The causes that he mentioned regarding Mr. Tibi's injuries, and which are in the report, were that the left facial asymmetry was caused by a hard, contusive object, and that the injuries described in the thorax and the extremities were dermatological in nature. The "hard, contusive object" could have been a heavy object that hit the body surface, or the body surface could have hit an inanimate surface. He could not establish the cause of the dermatological problems, but based in the reference made he deemed that they could have been caused by insects.
He was not knowledgeable about the Istanbul Protocol, United Nations manual for the investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment. He was also unaware of previous medical examinations of Daniel Tibi and of his medical history, and he conducted no psychological or psychiatric studies, as the judge did not ask him to assess whether he had been tortured, but merely requested a forensic medical assessment to establish whether he should be taken to a health clinic.
During the twenty-four years that he worked as a forensic physician for the police and nineteen as a forensic doctor for the forensic medical service, he has never reported the existence of injuries due to torture, as it is the judge who decides this based on the expert report supplied by the physicians and their recommendations. In his professional work, he has never had the opportunity or been forced to report cases of torture in the detention center, since due to the nature of his functions he only acts when the authorities require that he conduct assessments.

d) Expert opinion of Carlos Martín Beristain, who has a licentiate degree in medicine and surgery and is a specialist in care for victims of torture, human rights violations, and other forms of violence

He assessed the torture that Mr. Tibi was subjected to and its respective physical and psychological consequences. He analyzed the reports of the medical examinations conducted on him during his detention and those conducted after his release. In the first medical reports during Daniel Tibi's detention period there is no clear definition of the typology of the injuries on his skin. The injuries are described in medically generic and non-specific ways. There is no establishment of possible causes of said injuries, either. The report by a dermatologist hired by the French Embassy in Ecuador during the alleged victim's detention was more specific, and there was follow-up on it. Mr. Tibi was also examined by an otorhinolaryngologist and a traumatologist after his release, and the latter describes the injuries in two disk hernias in the lumbar zone. There is a set of reports made during the period after Mr. Tibi recovered his freedom; all those reports were made in France by various experts or heads of clinical services in hospitals.
Forensic medical reports should have data on the patient's general situation. In Mr. Tibi's case an anamnesis is lacking; this is a set of questions about whether he had problems in the muscular-skeletal system, in the digestive, respiratory, neurological systems, as well as an assessment of the possible origin of said injuries, and how to prevent those situations.
He conducted a clinical interview with Mr. Tibi, and he reviewed testimony of several persons in connection with the case. In his interview with the alleged victim he corroborated that he

coherently narrates the circumstances and the facts. There is no exaggeration in his account regarding possible continuity of the torture sessions or his various injuries; he does not attribute them all to mistreatment but to other situations that he faced while he was detained.

As a result of his assessment, he was able to establish that there was a period between February and April, 1996 when Mr. Tibi showed a number of quite serious injuries, such as the sunken left malar, the loss of part of the upper teeth, and a deviation of the nasal septum. Furthermore, in his medical examination of Mr. Tibi, he photographed and identified at least five injuries that are cigarette burns. There are many other injuries that he could not establish without a doubt whether or not they were due to cigarette burns. Mr. Tibi also lost high-frequency hearing in his left ear, and for lack of other risk factors, this shows very significantly that the consequences in that ear have to do with the traumatic impact. Submersions in water as a method of torture cause a very distressing feeling of asphyxiation, but to not leave physical injuries, save for certain injuries of a very limited type, such as pressure maneuvers on the neck, and some small hemorrhages in the ocular sclerotic. Electric discharges on the testicles are a very important aggression in a very sensitive part of the body.

The penitentiary service physicians conducted the first medical examination on Mr. Tibi six months after suffering the more evident and serious injuries, which shows that there was no minimum follow-up during that period regarding the health conditions of the alleged victim. Mr. Tibi's injuries were visible and it was obvious that they required medical care. Lack of adequate medical treatment of injuries has a major impact on the recovery process.

The physical pain suffered by Mr. Tibi due to the sunken malar could have lasted until the surgical recovery of the bone and the nasal septum. The other pain associated with cigarette burns and the other physical injuries might have taken two to four months to cure with an antibiotic treatment, and much more without the treatment. Mr. Tibi's most obvious current physical limitations are his lumbar problems and recurrent mobility problems from the two disk hernias. He suffers hepatitis C and the existence of type B lymphoma. Mr. Tibi requires medical follow-up on these diseases.

Daniel Tibi's symptoms from the period of detention, characterized by acute stress, gradually diminished. He currently still has frequent mood changes, problems such as irritability and lack of control of situations of aggressiveness that he previously faced in daily life. These situations are part of a lasting personality change, which is a type of mental health problem that is part of the "International Classification of Diseases."

e) Expert opinion of Ana Deutsch, a psychologist

She interviewed Daniel Tibi and Beatrice Baruet in Paris, France, and in San José, Costa Rica. She also interviewed Mrs. Baruet's daughters, Sarah and Jeanne Camila, and she met Lisianne Judith Tibi.

Mr. Tibi suffered an unlawful and arbitrary arrest and a detention that went on for more than two years, during which he was beaten, tortured, and kept in inhuman living conditions, despite the fact that he was known to be innocent. He did not have access to an adequate legal proceeding to defend himself and obtain his release. All these actions were contrary to logic, to common sense, and they are in themselves psychotogenic.

The psychological symptoms identified in Daniel Tibi are consistent with the effects caused by torture. Mr. Tibi did not have these psychopathies before the events, which can lead to the

conclusion that they originated in the incarceration conditions that he was subjected to. Mt. Tibi's imprisonment also affected his image before his family and before society.
After his release, Mr. Tibi received psychological treatment in France, but did not continue it. The symptoms of depression and despair led the alleged victim to think that nothing could help him recover the person he was before. Mr. Tibi had constructed a comfortable life style in Ecuador, and he planned to spend the rest of his life there with his family. When he returned to France he attempted to start a business again, but his depression and the periods of inactivity that he often underwent did not allow him to prosper in the business initiatives and in the jobs he got.
Beatrice Baruet suffered intensely when Daniel Tibi was detained and she had no information on his whereabouts. She also suffered constant anguish during the two years in which Mr. Tibi was in preventive detention. It can be said that she suffered the same effects of the torture and detention that her spouse suffered. During this period, the most difficult moments were those prior to the birth of Lisianne, their daughter, and the birth itself. On the other hand, Mrs. Baruet was worried about providing sustenance to her children and supporting Mr. Tibi. She was affected by Daniel Tibi's personality changes and by the disintegration of the family as a consequence of the events. She also suffered due to the fact that they had to leave Ecuador, where she had planned to stay for life. When she returned to France, she underwent psychiatric treatment for five months due to the deep depression that she suffered. She requested a leave of absence from her job, and did not work for seven months.
Beatrice Baruet still goes through periods of depression and memories of the situation that she suffered come to mind spontaneously. Mr. Tibi became more pessimistic and tends to be sad. They both show symptoms of anguish, perspiration on their hands, changes in their perspective on the world and on life. The daughters of Beatrice and Mr. Tibi feel that they lost their family due to the facts.
The psychological and emotional damage suffered by Mr. Tibi, Mrs. Baruet and the girls due to his detention and imprisonment are deep and long lasting. As measures of reparation, they require both psychological treatment and that justice be done, which is the first step to feel that there is an acknowledgment of the suffering.

f) Expert opinion of Santiago Argüello Mejía, attorney at law

The oldest statistics refer to five or six per cent of the prison population accused of drug trafficking crimes. The statistics show that in 1997 and 1998, the figure was forty-two percent. This situation has to do with over-criminalization of consumption, possession, and trafficking of narcotics.
Protracted incarceration prior to sentencing is currently the most serious problem of the criminal justice system in Ecuador. The twenty-eight month period endured by Mr. Tibi to prove his innocence is a good average of what someone needs in Ecuador to be released from prison despite being innocent. Despite the constitutional and secondary norms, the principle of presumption of innocence is not in force, even less so in regards to drug-related accusations where incarceration before sentencing and other serious types of abuse are frequent.
Life in the Penitenciaría del Litoral reflects a system of injustice and commoditization of every favor or advantage for the inmates.
Use of the cell called "quarantine" in the Penitenciaría del Litoral is an indisputable reality. It is a nauseous space with no services, roughly 120 square meters, where up to three hundred inmates sleep on the ground. As bathrooms they use holes in the floor and tubes from which water

occasionally comes out. Due to the population and to the limited space, the inmates' breathing becomes difficult. Generally only indictees are placed in the "quarantine;" however, it has also become a place where convicted criminals are placed as punishment.

The "quarantine" zone is part of a business. It is at the entrance of the Penitenciaría del Litoral and all the inmates who enter that penitentiary are taken there and threatened with remaining there. The threat makes the inmates of the Ecuadorian penal network definitely be willing to pay almost any price to be allocated one of the privileged cells. The prison staff, in complicity with some inmates, participates in and validates a space rental and purchase system, and organizes trafficking in drugs, alcohol, and weapons, which increases the privileges, the discrimination, and worsens the violence. In conclusion, Mr. Tibi's statements are a supplementary practical demonstration of that phenomenon.

At the Penitenciaría del Litoral, inmates without financial means remain in the "quarantine" zone and when "there is nothing more to be done with them and they have no money to take from them," they are sent to one of the cell blocks. At this penitentiary center, the system for classification of the detainees is based on their financial capacity.

Human rights organizations have recorded numerous complaints in regards torture in Ecuadorian prisons. In 1997, the complaints received at the Comisión Ecuménica de Derechos Humanos (CEDH) against penitentiary guards and policemen included three disappeared detainees, and there were fourteen victims between 1995 and 1997, 29 homicides, 51 cases of torture, 145 cases of physical aggression, and 251 of unlawful deprivation of liberty. But what stood out most was application of the so-called "flight law" to five inmates in 1997. This "law" is constantly used by the guards in Ecuador's prisons as a mechanism for social cleansing within the prisons.

The Penitenciaría del Litoral is sixteen kilometers from the city of Guayaquil and possibly twenty kilometers from the closest health center, and there has been no willingness to build an operating room within the center, so there are cases of people who cannot withstand the trip to Guayaquil and die on the way. Currently there is a health center next to the prison. However, that center has three or four physicians who work four hours a day, Monday to Friday, to address the needs of three thousand five hundred inmates. Over the weekend there are no physicians available for them, and some die in the prisons.

Ecuador's 1998 Political Constitution offers basic rules that should be applied to improve the Ecuadorian Penitentiary System. First of all, restriction of the period that a person may be in preventive detention and, secondly, respect for a minimum system for separation and classification of indictees or suspects, for the former to remain in provisional detention centers.

The Ecuadorian penal system must be modified, and this requires changes to legislation, to the criminal investigation system, and to the penitentiary system.

Impunity in Ecuador is one of the country's worst problems. Sometimes there have been up to sixty complaints per year against policemen who have abridged human rights, and not one of them has been sentenced.

C) ASSESSMENT OF THE EVIDENCE

Assessment of the Documentary Evidence

77. In this case, as in others, [FN23] the Court acknowledges the evidentiary value of the documents submitted by the parties at the appropriate procedural moment, or requested as

evidence to facilitate adjudication of the case, which were not disputed nor challenged, and whose authenticity was not questioned.

[FN23] See Case of the Goméz Paquiyauri Brothers, supra note 8, para. 50; Case of the 19 Tradesmen, supra note 9, para. 73; and Case of Molina Theissen. Reparations, supra note 9, para. 31.

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78. The Court finds the compact disk submitted by the representatives on July 7, 2004 during their oral pleadings at the public hearing on preliminary objections and merits, reparations, and costs (supra para. 34) useful, to rule on this case, together with the documents submitted by witness Juan Montenegro and expert witness Santiago Argüello Mejía, during their testimony and expert opinion, at that same public hearing (supra para. 35), and it notes that these documents were neither disputed nor challenged, and their authenticity or veracity was not questioned, and it therefore decides to add them to the body of evidence, pursuant to the provision set forth in Article 45(1) of the Rules of Procedure.

79. In regards to the sworn statements of Eric Orhand, Frederique Tibi and Blandine Pelissier (supra paras. 30 and 73), additionally submitted by the representatives, whose authors were not offered as witnesses at the appropriate procedural moment or requested in the June 11, 2004 Order of the President (supra para. 29), since there were no objections by the Commission or by the State, this Court accepts them pursuant to Article 45(1) of the Rules of Procedure, as it deems them useful to adjudicate the instant case, and it assesses them within the body of evidence.

80. In regards to the sworn statements rendered by Alain Abellard and expert witness Michel Robert, Laurent Rapin's replies to the questions sent to him in writing by the representatives, and the sworn statement before a notary public by expert witness César Banda Batallas (supra paras. 30 and 73), the Court accepts them inasmuch as they are in accordance with their object and assesses them within the body of evidence as a whole, applying the rules of competent analysis.

81. The statements rendered before a notary public by witnesses Elsy Magdalena Peñafiel Toscano and Gloria Antonia Pérez Vera (supra paras. 32 and 73), pursuant to the President's June 11, 2004 Order (supra para. 29), were challenged by the Commission and the representatives (supra paras. 36 and 37). However, the Court accepts them inasmuch as they are accordance with their object, taking into account the objections raised by the parties, and it assesses them within the body of evidence as a whole, applying the rules of competent analysis.

82. Regarding the medical reports issued by doctors Christian Rat, Samuel Gèrard Benayoun, and Philippe Blanche (supra para. 69), which the State deemed "lack reliability, impartiality, and timeliness," this Court admits them because it finds them useful to rule on the instant case; however, it takes into account the objections of the State and will assess them in the context of the body of evidence according to the rules of competent analysis.

83. This Court notes that the Inter-American Commission and the representatives forwarded only part of the documents requested as evidence to facilitate adjudication of the case and the

State forwarded no such documents (supra paras. 40, 41 and 42). The Court has reiterated that the parties must provide to the Court the evidence that it requests, whether documents, testimony, expert opinions, or other types of evidence. The Commission, the State and the representatives of the alleged victim and his next of kin must provide all the evidence requested to facilitate adjudication of the case, for the Court to have better grounds to establish the facts and on which to base its decisions. Specifically, in proceedings on human rights violations, the State has the obligation to provide to the Court the evidence that can only be obtained through its cooperation. [FN24]

[FN24] See Case of the 19 Tradesmen, supra note 9, para. 77; Case of Juan Humberto Sánchez. Interpretation of the Judgment on Preliminary Objections, Merits and Reparations, para. 47; and Case of the Caracazo. Reparations (Art. 63(1) American Convention on Human Rights). August 29, 2002 Judgment. Series C No. 95, para. 56.

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84. The Court includes in the body of evidence the documents forwarded by the Commission and the representatives as evidence to facilitate adjudication of the case in accordance with the provisions of Article 45(2) of the Rules of Procedure. This Court notes that the Commission submitted, together with the evidence to facilitate adjudication of the case, the following documents: a December 18, 2001 report by the Laboratoire de Biologie Lé-Thiébaut Selarl; a December 18, 2001 laboratory report prepared by Christophe Ronsin and Anne Ebel of the Laboratoire d´analyses spécialisées; a June 17, 2002 laboratory report prepared by Christophe Ronsin of the Laboratoire d´analyses spécialisées; an audiometry conducted by the Cabinet Dr Ardaud, Bonefille et Gaucher on June 19, 2004; a medical certificate prepared by doctor Micheline Tulliez of the Service d´anatomie et cytologie pathologiques on June 7, 2001; a medical certificate prepared by doctor Micheline Tulliez of the Service d´anatomie et cytologie pathologiques on April 1, 2004; a medical certificate prepared by doctor Micheline Tulliez of the Service d´anatomie et cytologie pathologiques on April 5, 2004; a medical certificate prepared by doctor Philippe Blanche, of the Groupe Hospitalier Cochin,- Saint Vicent De Paul-La Roche-Guyon on June 6, 2001 (supra para. 41); and the representatives submitted together with the evidence to facilitate adjudication of the case a video (supra para. 40), which they had not offered and which had not been requested by the Court. In view of the fact that the above was not disputed by the parties and that it is useful to rule on the instant case, they admit it as evidence to facilitate adjudication of the case pursuant to Article 45 of the Rules of Procedure.

85. In regards to the appendixes submitted by the representatives of the alleged victim and his next of kin together with the final written pleadings (supra para. 41), the Court deems them useful and notes that they were neither disputed nor challenged, and their authenticity and veracity were not questioned. Therefore they are included in the body of evidence, in accordance with the provisions of Article 45(1) of the Rules of Procedure.

Assessment of the Testimony and Expert Opinions

86. The Court admits the statement rendered at the public hearing by Daniel Tibi (supra paras. 33 and 76.a), insofar as it is in accordance with the object of the examination, and it will

assess it within the context of the body of evidence. This Court deems that since he is the alleged victim and has a direct interest in this case, his statements cannot be assessed in an isolated manner, but rather within the context of the body of evidence of the proceeding. The statements of the alleged victim have a special value, as it is he who can provide more information on the consequences of the violations that may have been committed against him. [FN25]

[FN25] See Case of Herrera Ulloa, supra note 3, para. 72; Case of Maritza Urrutia, supra note 8, para. 53; and Case of the "Five Pensioners". February 28, 2003 Judgment. Series C No. 98, para. 85.

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87. The Court likewise admits the statement rendered at the public hearing by Beatrice Baruet (supra paras. 33 and 76.b), insofar as it is in accordance with the object of the examination, and it will assess it within the context of the body of evidence. The Court deems that since she is a next of kin of the alleged victim and has a direct interest in this case, her statements cannot be assessed in an isolated manner, but rather within the context of the body of evidence of the proceeding. [FN26] The statements of the next of kin of the alleged victims are useful regarding the merits and reparations, insofar as they can provide further information on the consequences of the violations committed. [FN27]

[FN26] See Case of the Goméz Paquiyauri Brothers, supra note 8, para. 62; Case of the 19 Tradesmen, supra note 9, para. 79; and Case of Molina Theissen. Reparations, supra note 9, para. 32.

[FN27] See Case of the Goméz Paquiyauri Brothers, supra note 8, para. 63; Case of the 19 Tradesmen, supra note 9, para. 79; and Case of Herrera Ulloa, supra note 3, para. 72.

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88. In regards to the testimony of Juan Montenegro and the expert opinions of expert witnesses Ana Deutsch and Santiago Argüello Mejía (supra paras. 33 and 73(c), 73(e) and 73(f)), which were neither challenged nor disputed, the Court admits them and grants them evidentiary value. Regarding the expert opinion of expert witness Carlos Martín Beristain (supra paras. 33 and 73(d)), this Court admits it because it deems it useful to rule on the instant case, but it also takes into account the assertion by the State that this expert opinion had the same flaws as the reports rendered by French doctors Christian Rat, Samuel Gèrard Benayoun, and Philippe Blanche (supra para. 82), and it assesses it within the context of the body of evidence, in accordance with the rules of competent analysis.

89. In the aforementioned terms, the Court will assess the evidentiary value of the documents, statements and expert opinions submitted in writing or rendered before the Court. The evidence submitted during the proceeding has been included in a single body of evidence, which is considered as a whole. [FN28]

[FN28] See Case of the Goméz Paquiyauri Brothers, supra note 8, para. 66; Case of the 19 Tradesmen, supra note 9, para. 82; and Case of Herrera Ulloa, supra note 3, para. 74.

VII. PROVEN FACTS

90. After examining the documents, the statements of the witnesses, the expert opinions of the expert witnesses, and the arguments of the Commission, of the representatives of the alleged victim and his next of kin and of the State, this Court deems the following facts proven:

In regards to Daniel Tibi and his next of kin

90.1. Daniel Tibi, a French national, was born on November 23, 1958 and he was 36 years old at the time of the facts. [FN29] He lived in the city of Quito, Ecuador, was an Ecuadorian art and gems merchant, and he stated that he did not have a merchant matriculation. [FN30] He was detained by agents of the State on September 27, 1995. [FN31] After being deprived of his liberty for twenty-seven months, three weeks, and three days, he was released on January 21, 1998. [FN32]

[FN29] See copy of the passport of Daniel Tibi (file with preliminary objections and merits, reparations and costs, volume I, leaf 62).

[FN30] See general certificate of alienage; certificate of registration in the Registro de Extranjeros. Ministerio de Gobierno. Republic of Ecuador; official letter sent by the Director General de Extranjería to the head of the Registro Civil, Identificación y Cedulación on September 4, 1995 (file with appendixes to the brief with arguments and motions, appendix 5, leaves 675 and 676); testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.

[FN31] See report submitted to the provincial head of INTERPOL at Pichincha on September 27, 1995 (file with appendixes to the application, volume II, appendix 13, leaf 214; file with appendixes to the brief with arguments and motions, appendix 2, leaf 668; and file with appendixes to the brief with a Preliminary Objection, reply to the application and comments on the arguments and motions, leaf 1292).

[FN32] See release warrant issued by the Second Criminal Judge of the Guayas, Alternate to the Eighteenth Criminal Court of the Guayas (Durán) on January 21, 1998 (file with appendixes to the application, appendix 34, leaf 585; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1095); and testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.2. Beatrice Baruet, a French national, [FN33] lived with Daniel Tibi at the time of the facts. [FN34] Mrs. Baruet has two daughters: Sarah Vachon, who was born on August 27, 1983, and Jeanne Camila Vachon, who was born on October 1, 1989. [FN35] At the time of the facts, Sarah

was twelve years old and Jeanne Camila was six. The two girls lived with their mother and Daniel Tibi. Mrs. Baruet was three months pregnant. [FN36]

[FN33] See copy of the passport of Beatrice Baruet presented before the Inter-American Court during the public hearing held on July 7, 2004.
[FN34] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.
[FN35] See the February 11, 1998 extrait de l´acte de naissance No. 2514 of Sarah Vachon (file with evidence to facilitate adjudication of the case submitted by the representatives of the alleged victim and his next of kin, single volume, leaves 2076); and the February 27, 1989 extrait de l´acte de naissance No. 90/1989 of Jeanne Camila Vachon (file with evidence to facilitate adjudication of the case submitted by the representatives of the alleged victim and his next of kin, single volume, leaves 2077 to 2078).
[FN36] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.3. Minor Lisianne Judith Tibi, the daughter of Daniel Tibi and Beatrice Baruet, was born on March 30, 1996. [FN37] At that time, her father was detained at the Penitenciaría del Litoral. [FN38]

[FN37] See February 20, 1997 birth registration of Lisianne Judith Baruet Gazeilles, Republic of Ecuador, Dirección General de Registro Civil, Identificación y Cedulación; the December 12, 1997 birth certificate of Lisianne Judith Baruet Gazeilles, Republic of Ecuador, Dirección General de Registro Civil, Identificación y Cedulación, Head Office at Pichincha; the April 2, 1998 acte de naissance of Lisianne Judith Baruet desormais Lisianne Judith Tibi; and extrait de l' acte de naissance of Lisianne Judith Tibi (file with evidence to facilitate adjudication of the case submitted by the representatives of the alleged victim and his next of kin, single volume, leaves 2067, 2068, 2069 and 2071).
[FN38] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.4. Valerian Edouard Tibi, the son of Daniel Tibi's previous relationship, was born on September 10, 1982 [FN39] and he lived in France. At the time of the facts he was 13 years old, and he was in communication with his father. [FN40]

[FN39] See the September 11, 1982 acte de naissance No. 2175 of Valerian Edouard Tibi (file with evidence to facilitate adjudication of the case submitted by the representatives of the alleged victim and his next of kin, single volume, leaf 2080).

[FN40] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.5. At the time of the facts, Beatrice Baruet sent her daughter Sarah Vachon to France. [FN41] When Mrs. Baruet visited Daniel Tibi at the prison, she sometimes took her daughter Jeanne Camila, and they both remained in the detainee's cell. The girl once witnessed a prison fight, and since then she did not want to return to the prison. [FN42] Valerian Edouard, Mr. Tibi's son, was unable to visit him or see him during his incarceration. [FN43] The girl Lisianne Judith Tibi was taken many times by her mother to the prison where her father was detained. [FN44]

[FN41] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.
[FN42] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.
[FN43] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.
[FN44] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.6. After his release, Mr. Tibi returned to France and separated from Beatrice Baruet, from his daughter and from his foster daughters. [FN45] He also lost communication with his son Valerian Edouard. [FN46]

[FN45] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004; and expert opinion of Ana Deutsch rendered before the Inter-American Court during the public hearing held on July 7, 2004.
[FN46] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

In regards to the anti-narcotics procedure called Operation "Camarón"

90.7. On September 18, 1995, in the Province of the Guayas, Ecuador, in the framework of an anti-narcotics operation, subsequently called "Operativo Camarón", the Police found "a 26 cubic feet, white General Electric refrigerator, inside which were forty-five boxes of prawn, and inside

each of these crustaceans there was a capsule with a substance[,] which reacted in the field test by means of chemical reagents[,] as COCAINE HIDROCHLORYDE." [FN47]

[FN47] See report by Police Lieutenant Rubén Alarcón Ramírez to the provincial head of INTERPOL at the Guayas on September 18, 1995 (file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1275).

90.8. On September 18, 1995, Eduardo Edison García León, an Ecuadorian national, was detained in the framework of Operation "Camarón". [FN48] On September 23, 1995 Mr. García León made his pre-trial statement before the Seventh Criminal Prosecutor of the Guayas, in which he stated that "a French individual, by name Daniel, […] supplied him with up to fifty grams [of cocaine], two or three times […]". [FN49]

[FN48] See arrest warrant against Eduardo Edison García León and others by the First Criminal Court of the Guayas on September 18, 1995 (file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaves 1268 and 1269).

[FN49] See statement rendered by Eduardo Edison García León before the Seventh Criminal Prosecutor of the Guayas on September 23, 1995 (file with appendixes to the application, volume II, appendix 3, leaf 223; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1129 to 1139).

90.9. On September 26, 1995, Police Second Lieutenant Carlos Blanco submitted a report to the Provincial Head of INTERPOL in the Guayas, in which he pointed out that "there is a reference in the investigations in the 'Camaron' [Operation] to Daniel, [a] 'Frenchman', as the supplier of cocaine hydrochloride for its retail distribution in the city of Quito," for which reason he requested an arrest warrant against Daniel Tibi. [FN50]

[FN50] See report submitted to the provincial head of INTERPOL of the Guayas on September 26, 1995 (file with appendixes to the application, volume II, appendix 13, leaf 210; and file with appendixes to the brief with arguments and motions, appendix 1, leaf 666).

In regards to Daniel Tibi's detention and various judicial actions

90.10. On September 26, 1995, Lieutenant Colonel Abraham Correa Loachamín, head of the INTERPOL at the Guayas, asked the First Criminal Judge of the Guayas, Ángel Rubio Game, to order Daniel Tibi's detention. [FN51]

[FN51] See official letter sent by the head of INTERPOL at the Guayas to the First Criminal Judge of the Guayas on September 26, 1995 (file with appendixes to the application, volume II, appendix 13, leaf 211; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1142).

90.11. On September 27, 1995, at 16.30 hours, Daniel Tibi was detained in the city of Quito, Ecuador, while he was driving his car between Amazonas and Carrión avenues (Eloy Alfaro). [FN52] He was detained by INTERPOL agents, without a court order [FN53] and based on a single item of evidence that was the statement of a co-suspect. [FN54] Mr. Tibi was committing no crime at the time of his detention. [FN55] When he was arrested, the policemen did not inform him of the charges against him; [FN56] he was told that it was for "migration control." [FN57]

[FN52] See report submitted to the provincial head of INTERPOL at Pichincha on September 27, 1995 (file with appendixes to the application, volume II, appendix 13, leaf 214; file with appendixes to the brief with arguments and motions, appendix 2, leaf 668; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1292).

[FN53] See arrest warrant against Daniel Tibi issued by the First Criminal Court of the Guayas on September 28, 1995 (file with appendixes to the application, volume II, appendix 13, leaf 212; file with appendixes to the brief with arguments and motions, appendix 3, leaf 670; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1141); and document sent by the Ecuadorian National Police to the President of the Inter-American Commission on Human Rights on July 21, 1999 (file with appendixes to the brief with arguments and motions, appendix 9, leaf 689 and 690).

[FN54] See statement rendered by Eduardo Edison García León before the Seventh Criminal Prosecutor of the Guayas on September 23, 1995 (file with appendixes to the application, volume II, appendix 13, leaf 223; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1133); and report submitted to the provincial head of INTERPOL at Pichincha on September 27, 1995 (file with appendixes to the application, volume II, appendix 13, leaf 214; file with appendixes to the brief with arguments and motions, appendix 2, leaf 668; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1292).

[FN55] See report submitted to the provincial head of INTERPOL of the Guayas on September 27, 1995 (file with appendixes to the application, volume II, appendix 13, leaf 214; file with appendixes to the brief with arguments and motions, appendix 1, leaf 668; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1292).

[FN56] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

[FN57] See statement rendered by Daniel Tibi before the Tenth Criminal Public Prosecutor of the Guayas on September 28, 1995 (file with appendixes to the application, volume II, appendix 13, leaf 215; and file with appendixes to the brief with preliminary objections, reply to the

application and comments on the arguments and motions, leaf 1125); and testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.12. When Mr. Tibi was detained, his belongings were seized. [FN58] The authorities informed him at that moment that he must travel to Guayaquil, a city 600 kilometers away from Quito, and that he would come back that same night. Daniel Tibi was taken by plane to Guayaquil, and upon arrival he was handcuffed and taken to the INTERPOL office. [FN59]

[FN58] See list of belongings seized that were in the hands of Daniel Tibi at the time of his detention, prepared by Police Lieutenant Edison Tobar on September 27, 1995 (appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaves 1293 to 1297); and testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

[FN59] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.13. On September 28, 1995, the First Criminal Judge of the Guayas, Ángel Rubio Game, issued the judicial arrest warrant against Daniel Tibi. [FN60]

[FN60] See arrest warrant against Daniel Tibi issued by the First Criminal Court of the Guayas on September 28, 1995 (file with appendixes to the application, volume II, appendix 13, leaf 212; file with appendixes to the brief with arguments and motions, appendix 3, leaf 670; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1141).

90.14. On September 28, 1995 Mr. Tibi was taken before Public Prosecutor Oswaldo Valle Cevallos, before whom he rendered his pre-trial statement, without the presence of a judge or of defense counsel. [FN61]

[FN61] See statement rendered by Daniel Tibi before the Tenth Criminal Public Prosecutor of the Guayas on September 28, 1995 (file with appendixes to the application, volume II, appendix 13, leaves 215 to 218; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaves 1125 to 1128); and testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.15. At the Public Prosecutor's Office, they showed Mr. Tibi photographs of persons involved in the "Camarón" operation, among whom he recognized Eduardo Edison García León, whom

Mr. Tibi had seen twice to negotiate a leather jackets export deal, which was never completed. After recognizing this person, Mr. Tibi explained why he had visited his house. [FN62]

[FN62] See statement rendered by Daniel Tibi before the Tenth Criminal Public Prosecutor of the Guayas on September 28, 1995 (file with appendixes to the application, volume II, appendix 13, leaf 216; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1125 to 1128); and testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.16. In the request for an arrest warrant, filed before the First Criminal Judge of the Guayas on September 26, 1995, the head of INTERPOL at the Guayas stated that Mr. Tibi was a "supplier of cocaine hydrochloride to retailers, for it to be sold to consumers." [FN63]

[FN63] See official letter sent by the head of INTERPOL of the Guayas to the First Criminal Judge of the Guayas (file with appendixes to the application, volume II, appendix 13, leaf 211; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1142).

90.17. When he was detained, Mr. Tibi was not allowed to communicate with his spouse or with his country's Consulate. Subsequently, he was able to inform Beatrice Baruet that he was detained at the Cuartel Modelo in Guayaquil. [FN64] However, when Mrs. Baruet went to said military garrison, the officers in charge stated that Mr. Tibi was not there. Mrs. Baruet and an attorney visited other detention centers in Guayaquil, with the aim of finding Daniel Tibi, but they returned to the city of Quito without having found him. A few days later, through the wife of a detainee at the Penitenciaría del Litoral, Mr. Tibi was able to inform his then spouse where he was detained. [FN65]

[FN64] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.

[FN65] See testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.18. On October 4, 1995, the First Criminal Judge of the Guayas, Ángel Rubio Game, issued a preventive detention order against Daniel Tibi and the others accused in the "Camarón" operation, and began the criminal proceeding with the court order to investigate the alleged crime, [FN66] which was not notified. Mr. Tibi learned about the content of the court order to investigate the alleged crime several weeks later, through the defense counsel of another

detainee. [FN67] Daniel Tibi was not brought immediately before the case judge, nor was he examined by said judge. [FN68]

[FN66] See court order to investigate the alleged crime issued by the First Criminal Judge of the Guayas on October 4, 1995 (file with appendixes to the application, volume II, appendix 13, leaves 393 to 407; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaves 1104 to 1118).
[FN67] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.
[FN68] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.19. Mr. Tibi had no defense counsel for a month, [FN69] despite the fact that the court order to investigate the alleged crime had assigned him a court-appointed defense counsel, [FN70] a fact that he was unaware of, and he never met this defense counsel. [FN71]

[FN69] See preliminary statement rendered by Daniel Tibi before the First Criminal Court of the Guayas on March 21, 1996 (file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaves 1402 to 1404); and testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.
[FN70] See court order to investigate the alleged crime issued by the First Criminal Court of the Guayas on October 4, 1995 (file with appendixes to the application, volume II, appendix 13, leaf 401; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1112).
[FN71] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.20. On October 5, 1995 Daniel Tibi was taken from the Cuartel Modelo de Guayaquil to the Centro de Rehabilitación Social de Varones of Guayaquil or Penitenciaría del Litoral, [FN72] where he was imprisoned in the cell block known as “the quarantine,” where he remained 45 days. [FN73] Afterwards, he was taken to the “low attenuated” cell block of said penitentiary. [FN74]

[FN72] See control table of the Dirección Nacional de Prisiones (file with appendixes to the application, volume III, appendix 34, leaf 579; file with appendixes to the brief with arguments and motions, appendix 19, leaf 769; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1087); and official letter sent by the Director of the Centro de Rehabilitación Social de Varones de Guayaquil to the Provincial Commander of the 2d. Regiment of the Guayas on September 26,

1997 (file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1073).
[FN73] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.
[FN74] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.21. On December 8, 1995, Eduardo Edison García León retracted from the statement in which he incriminated Mr. Tibi, and he pointed out that "under physical and moral pressure, [he was] forced to sign an extra-procedural statement[,] under threat[,] without him being responsible for everything that is said in it," and he impugned the statement. [FN75] On March 6, 1996 Eduardo Edison García León issued a second statement, in which he reiterated what he said in the former one. [FN76]

[FN75] See preliminary statement rendered by Eduardo Edison García León before the First Criminal Court of the Guayas on December 8, 1995 (file with appendixes to the brief with arguments and motions, appendix 6, leaves 680 and 681).
[FN76] See preliminary statement rendered by Eduardo Edison García León before the First Criminal Court of the Guayas on March 6, 1996 (file with appendixes to the brief with arguments and motions, appendix 7, leaves 683 to 685).

90.22. On March 21, 1996 Mr. Tibi rendered his trial statement before "a notary public" or before the First Criminal Judge of the Guayas, Ángel Rubio Game. In said statement Mr. Tibi did not accept the charges against him. [FN77]

[FN77] See preliminary statement rendered by Daniel Tibi before the First Criminal Court of the Guayas on March 21, 1996 (file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaves 1402 to 1404); and testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004. Note: Judge Ángel Rubio Game's signature is on the pretrial statement. However, in his testimony before the Court, Mr. Tibi asserted that "at no time did the judge receive the statement that he and Eduardo García made, which was rendered before the same "notary public" who went to the prison in March."

90.23. On September 3 or 5, 1997 the Second Criminal Judge of the Guayas, Alternate to the Eighteenth Criminal Judge of the Guayas, with seat at Durán, ordered the provisional dismissal of the proceeding and of the charges against the accused, in favor of Daniel Tibi. This order was consulted ex-officio to the High Court of Justice of Guayaquil. [FN78]

[FN78] See provisional dismissal ruling issued by the Second Criminal Judge of the Guayas, Alternate to the Eighteenth Criminal Court of the Guayas (Durán) on September 3 or 5, 1997 (file with appendixes to the application, volume I, appendix 2, leaf 106 al 109). Note: the ruling is illegible and when the parties refer to it they state that it is dated September 3, 1997, while at the end of said ruling the date is September 5, 1997.

90.24. On January 14, 1998 the High Court of Justice of Guayaquil upheld the provisional dismissal of the proceeding and of the accused in favor of Daniel Tibi. [FN79]

[FN79] See the January 14, 1998 ruling of the High Court of Justice of Guayaquil (file with appendixes to the application, volume I, appendix 2, leaf 118 to 132; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1213 to 1227).

90.25. On January 20, 1998 the Second Criminal Judge of the Guayas, Reynaldo Cevallos, Alternate Judge for the Eighteenth Criminal Court of the Guayas, ordered Daniel Tibi's immediate release, [FN80] and he was released on January 21, 1998. [FN81]

[FN80] See ruling issued by the Second Criminal Judge of the Guayas, Alternate to the Eighteenth Criminal Judge of the Guayas (Durán) on January 20, 1998 (file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1250).

[FN81] See release warrant issued by the Second Criminal Judge of the Guayas, Alternate to the Eighteenth Criminal Court of the Guayas (Durán) on January 21, 1998 (file with appendixes to the application, appendix 34, leaf 585; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1095).

90.26. After his release, Daniel Tibi traveled to Paris, France. [FN82]

[FN82] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.27. Mr. Tibi remained under preventive detention, in an uninterrupted manner, in Ecuadorian detention centers, from September 27, 1995 [FN83] to January 21, 1998. [FN84]

[FN83] See report to the to the provincial head of INTERPOL at Pichincha on September 27, 1995 (file with appendixes to the brief with arguments and motions, appendix 2, leaf 668; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1292).
[FN84] See release warrant issued by the Second Criminal Judge of the Guayas, Alternate to the Eighteenth Criminal Court of the Guayas (Durán) on January 21, 1998 (file with appendixes to the application, appendix 34, leaf 585; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1095); and ruling issued by the Second Criminal Judge of the Guayas, Alternate to the Eighteenth Criminal Judge of the Guayas (Durán) on January 20, 1998 (file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1250).

In regards to the judicial amparo remedies filed by Daniel Tibi

First judicial amparo remedy filed

90.28. On July 1, 1996 Daniel Tibi filed a judicial amparo remedy before the President of the High Court of Guayaquil, alleging that there was no evidence against him, as "[t]here is no evidence in the proceeding that is in accordance with Art[icles] 61, 65 [and] 66 of the Criminal Procedures Code and something that is very important, the investigative agents themselves ARE NOT SURE OR CERTAIN that he supplied the grams [.] The attitude of the police agents of accepting the account of a co-accused is contrary to the law, and it even specifies that the current account is outside the sphere of what is being investigated." [FN85]

[FN85] See amparo remedy filed by Daniel Tibi before the President of the High Court of Justice of Guayaquil on July 1, 1996 (file with appendixes to the application, volume I, appendix 2, leaf 096 to 098).

90.29. On July 22, 1996 the President of the High Court of Guayaquil rejected the judicial amparo remedy filed by Mr. Tibi, based on the fact that the merits of the charge that were the basis for the detainee's preventive incarceration had not been disproved in the proceeding. [FN86]

[FN86] See ruling issued by the President of the High Court of Guayaquil on July 22, 1996 (file with appendixes to the application, volume I, appendix 2, leaves 099 to 100).

Second judicial amparo remedy filed

90.30. On October 2, 1997 Daniel Tibi, through his attorney, filed a second judicial amparo remedy before the President of the High Court of Justice of Guayaquil, requesting his release due

to non-fulfillment of Article 246 of the Criminal Procedures Code and Article 22.19.d and h of the Political Constitution of Ecuador, since despite the order for his immediate release issued on September 3 or 5, 1997 by the Second Criminal Judge of the Guayas, Alternate to the Eighteenth Criminal Judge of the Guayas, he was still deprived of his liberty. [FN87]

[FN87] See amparo remedy filed by Daniel Tibi before the President of the High Court of Justice of Guayaquil on October 2, 1997 (file with appendixes to the application, volume I, appendix 2, leaves 110 and 111).

90.31. On October 21, 1997 Daniel Tibi filed before the President of the High Court of Justice of Guayaquil a request for clarification and further explanation of the ruling that rejected the judicial amparo remedy. [FN88] At the time of the instant Judgment, the Court has no information on the response to said request.

[FN88] See request for clarification and further explanation filed before the High Court of Justice of Guayaquil on October 21, 1997 (file with appendixes to the application, volume I, appendix 2, leaves 112 to 113).

In regards to the complaint filed by Daniel Tibi

90.32. In October 1996 Mr. Tibi filed a complaint against the First Criminal Judge of the Guayas regarding the delay to decide on his case and due to his actions. [FN89]

[FN89] See complaint filed by Daniel Tibi against the First Criminal Court of the Guayas in October 1996 (file with appendixes to the application, volume I, appendix 3, leaves 140 to 142).

90.33. On October 7, 1996 the Presidency of the Comisión de Quejas y Reclamos of the Supreme Court of Justice heard the complaint filed by Mr. Tibi against the First Criminal Judge of the Guayas. [FN90]

[FN90] See ruling issued by the Presidency of the Comisión de Quejas of the Supreme Court of Justice on October 7, 1996 (file with appendixes to the application, volume I, appendix 3, leaf 143).

90.34. On October 14, 1996 the High Court of Guayaquil ordered notification of the ruling of the Presidency of the Comisión de Quejas y Reclamos of the Supreme Court of Justice to the First Criminal Judge of the Guayas, Ángel Rubio Game, who was granted five days time to reply to the complaint. [FN91]

[FN91] See ruling issued by the Presidency of the High Court of Guayaquil on October 14, 1996 (file with appendixes to the application, volume I, appendix 3, leaf 144).

90.35. On November 7, 1996 the First Criminal Judge of the Guayas, Ángel Rubio Game, answered the complaint and pointed out that the criminal indictment against Mr. Tibi had been closed since October 23, 1996 and that on the 25th of that same month the representative of the Public Prosecutor's Office had been notified for him to issue his opinion as soon as possible, and once the opinion had been issued, he would rule on the case within the term allotted by Law. [FN92]

[FN92] See official letter sent by the First Criminal Judge of the Guayas to the Minister of the Supreme Court of Justice, President of the Comisión Nacional de Quejas y Reclamos, on November 7, 1996 (file with appendixes to the application, volume I, appendix 3, leaf 147).

90.36. On March 10, 1997 the Comisión Nacional de Quejas y Reclamos of the Supreme Court of Justice ruled on the complaint filed by Mr. Tibi against the First Criminal Judge of the Guayas, Ángel Rubio Game. Said Committee recommended that this Judge and the Public Prosecutor be "severely reprimanded" and that after reading the criminal file against Mr. Tibi "the conclusion must necessarily be reached that [he] is innocent." [FN93]

[FN93] See official letter addressed to the President of the Supreme Court of Justice by the Comisión Nacional de Quejas y Reclamos on March 10, 1997 (file with appendixes to the brief with arguments and motions, appendix 13, leaf 703 to 704).

90.37. On March 17, 1997 Public Prosecutor Carlos Julio Guevara Alarcón sent his opinion to the First Criminal Judge of the Guayas, Ángel Rubio Game, pointing out that "while it is true that in the records [Daniel Tibi] presumably appears to have illegitimately delivered narcotics, this unlawful act has not been proven in accordance with the law, and furthermore it should be under another procedural item and not that investigated here." [FN94]

[FN94] See opinion issued by the First Criminal Public Prosecutor of the Guayas to the First Criminal Judge of the Guayas on March 17, 1997 (file with appendixes to the application, volume I, appendix 2, leaf 105; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1396).

90.38. The District Attorney for the Guayas, John Birkett Mortola, asked that the First Criminal Judge of the Guayas, Ángel Rubio Game, be reprimanded due to the grave irregularities committed in the criminal proceeding against Mr. Tibi. [FN95]

[FN95] See opinion issued by the District Attorney of the Guayas (file with appendixes to the application, volume I, appendix 2, leaf 116; file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, 1228 al 1233).

90.39. On April 14, 1997 the First Criminal Judge of the Guayas, Ángel Rubio Game, was substituted by the Fourteenth Criminal Judge of the Guayas. [FN96]

[FN96] See ruling issued by the Thirteenth Criminal Judge of the Guayas on April 14, 1997 (file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaves 1361 to 1364).

On Daniel Tibi's property

90.40. The Quito police seized the goods and securities that Daniel Tibi had with him when he was detained. The goods and securities that were in his possession then, according to the list made by the police for this purpose, [FN97] were the following:

1. a plastic box with glass, two yellow stones and eight lilac stones of different sizes.
2. a small suede sheath containing a yellow metal ring and in its center a green stone with 12 white stones around it.
3. two pieces of paper containing four black stones, two blue stones, one white stone, and one purple stone, 7 in all.
4. two pieces of paper containing two white stones.
5. two pieces of paper containing four green stones.
6. two pieces of paper containing 31 green stones of various sizes.
7. two pieces of paper containing one green stone.
8. two pieces of paper containing one green stone.
9. two pieces of paper containing 21 green stones of various sizes.
10. two pieces of paper containing 5 green stones.
11. two pieces of paper containing 17 green stones.
12. two pieces of paper containing 2 green stones.
13. two pieces of paper containing 14 green stones.
14. two pieces of paper containing 2 green stones.
15. two pieces of paper containing 2 green stones.
16. two pieces of paper containing 33 dark blue stones.
17. two pieces of paper.
18. one wooden case with a silver-colored, 18 piece mini-weight.
19. one 5 franc coin.

20. two 2 franc coins.
21. two 1 franc coins.
22. one 20 franc coin.
23. two 10 franc coins.
24. two 20 franc cent coins.
25. two 10 franc-cent coins.
26. one pair of glasses with a case, brown with yellow stripes, on one of the lenses the legend “faconnable jeans lunettes”.
27. one Visa card No. 4976930000335448 in the name of DANIEL DAVID TIBI.
28. one NORPLUS card No. 6200173858 in the name of DANIEL DAVID TIBI.
29. one CALLE HOME key card.
30. one French Republic passport No. 931D62605, in the name of DANIEL DAVID TIBI.
31. one Ecuadorian identity card No. 171493206-6 in the name of DANIEL DAVID TI[B]I.
32. one registration certificate in the name of DANIEL DAVID TIBI.
33. one immigration form in the name of TIBI CHEKLY DANIEL DAVID.
34. one photocopy of the passport and identity card of DANIEL DAVID TIBI.

34.(sic) one photocopy of the index card of citizen WOJCIECH KONRAD KULWIEC NOWAKOWSKY.

35. one registration card for a Volvo vehicle, license plate PGN244 in the name of HERRERA SANTACRUZ EDGAR.
36. one Volvo vehicle, license plate PGN-244, wine colored, which is held in the courtyard of the offices of INTERPOL at Pichincha.
37. a wine-colored directory holder with a phonebook and several personal presentation cards, two photographs of a woman, several pieces of paper with several notes.
38. a black address book, with several notes inside.
40. a blue agenda with several personal presentation cards and the photograph of a man.
41. twelve consumption vouchers made out to DANIEL DAVID TIBI.
42. one Pichincha bank deposit slip for checking account No. 7622426 in the name of BEATRICE [V]ACHON.
43. a small paper sheath containing four different pieces of paper.
44. a BANQUE COURTOIS check made out to DANIEL TIBI.
45. an AMC Automóviles S.A invoice made out to TIBI DANIEL.
46. a photocopy of the logo of Manufacture Machones Du Haut Thin.
47. a foreign currency purchase receipt made out to Daniel Tibi.
48. a letter with the COFICA logo.
49. three packages with the logo of the BANQUE COURTOIS in the name of Daniel Tibi.
50. three receipts made out to DANIEL TIBI.
51. one ECUACAMBIO receipt made out to Daniel Tibi.
52. three contemporary art fund catalogues.
53. one CATASSE catalogue.
54. one white notebook.
55. one detailed sample of work by painter CARLOS CATASSE.
56. one black suede sheath.
57. two small sheaths, green and turquoise, containing cigarette-wrapping paper.
58. one small white sheath with some seeds.
59. one silver-colored magnifying glass.

60. three black, three-service pens, another red one and another black one.
61. [three] silver-colored metal tweezers of various sizes.
62. two pocket knives[,] one with a wooden handle and the other one made in aluminum with a hilt;
63. a lilac highlighter
64. three cigarette holders and one aluminum protector.
65. a wooden stick with notches.
66. a Baygon tablet.
67. a MARCOS Y ARTE invoice made out to DANIEL TIBI.
68. a blue and yellow checkbook holder with a BANQUE COURTOIS check stub book and several papers.
69. a wallet with a motorcycle driver's license and a sportsman license in the name of Daniel David Tibi, the identification card of minor OCEANE TIBI CONILH DE BEYSSAC, a GLOBAL COM card in the name of DANIEL TIBI, three identity-card sized photographs and several personal presentation cards.
70. a LIFT MASTER remote control, series No. HBWID3505.
71. a key ring with ten keys.
72. a box with 18 9mm bullets.
73. a silver-colored and yellow TIMEX INDIGLO watch.
74. a white ELECTRONIC CALCULATOR brand calculator.
75. a yellow metal chain with three small links and a large link, with a locket with a face on it, and one green stone in the middle.
76. [forty-one] 10,000 sucre bills.
77. one 5,000 sucre bill.
78. three 1,000 sucre bills.
79. four 500 sucre bills.
80. ten 100 sucre bills, adding up to 421,000 sucres.
81. one black belt.
82. a bottle of visina.
83. several papers, including receipts, various notes, and envelopes.
84. a black and white photograph of a woman.
85. a black suitcase.

[FN97] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and list of belongings seized that were in the hands of Daniel Tibi at the time of his detention prepared by Police Lieutenant Edison Tobar on September 27, 1995 (file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaves 1293 to 1297).

90.41. On September 23 or 29, the Second Criminal Judge of the Guayas, Alternate Judge for the Eighteenth Criminal Court of the Guayas, with seat in Durán, ordered the return of Mr. Tibi's property, once this order was upheld by the Sixth Chamber of the High Court of Justice of Guayaquil, to which it was consulted, forwarding the a copy of the proceedings. [FN98] The results of said consultation are unknown.

[FN98] See ruling issued by the Second Criminal Judge of the Guayas, Alternate to the Eighteenth Criminal Court of the Guayas on September 23 or 29, 1998 (file with appendixes to the application, volume II, appendix 22, leaf 498; and file with appendixes to the brief with arguments and motions, appendix 10, leaf 696). Note: there are two dates on this ruling: September 23, 1998, at the beginning of the court document, and another one, September 29, 1998, at the end of that document.

90.42. When Mr. Tibi returned to France he addressed the Ecuadorian Embassy in Paris, together with his attorney, to demand return of his property. [FN99]

[FN99] See letter addressed by Daniel Tibi's attorney, Arthur Vercken, to the Ecuadorian Ambassador in France, Juan Cueva, on June 11, 1998 (file with appendixes to the application, volume II, appendix 21, leaf 493); e-mails addressed by the "Director General de Europa" to the Ecuadorian Ambassador in France on August 13, 1998 and on September 29, 1998 (file with appendixes to the application, volume II, appendix 21, leaves 494 and 495); and testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.43. Mr. Tibi's seized property has not been returned to him. [FN100]

[FN100] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004 ; and ruling issued by the Second Criminal Judge of the Guayas, Alternate to the Eighteenth Criminal Court of the Guayas, on September 23 or 29, 1998 (file with appendixes to the application, volume II, appendix 22, leaf 498; and file with appendixes to the brief with arguments and motions, appendix 10, leaf 696).

In regards to the pecuniary and non-pecuniary damages to Daniel Tibi

90.44. When Daniel Tibi was detained, he was conducting a profitable activity as an Ecuadorian art and gems merchant (supra para. 90.1). As a consequence of the facts, he lost income, and this caused him pecuniary damage. The alleged victim did not have a fixed monthly salary; his income fluctuated, because it depended on the sale of the goods that he traded. With his income, he supported his spouse Beatrice Baruet and their family. [FN101]

[FN101] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.45. Given Daniel Tibi's physical and psychological alterations as a consequence of the facts (infra para. 90.52 y 90.53), he is currently unable to work normally. [FN102]

[FN102] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; expert opinion of Carlos Martín Beristain rendered before the Inter-American Court during the public hearing held on July 7, 2004; and report of the medical examination conducted by Gèrard Benayoun (file with appendixes to the brief with arguments and motions, appendix 35, leaf 1057).

90.46. At the Penitenciaría del Litoral, Mr. Tibi was placed in the cell block known as "the quarantine," where he remained 45 days, in overcrowded and unhealthy conditions. [FN103] There were 120 to 300 persons in this cell block, in a 120 square meter area. [FN104] He was locked in there twenty-four hours a day, in a place without adequate ventilation or light, and he was not given food. He had to pay other inmates to bring him food. [FN105]

[FN103] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004; expert opinion of Santiago Argüello Mejía rendered before the Inter-American Court during the public hearing held on July 7, 2004; and answers of Laurent Rapin to the questionnaire sent by the representatives on June 22, 2004 (file with preliminary objections and merits, reparations and costs, volume III, leaf 571).

[FN104] See expert opinion of Santiago Argüello Mejía rendered before the Inter-American Court during the public hearing held on July 7, 2004; testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.

[FN105] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and compact disk submitted by the representatives el July 7, 2004 (file with documents submitted by the representatives during the public hearing on Preliminary objections and merits, reparations and costs).

90.47. Subsequently, Daniel Tibi was taken to the "low attenuated" cell block of the Penitenciaría del Litoral and he remained several weeks in the cell block corridor, sleeping on the floor, until he was finally able to get into a cell by force. [FN106]

[FN106] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.48. On February 19, 1997 Mr. Tibi was placed in the cell block for undisciplined inmates, where he was attacked by other inmates. [FN107]

[FN107] See two event reports to the Director of the Centro de Rehabilitación Social de Varones de Guayaquil by the Jefe de Guías of that Rehabilitation Center on February 20, 1997 (file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaves 1099 to 1101); and brief addressed by Daniel Tibi to the National Prison Director on February 24, 1997 (file with appendixes to the application, volume I, appendix 2, leaf 092).

90.49. There was no inmate classification system at the penitentiary where Daniel Tibi was incarcerated. [FN108]

[FN108] See expert opinion of Santiago Argüello Mejía rendered before the Inter-American Court during the public hearing held on July 7, 2004; brief addressed by Daniel Tibi to the National Prison Director on February 24, 1997 (file with appendixes to the application, volume I, appendix 2, leaf 092); and testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.50. During his detention in March and April 1996 at the Penitenciaría del Litoral, Daniel Tibi suffered physical violence and was threatened, by prison guards, to obtain his self-incrimination; [FN109] for example, he was beaten with fists on the body and in the face; his legs were burned with cigarettes. Subsequently, the beatings and burns were repeated. He also suffered several broken ribs, his teeth were broken, and he received electrical discharges on his testicles. Another time he was beaten with a contusive object and his head was submerged in a water tank. Mr. Tibi underwent at least seven such "sessions." [FN110]

[FN109] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004.

[FN110] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; expert opinion of Carlos Martín Beristain rendered before the Inter-American Court during the public hearing held on July 7, 2004; and medical certificate by doctor Philippe Lesprit, head clinical assistant at the Henri Mondor Hospital on January 26, 1998 (file with appendixes to the application, volume I, appendix 2, leaf 73).

90.51. While he was in prison, Daniel Tibi was examined twice by Ecuadorian physicians appointed by the State. They verified that he had suffered wounds and traumatism, [FN111] but he never received medical treatment and the cause of his ailing was never investigated.

Furthermore, he was never thoroughly examined. [FN112] After his return from France, Mr. Tibi was examined by French physicians, who verified the injuries that he had suffered. [FN113]

[FN111] See report prepared by doctor Jorge Vivas Tobar, third physician of the Centro de Rehabilitación Social de Varones of Guayaquil on November 13, 1996 (file with appendixes to the brief with arguments and motions, appendix 12, leaf 701; and file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1093); forensic medical examination conducted by the physicians appointed by the Eighteenth Criminal Judge of the Guayas (Durán), doctors Juan Montenegro and Jorge Salvatierra on September 19, 1997 (file with appendixes to the brief with arguments and motions, appendix 32, leaf 1043); and official letter N□ 389 DNRS-SG addressed by the Supervisor General, attorney for the Dirección Nacional de Rehabilitación Social, to the Director Nacional de Rehabilitación Social on August 8, 2000 (file with appendixes to the brief with arguments and motions, appendix 11, leaf 698).

[FN112] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; expert opinion of Carlos Martín Beristain rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Juan Montenegro rendered before the Inter-American Court during the public hearing held on July 7, 2004.

[FN113] See medical certificate prepared by doctor Philippe Lesprit, Head clinical assistant at the Henri Mondor hospital dated January 26, 1998 (file with appendixes to the application, volume I, appendix 2, leaf 73); medical certificate prepared by doctor Pascale Barre of the Centre Hospitalier Universitaire de Dijon on March 28, 1998 (file with appendixes to the application, volume I, appendix 2, leaves 76 and 77); documentation regarding the septorinoplasty (file with appendixes to the application, volume I, appendix 2, leaves 79 and 80); medical certificate prepared by doctor Christian Rat, of the Centre Hospitalier Universitaire de Dijon on February 16, 1998 (file with appendixes to the brief with arguments and motions, appendix 33, leaf 1045); medical certificate prepared by doctor Philippe Blanche, of the Groupe Hospitalier Cochin,- Saint Vicent De Paul-La Roche-Guyon (file with appendixes to the brief with arguments and motions, appendix 36, leaf 1059; and file with evidence to facilitate adjudication of the case submitted by the Inter-American Commission, single volume, leaves 1058 to 1063); and medical certificate prepared by doctor Gèrard Benayoun, expert pres la Court D´Appel de Paris, on November 8, 2001 (file with appendixes to the brief with arguments and motions, single volume, appendix 35, leaves 1050 to 1057).

90.52. Mr. Tibi has suffered severe physical damage, including: loss of hearing in one ear, eyesight problems in the left eye, a broken nasal septum, injury of the left cheek bone, scars from burns on his body, broken ribs, broken and deteriorated teeth, blood problems, disk and inguinal hernias, maxillary displacement, he either contracted hepatitis C or this condition worsened, and cancer, called digestive lymphoma. [FN114]

[FN114] See expert opinion of Carlos Martín Beristain rendered before the Inter-American Court during the public hearing held on July 7, 2004; medical certificate prepared by doctor Virginia

Miranda and clinical analyses by the Centro Clínico y Dermatológico San Luis of Ecuador on January 22, 1998 (file with appendixes to the application, volume I, appendix 2, leaves 066 to 071); medical certificate prepared by doctor Philippe Lesprit, Head clinical assistant at the Henri Mondor hospital dated January 26, 1998 (file with appendixes to the application, volume I, appendix 2, leaves 73 and 74); medical certificate prepared by doctor Pascale Barre of the Centre Hospitalier Universitaire de Dijon on March 28, 1998 (file with appendixes to the application, volume I, appendix 2, leaves 76 and 77); documentation regarding the septorinoplasty (file with appendixes to the application, volume I, appendix 2, leaves 79 and 80); medical certificate prepared by doctor Christian Rat, of the Centre Hospitalier Universitaire de Dijon on February 16, 1998 (file with appendixes to the brief with arguments and motions, appendix 33, leaf 1045); report prepared by doctor Jorge Vivas Tobar, third physician of the Centro de Rehabilitación Social de Varones of Guayaquil, on November 13, 1996 (file with appendixes to the brief with arguments and motions, appendix 12, leaf 701; file with appendixes to the brief with preliminary objections, reply to the application and comments on the arguments and motions, leaf 1093); forensic medical examination conducted by physicians appointed by the Eighteenth Criminal Judge of the Guayas (Durán), doctors Juan Montenegro and Jorge Salvatierra on September 19, 1997, (file with appendixes to the brief with arguments and motions, appendix 32, leaf 1043); laboratory report by the Laboratoire de Biologie Lé-Thiébaut Selarl on December 18, 2001 (file with evidence to facilitate adjudication of the case submitted by the Inter-American Commission, single volume, leaves 1850 to 1851); laboratory report by the Laboratoire de Biologie Lé-Thiébaut Selarl on June 17, 2002 (file with evidence to facilitate adjudication of the case submitted by the Inter-American Commission, single volume, leaves 1864 to 1867); laboratory report prepared by Christophe Ronsin and Anne Ebel of the Laboratoire d´analyses spécialisées on December 18, 2001 (file with evidence to facilitate adjudication of the case submitted by the Inter-American Commission, single volume, leaf 1853); laboratory report prepared by Christophe Ronsin of the Laboratoire d´analyses spécialisées on June 17, 2002 (file with evidence to facilitate adjudication of the case submitted by the Inter-American Commission, single volume, leaf 1868); audiometry conducted by the Cabinet Dr Ardaud, Bonefille et Gaucher on June 19, 2004 (file with evidence to facilitate adjudication of the case submitted by the Inter-American Commission, single volume, leaf 1852); medical certificate prepared by doctor Micheline Tulliez of the Service d´anatomie et cytologie pathologiques on June 7, 2001 (file with evidence to facilitate adjudication of the case submitted by the Inter-American Commission, single volume, leaf 1854); medical certificate prepared by doctor Micheline Tulliez of the Service d´anatomie et cytologie pathologiques on April 1, 2004 (file with evidence to facilitate adjudication of the case submitted by the Inter-American Commission, single volume, leaves 1855 to 1856); medical certificate prepared by doctor Micheline Tulliez of the Service d´anatomie et cytologie pathologiques on April 5, 2004 (file with evidence to facilitate adjudication of the case submitted by the Inter-American Commission, single volume, leaf 1857); and medical certificate prepared by doctor Philippe Blanche, of the Groupe Hospitalier Cochin,- Saint Vicent De Paul-La Roche-Guyon on June 6, 2001 (file with evidence to facilitate adjudication of the case submitted by the Inter-American Commission, single volume, leaves 1859 to 1863).

90.53. As a consequence of the facts that gave rise to this case, Daniel Tibi has suffered and continues to suffer physical health problems, [FN115] as well as psychological ones, some of

which may be alleviated, while others could last the rest of his life. [FN116] Due to said problems, he has had to receive medical treatment, and has incurred various expenses. [FN117]

[FN115] See expert opinion of Carlos Martín Beristain rendered before the Inter-American Court during the public hearing held on July 7, 2004.
[FN116] See expert opinion of Ana Deutsch rendered before the Inter-American Court during the public hearing held on July 7, 2004; expert opinion of Carlos Martín Beristain rendered before the Inter-American Court during the public hearing held on July 7, 2004; sworn statement by Michel Robert on May 31, 2004 (file with preliminary objections, and merits and reparations, Volume III, leaves 601 to 602 and 572.b and 573).
[FN117] See expert opinion of Ana Deutsch rendered before the Inter-American Court during the public hearing held on July 7, 2004; hospitalization invoice issued by the Henri Mondor hospital on February 21, de 1998 and March 17, 1998 brief requesting payment (file with appendixes to the written pleadings of the representatives of the alleged victim and his next of kin, single volume, leaves 1916 and 1917); and budget for dental treatment, prepared by doctor Gèrard Hoayon (file with appendixes to the brief with arguments and motions, appendix 22, leaf 783); and sworn statement by Michel Robert on May 31, 2004 (file with preliminary objections, and merits and reparations, Volume III, leaves 601 to 602 and 572.b and 573).

90.54. Daniel Tibi and his next of kin continue to suffer due to the impunity that prevails in this case. [FN118]

[FN118] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004; and expert opinion of Ana Deutsch rendered before the Inter-American Court during the public hearing held on July 7, 2004.

In regards to the pecuniary and non-pecuniary damage caused to the family of Daniel Tibi

90.55. Due to the facts in the instant case, Beatrice Baruet, the former spouse of Daniel Tibi, suffered detriment to her financial and work relations. She had to support the family without the alleged victim's support, in addition to incurring expenses in connection with his situation, travel, food and other expenses while she stayed in Guayaquil, visiting Daniel Tibi at the penitentiary, all of which caused pecuniary damage. [FN119]

[FN119] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004; and expert opinion of Ana Deutsch rendered before the Inter-American Court during the public hearing held on July 7, 2004.

90.56. Daniel Tibi's detention and incarceration and other facts derived from this situation have caused suffering, anguish and grief to the members of the family. [FN120] Beatrice Baruet did not know Mr. Tibi's whereabouts immediately after his detention. At the time of the facts, Mrs. Baruet was three months pregnant and in those conditions she traveled many times, at least 72 times, to Guayaquil to visit her spouse at a detention center. [FN121] Lisianne Judith Tibi and Valerian Edouard Tibi, Sarah Vachon and Jeanne Camila Vachon were forced to separate from their father and stepfather, respectively, during his incarceration. [FN122] After Mr. Tibi was released, his family ties with Beatrice Baruet, his stepdaughters and his daughter broke down. [FN123]

[FN120] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004; and expert opinion of Ana Deutsch rendered before the Inter-American Court during the public hearing held on July 7, 2004.
[FN121] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.
[FN122] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; and testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004.
[FN123] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004; and expert opinion of Ana Deutsch rendered before the Inter-American Court during the public hearing held on July 7, 2004.

In regards to the expenses incurred by Mr. Tibi and his next of kin processing the case under domestic venue

90.57. Mr. Tibi and his family incurred expenses in connection with the various administrative and judicial steps taken. [FN124]

[FN124] See testimony of Daniel Tibi rendered before the Inter-American Court during the public hearing held on July 7, 2004; testimony of Beatrice Baruet rendered before the Inter-American Court during the public hearing held on July 7, 2004 and letter addressed by attorney Nelson Martínez to Beatrice Baruet on November 13, 1995 (file with appendixes to the brief with arguments and motions, appendix 24, leaf 788).

In regards to representation of Daniel Tibi and his next of kin before the inter-American system for the protection of human rights, and the expenses in connection with said representation

90.58. The alleged victim and his next of kin have been represented in the proceedings before the Commission and the Court by members of the Center for Justice and International Law and the Clínica de Derechos Humanos of the Pontificia Universidad Católica del Ecuador, which have covered the expenses in connection with said steps. [FN125]

[FN125] See power of attorney granted to the attorneys of the Center for Justice and International Law and to the attorneys of the Clínica de Derechos Humanos of the Pontificia Universidad Católica del Ecuador by Daniel Tibi, Lisianne Tibi, Valerian Edouard Tibi, Sarah Vachon and Jeanne Vachon (file with appendixes to the brief with arguments and motions, appendix 20, leaves 775 and 776); power of attorney granted to the attorneys of the Center for Justice and International Law and to the attorneys of the Clínica de Derechos Humanos of the Pontificia Universidad Católica del Ecuador by Beatrice Baruet (file with appendixes to the brief with arguments and motions, appendix 20, leaf 777); and copies of the vouchers submitted to demonstrate the expenses incurred by the representatives of the alleged victim and his next of kin (file with appendixes to the brief with final pleadings of the representatives of the alleged victim and his next of kin, single volume, leaves 1921 to 2035).

VIII. VIOLATION OF ARTICLE 7 OF THE AMERICAN CONVENTION (RIGHT TO PERSONAL LIBERTY)

Pleadings of the Commission

91. The Commission argued that:

a) Article 19(17)(g) of Ecuador's 1978 Constitution, in force when Daniel Tibi was arrested, sets forth the formal circumstances to conduct a detention, that is, by order of a competent authority, except for cases of flagrancy. The Constitution does not establish any other situation in which the order of a competent authority is not necessary. Article 172 of the Criminal Procedures Code of Ecuador, in turn, regulates preventive detention as follows: "before the respective penal action begins, the Competent Judge must order detention of an individual […];"

b) it is for the national authorities, especially domestic justice, to interpret and enforce the country's law. However, according to Article 7(2) of the American Convention, "failure to comply with domestic legislation entails a violation of the Convention, for which reason the Court can and must exercise its jurisdiction to establish whether there has been compliance with domestic legislation;"

c) it has not been proven, and the State has not argued, that Mr. Tibi was arrested while flagrantly committing a crime. And there has there been no dispute regarding the fact that the arrest warrant is dated September 28, 1995. The detention took place in violation of procedures previously set forth in the Constitution and in Ecuador's Criminal Procedures Code, and therefore, failure to comply with Ecuadorian legislation constitutes a breach of Article 7(2) of the Convention;

d) arrest of an individual without an order requires legal and factual justification, which has not been submitted by the State. The process of capture and detention in the instant case is not in accordance with due process. Mr. Tibi's deprivation of liberty was arbitrary, under the terms of Article 7(3) of the American Convention;

e) Mr. Tibi asserted that at no time did the police inform him of the reason for his arrest, despite the fact that the court order stated that "he was detained because he was being investigated for drug trafficking in criminal proceeding N 361-95." Not informing Mr. Tibi of the reasons for his detention and of the charges against him breached Article 7(4) of the Convention;

f) on October 4, 1995 Mr. Tibi learned of the existence of a preventive detention order against him, issued by the judge in Guayaquil. Although the courts were hearing said case, Mr. Tibi was never brought before the pertinent judge in the course of the proceeding, as required by Article 7(5) of the Convention;

g) while the State may argue that Article 116 of the law on narcotics [Ley sobre Sustancias Estupefacientes y Psicotrópicas], in force at the time, established that the detainee should be brought before the Public Prosecutor and not before a Judge, the accused must appear before the judge or the judicial functionary with jurisdiction to issue a release warrant. The Ministerio Fiscal General is part of the Public Prosecutor's Office, which is independent and explicitly excluded from the category of bodies that according to Ecuador's Constitution carry out judicial function;

h) after the arrest, Mr. Tibi remained in preventive detention two years, three months and three weeks, which is not a reasonable time to remain in prison without being sentenced. In this regard, it must be proven that the detention was well founded from the start. If the detention was illegal or arbitrary from the outset, as in the case of Mr. Tibi, no period would be reasonable. Second, assuming that there are reasonable grounds to suspect that the accused committed a crime, the State must demonstrate that said suspicions have increased to justify duration of the detention; in other words, there must be a regular analysis of the necessity and legitimacy of the measure, a situation that did not take place in Mr. Tibi's case. Third, even if there are sufficient grounds for suspicion to continue preventive incarceration, the State must demonstrate that it has been especially diligent in the investigation of the case, a step that is clearly lacking in the instant case;

i) the national courts and, subsequently, the bodies established by the Convention must decide whether detention of the accused before a final decision has, at some point, gone beyond a reasonable limit. This limit serves the objective of protecting the accused regarding his basic right to personal liberty; and

j) both the need for and the duration of preventive detention must be proportional to the crime being investigated and to the applicable punishment. Once provisional dismissal has been ordered, a person's detention is neither reasonable nor legitimate, and it does not comply with the need for proportionality.

Pleadings of the representatives of the alleged victim and his next of kin

92. The representatives of the alleged victim and his next of kin argued that:

a) They fully agreed with the analysis of the Commission;

b) Article 7(2) of the Convention, in its material aspect, requires that the State fulfill the requirements previously and objectively defined in the Constitution and in the laws enacted in accordance with it, and that the authorities apply this legal order; in its formal aspect, said Article requires fulfillment of the formal requirements set forth in domestic legislation, such as existence of a written ad reasoned arrest warrant issued by a competent judicial authority;

c) Articles 19(17) of the Political Constitution of Ecuador and 172 of the Criminal Procedures Code require that a signed arrest warrant be issued, stating the reason for the detention, the place and date when the order was issued. The only exception to the written order is that set forth in Article 174 of the code, which refers to detention of an individual flagrantly committing a crime;

d) Mr. Tibi was arrested while he was driving his car, without an order by a competent judge, as set forth in Article 172 of the Criminal Procedures Code, and without a flagrant crime being committed, pursuant to Article 174 of that same legislation;

e) the concept of "arbitrary detention" applies when, despite fulfilling the constitutional and legal requirements, there is a circumstance that is incompatible with the rights and guarantees protected by the American Convention;

f) the police authorities detained Daniel Tibi with a flagrant abuse of authority, to involve him a crime that he did not commit and even to torture him, as they in fact did, for him to plead guilty of the facts of which he was accused. The detention was also unfair because the only evidence against Mr. Tibi was the statement of another co-accused (forbidden by the domestic legal system itself, in Article 108 of the Criminal Procedures Code), a statement allegedly also obtained under torture, that is, in violation of due process;

g) Article 7(4) of the Convention establishes two different requirements regarding the duty to inform the detainee: a) the duty to inform the person of the reasons for limiting his or her personal liberty; and b) the duty to immediately notify of the imputation against him or her. Appropriate notification of the imputation is decisive for exercise of the right to defense, as it establishes the object of the proceeding;

h) the "accidental" notifications of the charges against Daniel Tibi were not in accordance with the standards required by the American Convention in Articles 7(4) and 8(2)(b);

i) the agents of the State lied when they said that the detention and subsequent transfer of Mr. Tibi from INTERPOL's offices in Quito to the city of Guayaquil were due to migration control; they did not inform him that he was involved in a judicial proceeding, nor did he receive official notification of the charges against him, which he learned of through the attorney of another person who had been accused;

j) the guarantees set forth in Article 7(5) of the Convention seek both judicial review of any deprivation of liberty and to control the time that a person remains detained or incarcerated. Judicial review is the suitable control mechanism to avoid arbitrary and unlawful detentions. The objectives of presentation before a judge or other judicial authority are: to assess whether there are sufficient legal reasons for the arrest and whether pre-trial detention is required, to safeguard the wellbeing of the detainee, and to avoid abridgment of the detainee's fundamental rights;

k) Daniel Tibi was never taken before the judge who was hearing the case. And there is no evidence that the judge went to the penitentiary where Mr. Tibi was detained;

l) if the detainee is taken before an official who is not a judge, international jurisprudence has asserted that he must fulfill three requirements: be authorized by law to carry out judicial functions, fulfill the requirement of ensuring independence and impartiality, and have the authority to review the reasons for the detention and, if appropriate, to order release. In the

instant case, Daniel Tibi was taken before a prosecutor, he never appeared before a judge, and said prosecutor did not fulfill the aforementioned requirements;
m) in Ecuador the accused simply do not appear before a judge, in other words, the requirement that this be done "promptly" is never fulfilled; and
n) in Ecuador preventive detention is not used exceptionally, but rather is the rule. In this case there was no strong, univocal, and direct evidence as grounds for a grave, precise, and coherent presumption against Mr. Tibi, to justify detention lasting over two years.

Pleadings of the State

93. The State argued that:

a) it has complied with the necessary legal requirements for any detention, that is: "persons can only be detained if they have participated in, or they are suspected to have participate in, acts defined as crimes," and "the only objective of the detention must be to ensure that the suspect of a crime does not flee and to ensure that he appears before a competent judge;"
b) The detention and deprivation of liberty of Mr. Tibi and the other accused persons were more than necessary, as the wrongs being investigated are publicly actionable offenses. The accused were never deprived arbitrarily of their liberty, but rather on the basis of serious presumptions and after a judicial operation;
c) the fact that the police report on the investigation conducted by the National Police before the Public Prosecutor was sent to the competent judge two days after the detention shows that Mr. Tibi was brought before the judicial authorities without violating the term "promptly" used in Article 7(5) of the Convention. It can be concluded that the two days before the detainee was brought before the judge was not an excessive period, all the more so because the term "immediately" must be interpreted according to the circumstances of each case;
d) both for Article 7(5) and for Article 8(1) of the American Convention, "reasonable term" must be counted "from the time a person is accused," and accusation is "the official notification, issued by a competent authority, charging him with having committed a criminal violation." The date to begin counting the time, in this case, would be September 27, 1995, the day Mr. Tibi was detained;
e) the reasonable term mentioned in Article 7(5) of the Convention concludes with preventive detention and the term that Article 8(1) refers to ends with completion of the whole proceeding; and
f) the need for the exceptional measure of preventive detention "is justified by the following criteria reflected" by the Inter-American Commission in report No. 2/97 in regards to Argentina: i) a presumption that the accused has committed a crime; ii) danger of flight; iii) the risk of new crimes being committed; and iv) the need to investigate and the possibility of collusion. To decree said measure it is also necessary to satisfy certain substantive requirements: it must be a publicly actionable crime; the crime must be punishable with more than one year in prison, there must be sufficient indicia regarding the existence of a publicly actionable crime and there must be clear and precise indicia that the accused is the perpetrator of or accomplice to the crime. Preventive incarceration must fulfill certain formal requirements: competence, formalities, agents conducting the detention, and content of the order. Preventive detention against Mr. Tibi, as an exceptional measure, was necessary, in accordance with the aforementioned requirements, and therefore there was no violation of the right to personal liberty.

Considerations of the Court

94. Article 7 of the American Convention establishes that:

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.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

[…]

95. In consonance with the above, the second United Nations Principle for the Protection of All Persons under Any Form of Detention or Imprisonment sets forth that

[a]rrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose. [FN126]

[FN126] United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by the General Assembly in its Resolution 43/173, of December 9, 1988, Principle 2.

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96. The fourth Principle of that same international instrument, in turn, states that

[a]ny form of detention or imprisonment and all measures affecting the human rights of a person under any form of detention or imprisonment shall be ordered by, or be subject to the effective control of, a judicial or other authority. [FN127]

[FN127] United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Adopted by the General Assembly in its Resolution 43/173, of December 9, 1988, supra note 126, Principle 4.

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97. This Court has stated that protection of liberty safeguards "both the physical liberty of the individual and his personal safety, in a context where the absence of guarantees may result in the subversion of the rule of law and deprive those detained of the minimum legal protection." [FN128]

[FN128] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 82; Case of Maritza Urrutia, supra note 8, para. 64; and Case of Juan Humberto Sánchez , supra note 3, para. 77.

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98. This Court has also stated, in connection with subparagraphs 2 and 3 of Article 7 of the Convention, regarding prohibition of unlawful or arbitrary detention or arrest, that:

[a]ccording to the first of these regulatory provisions [Article 7(2) of the Convention], no one shall be deprived of his personal liberty except for reasons, cases or circumstances specifically established by law (material aspect) but, also, under strict conditions established beforehand by law (formal aspect). In the second provision, we have a condition according to which no one shall be subject to arrest or imprisonment for causes or by methods that – although qualified as legal – may be considered incompatible regarding for the fundamental rights of the individual, because they are, among other matters, unreasonable, unforeseeable or out of proportion. [FN129]

[FN129] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 83; Case of Maritza Urrutia, supra note 8, para. 65; and Case of Bulacio. September 18, 2003 Judgment. Series C No. 100, para. 125.

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99. The 1984 Political Constitution of Ecuador, in force when Daniel Tibi was detained, provided in Article 19(17)(h) that:

[n]o one shall be deprived of his liberty except with a written order by a competent authority, in the cases, for the time, and with the formalities set forth in the law, except in case of flagrant crime, in which case he may not be kept without a formal accusation before the court for more than 24 hours; in any case, he cannot remain incommunicado more than 24 hours.

100. Ecuador's 1983 Criminal Procedures Code, in force at the time of the facts, established in Article 170 that:

[t]o ensure immediacy of the accused in the proceeding, payment of damages and court costs, the Judge may order precautionary measures, whether personal in nature or pertaining to property.

101. Article 172 of that same Code established that:

[w]ith the aim of investigating a crime that was committed, before beginning the respective criminal action, the competent Judge may order detention of an individual, whether from personal cognizance or through verbal or written reports of agents of the National Police or the Judiciary Police or of any other person, establishing that the crime was committed and the respective presumptions of liability.

This detention will be ordered in a written document that must fulfill the following requirements:

1. Reasons for the detention;
2. Place and date issued; and
3. signature of the competent Judge.

To enforce the arrest warrant, this document will be given to an Agent of the National Police or of the Judiciary Police.

102. Likewise, Article 174 of the aforementioned Code set forth that:

[i]n case of flagrant crime, any person may detain the perpetrator and take him before a competent Judge or an Agent of the National Police or of the Judiciary Police. In the latter case, the Agent will immediately bring the detainee before the Judge, together with the respective warrant.

[…]

103. Pursuant to Articles 19(17)(h) of the Political Constitution and 172 and 174 of the Criminal Procedures Code of Ecuador, in force at the time of the facts, a court order is required to detain an individual, unless this person has been caught flagrantly committing a crime. In the instant case, it has been proven that Daniel Tibi's detention did not comply with the procedure established in said provisions. The alleged victim was not caught in fraganti, but rather was detained while driving his car in the city of Quito, without there being an arrest warrant against him, which was issued the day after said detention, that is, on September 28, 1995 (supra para. 90(13)). In light of the above, Daniel Tibi's unlawful detention constitutes a violation of Article 7(2) of the American Convention.

104. It has been proven that Mr. Tibi's detention was based on a single statement by a co-accused, which is forbidden by Article 108 of the Criminal Procedures Code, which established that "in no case will the Judge accept the co-accused as witnesses […]". In said statement, Eduardo Edison García León stated that "a French individual by name Daniel, […] supplied him with up to fifty grams of [cocaine] two or three times" (supra para. 90(8)).

105. It has been proven that on October 4, 1995 the First Criminal Judge of the Guayas issued a court order to investigate the alleged crime and ordered preventive incarceration of Daniel Tibi, who was detained for almost 28 months (supra para. 90(18)). The Criminal Procedures Code

established that "[t]he Judge may order preventive incarceration when he deems it necessary, if the following procedural facts are present: 1. Indicia that lead to presume the existence of a crime that merits deprivation of liberty; and 2. Indicia that lead to presume that the accused is the perpetrator of or an accomplice to the crime that is the object of the proceeding[…]" (Article 177).

106. The Court deems it indispensable to underline that preventive imprisonment is the most severe measure that may be applied to the person accused of a crime, for which reason its application must be exceptional, since it is limited by the principles of lawfulness, presumption of innocence, necessity, and proportionality, indispensable in a democratic society.

107. The State ordered the preventive imprisonment of Daniel Tibi, without sufficient indicia to presume that the alleged victim was the perpetrator of or an accomplice to any crime, and it did not prove the need for said measure. Therefore, this Court deems that Mr. Tibi's preventive imprisonment was arbitrary and it constituted a violation of Article 7(3) of the Convention.

108. Subparagraphs 4, 5 and 6 of Article 7 of the American Convention establish positive duties that impose specific requirements both on the agents of the State and on third parties acting with its tolerance or acquiescence and who are responsible for the detention. [FN130]

[FN130] See Case of the Gómez Paquiyauri Brothers. supra note 8, para. 91; Case of Maritza Urrutia. supra note 8, para. 71; and Case of Juan Humberto Sánchez . supra note 3, para. 81.

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109. This Court has established that Article 7(4) of the Convention sets forth a mechanism to avoid unlawful or arbitrary conduct from the very act of deprivation of liberty on, and to ensure defense of the detainee. Both the detainee and those representing him or with legal custody over him have the right to be informed of the motives of and reasons for the detention and about the rights of the detainee. [FN131]

[FN131] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 92; Case of Maritza Urrutia, supra note 8, para. 72; and Case of Bulacio, supra note 129, para. 128.

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110. The tenth United Nations Principle for the Protection of All Persons under Any Form of Detention or Imprisonment states that

[a]nyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him. [FN132].

[FN132] United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, supra note 126, Principle 10.

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111. In the sub judice case it has been proven that at the time of his detention, on September 27, 1995, Mr. Tibi was not informed of the true reasons for said detention, he was not notified of the charges against him and of his rights, and he was not shown the arrest warrant, which the First Criminal Judge of the Guayas issued one day later, September 28, 1995. The reason given to him was that it was migration control (supra para. 90.11).

112. On the other hand, when the detainee is deprived of his liberty and before making his first statement before the authorities, [FN133] the detainee must be informed of his right to establish contact with another person, for example, a next of kin, an attorney, or a consular official, as appropriate, to inform this person that he has been taken into custody by the State. Notification to a next of kin or to a close relation is especially significant, for this person to know the whereabouts and the circumstances of the accused and to provide him with the appropriate assistance and protection. In case of notification to an attorney, it is especially important for the detainee to be able to meet privately with him, [FN134] which is inherent to his right to benefit from a true defense. In case of consular notification, the Court has pointed out that the consul "may assist the detainee in various acts of defense, such as granting or hiring legal counsel, obtaining evidence in the country of origin, corroborating the conditions under which legal assistance is provided, and observing the situation of the accused while he is in prison." [FN135] That did not occur in the instant case.

[FN133] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 93; Case of Bulacio, supra note 129, para. 130; and The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99, of October 1, 1999. Series A No. 16, para. 106.
[FN134] See Case of Bulacio, supra note 129, para. 130.
[FN135] See Case of Bulacio, supra note 129, para. 130; The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, supra note 133, para. 86; and United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, supra note 126, Principles 13 and 16.

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113. Based on the above, this Court deems that the State breached Article 7(4) of the Convention, to the detriment of Daniel Tibi.

114. Article 7(5) of the Convention sets forth that a person's detention must promptly undergo judicial review, as a suitable means of control to avoid arbitrary and unlawful captures. Immediate judicial control is a measure that seeks to avoid arbitrariness or unlawfulness of detentions, taking into account that under the rule of law the judge must ensure the detainee's rights, authorize precautionary or coercive measures, when strictly necessary, and in general make sure that the accused is treated in a manner consistent with the presumption of innocence. [FN136]

[FN136] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 96; Case of Maritza Urrutia, supra note 8, para. 66; and Case of Bulacio, supra note 129, para. 129.
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115. Both the Inter-American Court and the European Court of Human Rights have highlighted the importance of prompt judicial control of detentions. He who is deprived of his liberty without judicial control must be released or immediately brought before a Judge. [FN137] The European Court of Human Rights has asserted that while the term "immediately" must be interpreted according to the special characteristics of each case, no situation, no matter how serious, empowers the authorities to unduly extend the detention period, because this would breach Article 5(3) of the European Convention. [FN138]

[FN137] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 95; Case of Maritza Urrutia, supra note 8, para. 73; and Case of Bulacio, supra note 129, para. 129; and, likewise, Eur. Court H.R., Brogan and Others, Judgment of 29 November 1988, Series A no. 145-B, paras. 58-59, 61-62; and Kurt vs. Turkey, No. 24276/94, paras. 122, 123 and 124, ECHR 1998-III.
[FN138] See Eur. Court H.R., Brogan and Others, supra note 137, para. 58-59, 61-62; and see Case of Maritza Urrutia, supra note 8, para. 73; Case of Juan Humberto Sánchez. supra note 3, para. 84; and Case of Bámaca Velásquez, supra note 8, para. 140.
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116. Article 173 of the Criminal Procedures Code of Ecuador set forth that:

[t]he detention that Article [172] refers to cannot surpass forty-eight hours, and within this time, if it is found that the detainee was not involved in the crime being investigated, he will be released immediately. If the opposite were the case, the respective criminal proceeding will begin and, if called for, an order of preventive imprisonment will be issued.

117. In the instant case, Mr. Tibi was presented before a Public Prosecutor on September 28, 1995. At that moment he rendered his "pre-trial statement." The State argued that "the fact that the police report on the investigation conducted by the National Police was forwarded to the competent Judge on September 29, 1995, that is, two days after the detention, shows that he was taken before the judicial authorities without violating in any way the term 'promptly' used in Article 7(5) of the Convention". According to the Commission and the representatives Mr. Tibi did not appear personally and promptly before a Judge or competent authority.

118. This Court deems it necessary to specify certain issues regarding this point. First of all, the terms of the guarantee set forth in Article 7(5) of the Convention are clear regarding the need for the detainee to be brought promptly before a Judge or competent judicial authority, in accordance with the principles of judicial control and procedural immediacy. This is essential to protect the right to personal liberty and to protect other rights, such as the right to life and to humane treatment. The fact that a Judge takes cognizance of the case or receives the respective police report, as the State argued, does not fulfill this guarantee, as the detainee must personally appear before the Judge or competent authority. In the case discussed here, Mr. Tibi stated that

he testified before a "notary public" on March 21, 1996, almost six months after his detention (supra para. 90(22)). There is no evidence in the file to warrant a different conclusion.

119. Second, a "Judge or other official authorized by law to exercise judicial functions" must fulfill the requirements set forth in paragraph one of Article 8 of the Convention. [FN139] Under the circumstances of the instant case, the Court deems that the Public Prosecutor of the Public Prosecutor's Office who received the Mr. Tibi's pre-trial statement, pursuant to Article 116 of the Law on narcotics and psychotropic substances, did not have the authority to be considered an "official authorized by law to carry out judicial functions," in the sense of Article 7(5) of the Convention, as the Ecuadorian Political Constitution then in force, itself, established in Article 98 which were the bodies authorized to carry out judicial functions and it did not grant this authority to the public prosecutors. Furthermore, the public prosecutor did not have sufficient authority to ensure the alleged victim's right to liberty and to humane treatment.

[FN139] See Case of Cantoral Benavides. August 18, 2000 Judgment. Series C No. 69, paras. 74 and 75.

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120. On the other hand, Article 7(5) of the American Convention sets forth that a detainee "shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings." Since Daniel Tibi's detention was illegal and arbitrary, the Court does not deem it necessary to address whether or not the time between his detention and his release surpassed the limits of what is reasonable.

121. Based on the above, the Court deems that the State did not comply with its obligation to promptly bring Daniel Tibi before a competent judicial authority, as required by Article 7(5) of the Convention.

122. Therefore, the Court concludes that the State breached Article 7(1), 7(2), 7(3), 7(4) and 7(5) of the American Convention, in combination with Article 1(1) of that same Convention, to the detriment of Daniel Tibi.

IX. VIOLATION OF ARTICLES 7(6) AND 25 OF THE AMERICAN CONVENTION (RIGHT TO PERSONAL LIBERTY AND RIGHT TO JUDICIAL PROTECTION)

Pleadings of the Commission

123. The Commission argued that:

a) filing of the habeas corpus remedy or "amparo de libertad" seeks to ensure prompt review of the lawfulness of a detention, as well as protection of the life and right to humane treatment of the detainee. The alleged victim was denied the judicial protection of the law, to which Article 25 of the Convention refers. The two "amparo de libertad" remedies filed by Mr. Tibi within the term set forth in the law "should have led to his immediate release;"

b) Article 458 of the Criminal Procedures Code of Ecuador sets forth that the Judge who hears this remedy must order the immediate presence of the detainee at a hearing and issue a ruling in 48 hours; and
c) Procedures followed in this case were inconsistent with the law and with the purpose of the remedy. The alleged victim suffered judicial delay in processing his habeas corpus petitions, which demonstrated their ineffectiveness and the consequent lack of judicial protection.

Pleadings of the representatives of the alleged victim and his next of kin

124. The representatives of the alleged victim and his next of kin argued that:

a) Article 458 of the Criminal Procedures Code in force at the time of the facts enshrined the "amparo de libertad" or judicial habeas corpus remedy, which enabled challenging the lawfulness of the provisional detention and of the preventive imprisonment, before a higher court;
b) Mr. Tibi filed two "amparo de libertad" remedies. The first was submitted on July 1, 1996, and it argued that there was no evidence linking Mr. Tibi with the crime of which he was being accused. The High Court of Guayaquil took 22 days to issue a ruling. The amparo remedy became illusory and ineffective, because there was an unjustified delay in the decision on it. The second remedy was filed on October 2, 1997, in view of the fact that the charges against that Mr. Tibi had already been provisionally dismissed, and he should be released immediately, pursuant to Article 246 of the Criminal Procedures Code. The ruling on this remedy was negative, disregarding the provisions of the Ecuadorian Constitution and laws; and
c) Ineffectiveness of these remedies was a combined violation of Articles 7(6) and 25(1) of the Convention.

Pleadings of the State

125. The State argued that:

a) Mr. Tibi had unlimited access to each and every remedy offered by Ecuadorian domestic legislation to protect the right to personal liberty and other basic rights. Neither he nor the population as a whole were denied the right to habeas corpus, amparo, and other remedies, and the accused could have resorted to them during the period of detention and, in general, throughout the trial; and
b) If the detention was unlawful, the alleged victim could have resorted to domestic authorities and filed such legal actions as he deemed appropriate regarding the alleged violations of his right to humane treatment, which he says he suffered during his detention; said remedies were rejected for strictly juridical reasons, which is not a breach of the Convention.

Considerations of the Court

126. Article 7(6) of the American Convention establishes that:

[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his

release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

127. Article 25 of that same Convention establishes 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.
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.

128. The Court has deemed that “writs of habeas corpus and of "amparo" are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) [of the Convention] and that serve, moreover, to preserve legality in a democratic society.” [FN140]

[FN140] Habeas corpus in Emergency Situations. Series A. Advisory Opinion OC-8/87 of January 30, 1987, para. 42; and see Case of the Gómez Paquiyauri Brothers, supra note 8, para. 97; Case of Durand-Ugarte. August 16, 2000 Judgment. Series C No. 68, para. 106; and Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9. para. 33.

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129. These guarantees, which seek to avoid arbitrariness and unlawfulness of detentions made by the State, are also reinforced by the latter’s role as guarantor of the rights of the detainees, in light of which, as the Court has pointed out, the State “does in fact have the responsibility to guarantee the rights of individuals under its custody as well as that of supplying information and evidence pertaining to what has happened to the detainee.” [FN141].

[FN141] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 98; and Case of Bulacio, supra note 129, para. 138.

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130. This Court has established that protection of the individual against arbitrary exercise of public authority is a fundamental objective of international human rights protection [FN142] In this regard, non-existence of effective domestic remedies places the individual in a state of defenselessness. Article 25(1) of the Convention sets forth, in broad terms, the obligation of the

States to offer all persons under their jurisdiction an effective judicial remedy against acts that violate their basic rights. [FN143]

[FN142] See Case of the "Five Pensioners", supra note 25, para. 126; and Case of the Constitutional Court. January 31, 2001 Judgment. Series C No. 71, para. 89.
[FN143] See Case of Maritza Urrutia, supra note 8, para. 116; Case of Cantos. November 28, 2002 Judgment. Series C No. 97, para. 52; and Case of the Constitutional Court, supra note 142, para. 89.

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131. From this standpoint, the Court has pointed out that for the State to comply with the provisions of the aforementioned Article 25(1) of the Convention, it is not enough for the resources to exist formally, but rather they must be effective, [FN144] in other words, the individual must have an effective possibility of filing a simple and prompt remedy that enables attainment, if appropriate, of the judicial protection requested. This Court has repeatedly stated that the existence of these guarantees "is one of the basic mainstays, not only of the American Convention, but also of the rule of law in a democratic society in the sense set forth in the Convention." [FN145]

[FN144] See Case of Maritza Urrutia, supra note 8, para. 117; Case of Juan Humberto Sánchez, supra note 3, para. 121; and Case of Cantos, supra note 143, para. 52.
[FN145] See Case of Maritza Urrutia, supra note 8, para. 117; Case of Juan Humberto Sánchez, supra note 3, para. 121; Case of Cantos, supra note 143, para. 52; Case of the Mayagna (Sumo) Awas Tingni Community. August 31, 2001 Judgment, para. 111; Case of Bámaca Velásquez, supra note 8, para. 191; Case of Cantoral Benavides, supra note 139, para. 163; Case of Durand-Ugarte, supra note 140, para. 101; Case of the "Street Children" (Villagrán Morales et al.). November 19, 1999 Judgment. Series C No. 63, para. 234; Case of Cesti Hurtado. September 29, 1999 Judgment, para. 121; Case of Castillo Petruzzi et al. May 30, 1999 Judgment. Series C No. 52, para. 184; Case of the "Panel Blanca" (Paniagua Morales et al.). March 8, 1998 Judgment. Series C No. 37, para. 164; Blake Case, January 24, 1998 Judgment. Series C No. 36, para. 102; Case of Suárez Rosero. November 12, 1997 Judgment. Series C No. 35, para. 65; and Case of Castillo Páez. November 3, 1997 Judgment. Series C No. 34, para. 82.

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132. The 1984 Ecuadorian Political Constitution, in force at the time of Daniel Tibi's detention, and the 1996 Political Constitution, respectively in Articles 19.17.j and 28, contain the following provision:

[e]very person who believes that he was unlawfully deprived of his liberty can resort to Habeas Corpus. This right can be exercised by the individual himself, or be filed by another person without the need for a written mandate before the Mayor or the President of the Council of the jurisdiction under which he finds himself, or before whoever is acting on his behalf. The municipal authorities will immediately order that the petitioner be brought before them, and that

the imprisonment order be shown. Said mandate will be obeyed with no reservation or excuse by those in charge of the social rehabilitation center or place of detention.
[…]

133. Article 458 of the Criminal Procedures Code established that:

[a]ny accused person who is detained in violation of the constant precepts in [said] Code can request his or her release before the Judge above the one who ordered deprivation of liberty.
[...]
The request will be made in writing.
[...]
The Judge who hears the request will, upon receiving it, immediately order that the detainee be brought before him, and he will hear his statement, recording it in a certification of the declaration that will be signed by the Judge, the Secretary, and the complainant, or by a witness for the latter, if he does not know how to sign. In said statement, the Judge will request all the information that he deems necessary to develop his own opinion and ensure lawfulness of his ruling, and he will decide what he deems lawful within forty-eight hours.
[...]

134. It has been proven that the alleged victim filed a judicial amparo remedy before the President of the High Court of Guayaquil on July 1, 1996, arguing that there is no evidence against him (supra para. 90.28) and therefore he should no longer be detained. On July 22, 1996 the President of the High Court of Guayaquil rejected said judicial amparo remedy, based on the fact that the merits of the charge on which the preventive incarceration was based had not been invalidated (supra para. 90.29). In this regard, the Court observes that Article 7(6) of the Convention requires that a remedy such as this one be decided promptly by the competent court or Judge. In this case, this condition was not fulfilled, as the ruling on the remedy was issued 21 days after it was filed, which is clearly an excessive time.

135. On September 3 or 5, 1997 the Second Criminal Judge of the Guayas, Alternate to the Eighteenth Criminal Judge of the Guayas, issued an order of provisional dismissal of the proceeding and of the charges against the accused, in favor of Daniel Tibi. Said ruling was forwarded to the High Court of Justice of Guayaquil for mandatory consultation, and this ruling was issued on January 14, 1998 (supra para. 90.24). On October 2, 1997 Daniel Tibi filed a second judicial amparo remedy before the President of the High Court of Justice of Guayaquil, when the legal term to decide on the consultation had expired, requesting his release pursuant to the provisional dismissal issued in his favor (supra para. 90.30).

136. On July 27, 2004 this Court asked the parties to submit as evidence to facilitate adjudication of the case the decision of the High Court of Guayaquil that would decide on the judicial amparo remedy filed by Mr. Tibi on October 2, 1997. It did not receive the certification that it had requested. The State did not prove that there had been a prompt ruling on this remedy, for which reason it is reasonable to conclude that it was not effective, in terms of Article 7(6) of the Convention.

137. Based on the above, the Court concludes that the State abridged Articles 7(6) and 25 of the American Convention, in combination with Article 1(1) of that same Convention, to the detriment of Daniel Tibi.

138. In regards to the allegation by the Commission and by the representatives of the alleged victim and his next of kin that Article 2 of the Convention was breached, this Court deems that the facts of the case are not consistent with the conditions set forth therein.

X. VIOLATION OF ARTICLE 5 OF THE AMERICAN CONVENTION (RIGHT TO HUMANE TREATMENT)

Pleadings of the Commission

139. The Commission argued that:

a) the concept of "inhumane treatment" includes that of "degrading treatment;" torture is an aggravated form of inhumane treatment, committed with an objective: that of obtaining information or confessions or inflicting punishment;
b) Ecuador is a party to the Inter-American Convention against Torture, which it ratified on November 9, 1999. Even though the State ratified the Convention after the facts of the instant case took place, the definition of torture in the aforementioned treaty substantially reflects international juridical elements governing the crime of torture and could, therefore, "adequately inform" in the sense of the provision set forth in Article 5(2) of the American Convention;
c) any situation in which a detainee is interrogated without the presence of his attorney or a judicial authority invites abuse, and therefore interrogations under said conditions are forbidden by domestic and international standards;
d) the evidence shows that agents of the State inflicted grave suffering on Mr. Tibi, causing him serious physical problems. After the beatings and the cigarette burns and the red-hot metal on Mr. Tibi's body, the State provided him with no medical treatment;
e) as shown by the French physicians' reports, based on examinations conducted months after the detention, Daniel Tibi suffered seven torture sessions, which have left physical evidence and consequences that will last his whole life;
f) the serious physical harm suffered by Daniel Tibi while he was detained constituted a violation of Article 5(1) of the American Convention and caused him sufficiently intense suffering as regards the purpose of Article 5(2) of the Convention;
g) Under the international standards that apply to abuse under custody, the State has the burden of proof, and must therefore explain how Mr. Tibi suffered a number of injuries and physical damage while he was in custody. While Ecuador denies its responsibility, it has offered no explanation of these injuries. The State did not respond with due diligence to the torture inflicted on Daniel Tibi and those responsible are –to date- in a situation of impunity;
h) Daniel Tibi was subjected to the torture described, in addition to what it meant to spend two years and three months in a prison that did not have the minimum requirements for decent treatment of the inmates; and
i) the obligation to investigate claims of torture and to punish those responsible is especially important when a person is deprived of his or her liberty and, therefore, is in a vulnerable situation vis-à-vis his guards. Therefore, when a person claims that he or she has been injured by

mistreatment while under detention, the State is under the obligation to provide a complete and sufficient explanation of how the injuries took place.

Pleadings of the representatives of the alleged victim and his next of kin

140. The representatives of the alleged victim and his next of kin argued:

In regards to Daniel Tibi's right to humane treatment, that:

a) assessment of the violation of Mr. Tibi's right to humane treatment must take into account the alleged victim's desperation due to total loss of control of his fate, the uncertainty of not knowing why, being innocent, he must remain locked up and far from his family, the unbearable conditions of the "quarantine," the constant threat against himself and his family, the stress that he suffered, the aggressions by agents of the State, lack of medical care, the anguish of exposing his spouse and newborn daughter to the unhealthy prison environment, the fights and threats by other inmates, the indifference of the prison directors and guards, constant extortion, punishment cells, the anxiety of seeing how what had been built through so many years of work was being spent on his defense expenses, among other problems. All these facts have caused Daniel Tibi deep physical and psychological harm that continues to date, and for which the State is responsible;
b) the American Convention prohibits torture and physical mistreatment (Article 5). Prohibition of torture and of cruel, inhumane, and degrading treatment has been recognized […] as an overriding provision of general international law, [which] is binding for all States, whether or not they are parties to treaties that contain said prohibition;"
c) the evidence of the torture suffered by Mr. Tibi is not only based on his own statements, but also on the forensic medical examinations conducted by Ecuadorian authorities and French physicians;
d) while Mr. Tibi was checked twice by Ecuadorian physicians who corroborated that he suffered injuries and traumatism, he never received medical treatment from the Ecuadorian authorities and his injuries were not investigated;
e) the alleged victim's claims of mistreatment, abuse, and death threats were not investigated either. Investigations of said crimes are conducted ex officio;
f) physical mistreatment against Mr. Tibi by agents of the State is analyzed from two angles: deliberate intention of causing pain and harm, awareness of the danger of causing the damage and inaction to avoid it, as well as indifference by the State;
g) under the general terms of Article 5(2) of the Convention, all persons deprived of their liberty have the right to live under detention conditions that are compatible with their personal dignity, and the State must ensure the right to life and to humane treatment. Mr. Tibi's right to humane treatment was abridged by the inhumane, cruel and degrading prison conditions that he was subjected to;
h) being locked up 24 hours a day in an overcrowded cell without basic sanitary conditions, lacking classification of the inmates, with a shortage of food, dress, and adequate beds, lack of ventilation, the deficient quality of the air and the lack of medical staff, among other problems, are circumstances that can cause serious damage to those who are exposed to said conditions, as in the case of Daniel Tibi;

i) prohibition of torture and mistreatment, enshrined in the American Convention, entails not only the obligation to ensure that public officials do not inflict torture and mistreatment, but also the obligation to adopt measures to protect persons under its jurisdiction against acts of torture and mistreatment committed by private individuals;
j) according to Mr. Tibi, the guards deliberately confined him with violent inmates who mistreated him and threatened to kill him;
k) States are under the obligation to investigate and punish cases of torture, as well as any violation of human rights. This obligation stems from several provisions. The general provision is contained in Article 1(1) of the American Convention and the specific obligation in regards to cases of torture stems from Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture; and
l) Article 22(1) of the Ecuadorian Constitution in force at the time of the facts forbade torture. However, the Ecuadorian Criminal Code has serious shortcomings regarding definition and punishment of torture and mistreatment. This legislation is not in accordance with international standards.

Respect for Daniel Tibi's next of kin's right to humane treatment

m) the next of kin of the victims of human rights violations may, in turn, be victims. Torture of an individual has adverse consequences for that person's next of kin;
n) the persons closest to Daniel Tibi are Beatrice Baruet, Beatrice's daughters Sarah and Jeanne Camila Vachon, the daughter of both of them, Lisianne Judith Tibi, and Mr. Tibi's son, Valerian Edouard Tibi. These persons must be considered victims in the instant case, as their right to psychological and moral well-being has been violated as a "direct [consequence] of Mr. Tibi's unlawful and arbitrary detention, of the uncertainty regarding his whereabouts for over a week, of the anguish caused by observing the signs of extreme violence on [Mr. Tibi] and his miserable jail conditions, family separation during the time he was imprisoned, exacerbated by the unnecessary physical distance between the place of detention and the place of residence of the family, lack of investigation and punishment of those responsible for these facts, slowness and arbitrariness in the criminal proceeding, and the knowledge that Mr. Tibi was innocent and nevertheless seeing how the State apparatus sought by all means to incriminate him;"
ñ) Beatrice Baruet was three months pregnant when Daniel Tibi was detained; he was unaware of his whereabouts for over seven days, traveled approximately 74 times to Guayaquil, had to support the family and was in charge of steps for her husband's defense, suffered social stigmatization due to Mr. Tibi's detention and, ultimately, her relationship with him ended when he was released;
o) Sarah, Beatrice Baruet's older daughter, who was twelve years old, returned to France and remained there close to two years without her parents, suffered problems at school and emotionally, and found it difficult to adapt to that country;
p) Jeanne Camila, Beatrice Baruet's second daughter, who was six years old, accompanied her mother to the penitentiary. She was traumatized when she witnessed a prison fight, suffered nightmares and anxiety, and did not want to return to the prison;
q) Lisianne Judith was born while her father was detained. He was not present for her during the first two years of her life. She was often taken by her mother to the penitentiary, where she was subject to an unhealthy and dangerous environment for a newborn; and

r) Valerian Edouard, Mr. Tibi's son, who was 13, could not visit or see his father for two years. Since he heard that he was detained, he lost trust in his father and still does not have a stable relationship with him.

Pleadings of the State

141. Regarding the point that is now being examined, the State argued that:

a) there is an attempt to find it responsible for the alleged torture suffered by Mr. Tibi during the detention period, but the only evidence regarding this complaint is the reports prepared by the French physicians, the forensic medical report of the Police Investigations Department, and the testimony of the alleged victim himself;
b) Mr. Tibi was regularly examined by specialized physicians and they never established that there had been such abuse, and the report of the Supreme Court of Justice also states that "there is no procedural attestation" of the alleged tortures;
c) the French physicians' reports were prepared two and six years after the alleged torture supposedly took place, and they are therefore unreliable and not sound. Obviously any sign of mistreatment would have disappeared by then, and if that were not the case, it would be very difficult to establish the cause of the injuries. In this regard, "the State challenge[d] the reports by the French physicians, doctors Christian Rat, Samuel Gérard Benayoun, and Philippe Blanche, as they are neither trustworthy, nor impartial, nor timely;"
d) the forensic medical reports issued by Ecuadorian specialists reached the conclusion that Mr. Tibi had a facial asymmetry and that he had dermatological injuries in his lower limbs. The Ecuadorian report at no point reached the conclusion that there were signs of alleged burns on the alleged victim's legs, caused by cigarettes and red-hot metal objects, but rather that they were dermatological signs;
e) there are no consistent indicia or presumptions that can lead to a solid conclusion that there was torture or other cruel, inhumane, or degrading treatment or punishment against Daniel Tibi by any member or functionary with public authority, or worse yet, with support from or tolerance by government authorities, so the State cannot be found responsible for facts which have never been irrefutably proven; and
f) according to the testimony of the physicians who appeared before the Court during the oral phase of the instant proceeding, the period between the alleged tortures and the examinations makes it impossible to specifically diagnose the etiology of the alleged lesions.

Considerations of the Court

142. Article 5 of the Convention establishes that:

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 liberty shall be treated regarding for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.

4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

143. There is an international legal system that absolutely forbids all forms of torture, both physical and psychological, and this system is now part of ius cogens. [FN146] Prohibition of torture is complete and non-derogable, even under the most difficult circumstances, such as war, the threat of war, the struggle against terrorism, and any other crimes, state of siege or of emergency, internal disturbances or conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies. [FN147]

[FN146] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 112; and Case of Maritza Urrutia, supra note 8, para. 92.
[FN147] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 111; Case of Maritza Urrutia. supra note 8, para. 89; and Case of Cantoral Benavides, supra note 139, para. 95.

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144. This Court has said that "the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty (paragraph 2 of Article 31 of the Vienna Convention), but also the system of which it is part (paragraph 3 of Article 31)." This orientation is especially important for International Human Rights Law, which has moved forward substantially by means of an evolutive interpretation of the international protection instruments. [FN148]

[FN148] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 165; Case of the "Street Children" (Villagrán Morales et al.), supra note 145, paras. 192 and 193; and The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, supra note 133, para. 113.

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145. The Inter-American Convention against Torture, which entered into force in the State on December 9, 1999, is part of the inter-American corpus iuris that this Court must resort to in establishing the content and scope of the general provision contained in Article 5(2) of the American Convention. Special attention must be paid to Article 2 of the Inter-American Convention against Torture, which defines the latter as:

[…]any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be

understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

This same provision adds that:

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

146. Pursuant to this definition and to the circumstances of each case, acts that have been "planned and inflicted deliberately upon the victim to wear down his psychological resistance and force him to incriminate himself or to confess to certain illegal activities, or to subject him to other types of punishment, in addition to imprisonment itself" can be classified as physical and psychological torture." [FN149]

[FN149] See Case of Maritza Urrutia, supra note 8, para. 104; and Case of Cantoral Benavides, supra note 139, para. 104.

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147. This Court has established that a "person who is unlawfully detained is in an exacerbated situation of vulnerability creating a real risk that his other rights, such as the right to humane treatment and to be treated with dignity, will be violated." [FN150] The Court has also recognized that threats and the real danger of subjecting a person to physical injury, under certain circumstances, cause such a moral anguish that they may be considered psychological torture. [FN151]

[FN150] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 108; Case of Maritza Urrutia, supra note 8, para. 87; and Case of Juan Humberto Sánchez , supra note 3, para. 96.
[FN151] See Case of Maritza Urrutia, supra note 8, para. 92; and Case of Cantoral Benavides, supra note 139, para. 102.

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148. It has been proven in the instant case that during March and April 1996, while Daniel Tibi was detained at the Penitenciaría del Litoral, the prison guards inflicted physical violence sessions on him with the aim of obtaining his self-incrimination (supra para. 90(50)). During those sessions, the alleged victim suffered fist blows on the body and face, cigarette burns on his legs, and electrical discharges on his testicles. Once, he was hit with a contusive object, and another time his head was submerged in a water tank. Mr. Tibi suffered at least seven such "sessions" (supra para. 90.50).

149. The acts of violence intentionally committed by agents of the State against Daniel Tibi caused him grave physical and mental suffering. The aim of repetitive execution of these violent acts was to diminish his physical and mental abilities and annul his personality for him to plead

guilty of a crime. It has also been proven in the sub judice case that the alleged victim was threatened and suffered harassment during the period when he was detained, and this made him feel panic and fear for his life. All this is a form of torture, under the terms set forth in Article 5(2) of the American Convention.

150. Pursuant to this provision, a person deprived of his or her liberty has the right to live in a detention situation that is compatible with his or her personal dignity. [FN152] In other cases, the Court has pointed out that keeping a detainee in overcrowded conditions, lacking natural light and ventilation, without a bed to rest on or adequate hygiene conditions, in isolation and incommunicado or with undue restrictions to the system of visits, constitutes a violation of that person's right to humane treatment. [FN153] Since the State is responsible for the detention centers, it must guarantee the inmates conditions that safeguard their rights. [FN154]

[FN152] See Case of Bulacio, supra note 129, para. 126; and Case of Cantoral Benavides, supra note 139, para. 87.
[FN153] See Case of Cantoral Benavides, supra note 139, paras. 85 al 89; and Case of Loayza Tamayo. September 17, 1997 Judgment. Series C No. 33, para. 58.
[FN154] See Case of Bulacio, supra note 129, para. 126.

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151. Daniel Tibi was incarcerated in overcrowded and unhealthy conditions for 45 days, in a cell block of the Penitenciaría del Litoral known as "the quarantine". He had to remain there all day, with insufficient light and ventilation, and he was not given food. Afterwards, he spent several weeks in the corridor of the cell block of said penitentiary, sleeping on the ground, until he was finally able to occupy a cell, by force (supra para. 90(46), and 90(47)). Once, he was confined to the undisciplined inmates pavilion, where other inmates attacked him (supra para. 90(48)). There was no classification of the inmates at the penitentiary center (supra para. 90(49)).

152. The description of the conditions under which Daniel Tibi lived during his detention shows that they did not fulfill the minimum requirements for decent treatment, as a human being, as set forth in Article 5 of the Convention.

153. It has also been proven that while he was in the prison, Daniel Tibi was twice examined by physicians supplied by the State, who established that he had suffered wounds and traumatism, but he never received medical treatment and the cause of said injuries was never investigated (supra para. 90(51)).

154. Regarding this specific matter, we must refer to Principle twenty-four of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which establishes that: "[a] proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge." [FN155]

[FN155] United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, supra note 126, Principle 24.

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155. The European Court has asserted that

under [Article 3 of the Convention], the State must ensure that a person is detained in conditions which are compatible regarding for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance. [FN156]

[FN156] See Kudla v. Poland, No. 30210/96, para. 93-94, ECHR 2000-XI.

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156. It is the understanding of the Inter-American Court, in turn, pursuant to Article 5 of the American Convention, that the State has the duty to provide regular medical examinations and care to the detainees, as well as adequate treatment when required. The State must also allow and facilitate examination of the detainees by a physician of their choice or chosen by their legal representative or custodian. [FN157]

[FN157] See Case of Bulacio, supra note 129, para. 131.

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157. This Court notes that, despite his serious physical and psychological situation, Mr. Tibi never received adequate and timely medical treatment or care at the penitentiary, and this has had adverse effects on his current health conditions. The deficient medical care received by the alleged victim constitutes a violation of Article 5 of the American Convention.

158. On the other hand, the representatives of the alleged victim and his next of kin argued that the State had breached, to Tibi's detriment, Article 5(4) of the American Convention, which establishes that, "save in exceptional circumstances," unconvicted persons shall be segregated from convicted prisoners, and shall receive adequate treatment according to their status as such. In the instant case, it has been proven (supra para. 90)(49)) that there was no system to classify the detainees at the penitentiary where Mr. Tibi was incarcerated, and that for this reason he had to be with convicted inmates and was exposed to greater violence. The Court deems that the lack of segregation of the inmates that has been described constitutes a violation of Article 5(4) of the American Convention.

159. It is the understanding of the Court that, in light of the general obligation of the States party to respect and ensure the rights of all persons under their jurisdiction, contained in Article 1(1) of the American Convention, the State has the duty to immediately and ex officio begin an effective investigation to identify, try, and punish those responsible, when there is a complaint or

there are grounds to believe that an act of torture has been committed in violation of Article 5 of the American Convention. In the instant case, the Court notes that the State did not act in accordance with these provisions. Daniel Tibi suffered serious injuries while he was detained at the Penitenciaría del Litoral, and this should have been sufficient reason for the competent authorities to begin, upon their own initiative, an investigation of what happened to him. This action is also specifically set forth in Articles 1, 6 and 8 of the Inter-American Convention against Torture, which place the States Party under the obligation to take such effective measures as may be necessary to prevent and punish all acts of torture under their jurisdiction. [FN158] Since said Inter-American Convention against Torture entered into force in Ecuador (December 9, 1999), the State is demandable regarding compliance with the obligations set forth in that treaty. It has been proven that, in the period since that date, the State has not investigated, tired, or punished those responsible for the tortures suffered by the alleged victim. Therefore, the Court deems that this conduct constitutes a violation of Article 5 of the American Convention, in combination with Article 1(1) of this same Convention, as well as non-compliance with the obligations set forth in Articles 1, 6 and 8 of the Inter-American Convention against Torture.

[FN158] See Case of Maritza Urrutia, supra note 8, para. 95.

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160. This Court notes that the right to humane treatment of Beatrice Baruet, of her daughters Sarah y Jeanne Camila Vachon, of Lisianne Judith Tibi, her and Mr. Tibi's daughter, and of Valerian Edouard Tibi, Mr. Tibi's son, suffered detriment as a consequence of the unlawful and arbitrary detention, lack of due process, and torture suffered by the alleged victim. This detriment consisted, among other things, of the anguish caused by not knowing the whereabouts of the alleged victim immediately after his detention, and the feeling of powerlessness and insecurity due to negligence of the State authorities to make Mr. Tibi's unlawful and arbitrary detention cease, as well as their fear for the life of the alleged victim.

161. In the sub judice case, it has been proven that the members of Daniel Tibi's household were affected by numerous circumstances, such as: constant trips made by Mrs. Baruet, sometimes with her daughters, more than six hundred miles from their place of residence in the city of Quito; return of minor Sarah Vachon to France, where she remained over two years far from her family; visits to the Penitenciaría del Litoral by minor Jeanne Camila Vachon, who after witnessing a riot in the prison refused to visit her stepfather again; lack of a father figure for minor Lisianne Judith Tibi during her first two years of life; and lack of contact of Mr. Tibi with his son Valerian Edouard Tibi. Some of these circumstances continued even after Mr. Tibi's release and his return to France, for which reason this Court deems that Mr. Tibi's unlawful and arbitrary detention contributed to break-up of the family nucleus and to frustration of personal and family plans.

162. As a consequence of the foregoing, the Court finds that the State breached Article 5(1), 5(2), 5(4) of the American Convention, in combination with Article 1(1) of that same Convention, and failed to comply with the obligations set forth in Articles 1, 6 and 8 of the Inter-American Convention against Torture, to the detriment of Daniel Tibi; and breached Article 5(1) of the American Convention, in combination with Article 1(1) of that same Convention, to the

detriment of Beatrice Baruet, Sarah and Jeanne Camila Vachon, Lisianne Judith Tibi and Valerian Edouard Tibi.

163. In regards to the pleading by the Commission and by the representatives of the alleged victim and his next of kin regarding violation of Article 2 of the Convention, this Court deems that the facts of the case are not consistent with the conditions set forth in said provision.

XI. VIOLATION OF ARTICLE 8 OF THE AMERICAN CONVENTION (RIGHT TO FAIR TRIAL)

Pleadings of the Commission

164. In regards to the alleged violation of Article 8 of the Convention, the Commission argued that:

a) the right to be heard within a reasonable term, pursuant to Article 8(1) of the Convention, seeks to avoid protracted periods in which the accused remain in that situation and to ensure that charges are brought promptly. Reasonable term must be calculated beginning with the first act of the criminal proceeding, which is the arrest of the accused, and until an order for execution of judgment is issued;
b) "[t]he State has provided no explanation of the protracted detention, and the facts do not reveal any clues that justify the authorities' presumption that the accused was guilty and not innocent, whilst Ecuadorian legislation and the American Convention require the presumption of innocence;"
c) the principle of presumption of innocence derives from the obligation of the State not to restrict the detainee's liberty beyond the strictly necessary limits, to ensure that he will not impede efficient investigation and that he will not avoid law enforcement. Furthermore, preventive deprivation of liberty is a precautionary measure, not a punitive one;
d) Daniel Tibi received no prior and detailed communication regarding the charges against him, "as he twice learned unofficially of the charges," which violated Article 8(2)(b) of the Convention, in combination with Article 1(1) of that same instrument;
e) Daniel Tibi did not have access to an attorney from the time of his detention. In this regard, he stated that "during the first month of his detention he did not have access to an attorney, but he did after that," and that his first attorney was not Colón Delgado, as the State argues, but rather Nelson Martínez, with whom he "met in November 1995;"
f) the Political Constitution of Ecuador requires that no one be interrogated, even for investigative purposes, by the police or any other agent, without the assistance of a defense counsel, chosen by the person or appointed by the State, if the person is unable to choose his own attorney. In the statement by the alleged victim before the Public Prosecutor on September 28, 1995, there is no signature of any person identifying himself as his attorney;
g) the State is responsible for violation of Mr. Tibi's right, embodied in Article 8(2)(d) and 8(2)(e) of the American Convention, to be assisted by an attorney of his choice or a State-appointed attorney, if he is financially unable to hire one; and
h) the objective of the torture inflicted on Mr. Tibi, according to his testimony, was to force him to plead guilty in connection with drug-trafficking, in open violation of Article 8(2)(g) and 8(3) of the Convention.

Pleadings of the representatives of the alleged victim and his next of kin

165. The representatives of the alleged victim and his next of kin pointed out that they concur with the Commission regarding State responsibility for violation of Article 8 of the Convention. Nevertheless, they made some additional comments:

a) the State disregarded the right to be tried within a reasonable time, set forth in Article 8(1) of the Convention;
b) the Ecuadorian Courts ordered provisional dismissal of the proceeding and of the charges against the accused in the case against Mr. Tibi, which, pursuant to Article 249 of the Criminal Procedures Code, means that "its substantiation is suspended for five years," in the case of the proceeding, and in the case of provisional dismissal of charges against the accused, they are "suspended for three years." Suspension of this proceeding continues to affect the situation of the alleged victim because there is the possibility of reopening it. The proceeding continued until January 14, 2001, the date on which quashing of the indictment should have been ordered ex officio. This is clearly unreasonable;
c) the judicial authorities were negligent, as they did not comply with the legal periods for processing of a criminal trial;
d) excessive duration of Mr. Tibi's preventive incarceration entails a violation of the presumption of innocence. The Ecuadorian authorities kept an innocent person in jail based exclusively on the pre-trial statement of a co-accused, explicitly forbidden by domestic legislation and presumably obtained under torture;
e) at the time of Daniel Tibi's detention, the agents of the State had the obligation to immediately explain to him the legal and objective grounds for his detention;
f) Daniel Tibi did not have access to a defense attorney during the first month of his detention, despite the fact that the Political Constitution of Ecuador recognized this right. Mr. Tibi rendered his pre-trial statement before the Public Prosecutor on September 28, 1995, without the presence of a defense attorney;
g) on October 4, 1995, Judge Angel Rubio Game issued a court order to investigate the alleged crime and appointed attorney José Alejandro Chica as the court-appointed defense counsel for Mr. Tibi and other accused persons. Nevertheless, Mr. Chica never met with Mr. Tibi and he did not file any briefs or remedies in his favor;
h) As a French citizen, Daniel Tibi should have been informed of his right to communicate with France's diplomatic agents. The State did not notify the State of France of the detention, indictment, and prosecution of Mr. Tibi, disregarding commitments undertaken by the Ecuadorian State when it ratified the Vienna Convention on Consular Relations; and
i) Daniel Tibi was tortured with the objective of making him plead guilty. He was tortured at least seven times. This physical and psychological coercion not only constitutes a violation of the right to humane treatment, but also of the basic aspects of the right to fair trial.

Pleadings of the State

166. The State argued that:

a) regarding the complexity of the matter, "undeniably, processing about [33] suspects is complicated due to the number of steps that have to be taken, the size of the file, and the complexity of the crimes for which they were charged [,…] the investigations conducted, the statements rendered, the remedies filed, the evidence obtained, [...] were also complex and complicated, which led to the duration of the proceeding against Daniel Tibi." In regards to the interested party's procedural actions, "the petitioner clearly never cooperated with the investigations conducted by the agents of the State, despite which he was never incommunicado, nor did he facilitate a rapid investigation." Finally, regarding the behavior of the judicial authorities, "undoubtedly the judicial authorities have acted in an agile manner, despite the complexity and the characteristics of the matter being investigated and the possibilities of the State;

b) the guarantee set forth in Article 8(2) of the Convention "places the States under the obligation to gather incriminating material against those accused of a crime, to establish their guilt." The State undertook this obligation in a fully responsible manner, both during the investigative phase and during the trial;"

c) the detention of those convicted "cannot violate the presumption of innocence, as it was not excessive;"

d) for purposes of the right being analyzed, it is sufficient to assert that "the records show that the next of kin of the [alleged] victim […] had legal assistance; and

e) "[t]he facts of the case do not demonstrate that the petitioner was forced to plead guilty, except for a groundless testimony by Daniel Tibi himself, for which reason, as there is no 'evidence of the facts in the records [...] the Court [must find] that the violation of Articles 8(2) and 8(3) of the American Convention was not proven'."

Considerations of the Court

a) In regards to the principle of a reasonable term in the criminal proceeding against Mr. Tibi

167. Article 8(1) of the American Convention sets forth 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.

168. Reasonability of the term, as set forth in this provision, must be assessed in connection with the total duration of the proceeding, from the first procedural act until the order to execute the judgment. The Court has ruled that, in criminal matters, the term begins on the date when the individual is detained. [FN159] When this measure is not applicable, but there is an ongoing criminal proceeding, said term begins when the judicial authority takes cognizance of the case.

[FN159] See Case of Suárez Rosero, supra note 145, para. 70; and likewise, Hennig v. Austria, No. 41444/98, para. 32, ECHR 2003-I; and Reinhardt and Slimane-Kaid v. France, 23043/93, para. 93, ECHR 1998-II.

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169. Daniel Tibi was detained on September 27, 1995. Therefore, the term must be assessed from that moment on. This Court has also established that to decide on reasonability of the term, it is necessary to take into account that the proceeding ends when an unappealable judgment is issued on the matter, which exhausts the jurisdiction, and that, especially regarding criminal matters, said term must include the whole proceeding, including the appeals that may be filed. [FN160]

[FN160] See Case of Suárez Rosero, supra note 145, para. 71.

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170. Article 242 of the Criminal Procedures Code of Ecuador established that:

[i]f the Judge deems that existence of the crime has not been proven sufficiently, or that the former having been proven, those guilty of it have not been identified, or if there is insufficient evidence of participation of the suspect, he will order provisional dismissal of the proceeding and of the charges against the accused, stating that for the time being, substantiation of the proceeding cannot continue.

171. Article 249 of said Code established that:

[p]rovisional dismissal of the proceeding suspends substantiation of the proceeding for five years; and provisional dismissal of the charges against the accused suspends it for three years. These terms will begin on the date when the respective order of dismissal is issued.

New evidence regarding the crime may be submitted during these periods, regarding liability or innocence of the accused.

172. Article 252 of said Code established that:

[i]f the periods established in Article 249 have expired and the proceeding has not been reopened, the Judge will issue an order quashing the indictment in regards to the proceeding and to the accused, in response to a request by a party or ex officio, in accordance with the provisions of Article 245 of this Code.

173. The Inter-American Court notes that on September 3 or 5, 1997 the Second Criminal Judge of the Guayas, Alternate to the Eighteenth Criminal Judge of the Guayas, pursuant to Article 242 of the Criminal Procedures Code, issued an “order of provisional dismissal of the proceeding and of the charges against the accused” in favor of Daniel Tibi, who was released on January 21, 1998.

174. The Court is not aware of an order to definitively quash the indictment regarding the proceeding and the accused, in accordance with Article 252 of the Criminal Procedures Code. In this regard, on July 27, 2004 this Court asked the parties, as evidence to facilitate adjudication of

the case, to provide copies of new rulings issued in the criminal proceeding against Daniel Tibi since January 14, 1998, if there were any. It did not receive the information requested.

175. To assess reasonability of this proceeding in accordance with Article 8(1) of the Convention, the Court takes three aspects into account: a) complexity of the matter, b) procedural activity of the interested party, and c) behavior of the judicial authorities. [FN161]

[FN161] See Case of Juan Humberto Sánchez, supra note 3, paras. 129 al 132; Case of Hilaire, Constantine and Benjamin et al.. June 21, 2002 Judgment. Series C No. 94, para. 143; and Case of Suárez Rosero, supra note 145, para. 72.

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176. In this regard, the Court deems that the argument of the State that the judicial authorities had "acted in an agile manner despite the complexity and the characteristics of the matter under investigation and the possibilities of the State," is insufficient to justify the delay in the proceeding against Daniel Tibi. The fact that almost nine years have passed since Daniel Tibi was detained conflicts with the principle of reasonability of the time to reach a decision in a proceeding, especially bearing in mind that, according to Ecuadorian law, when a provisional dismissal is ordered the case remains open for five years, during which time the investigation may be reopened if new evidence is submitted. The records do not show that Mr. Tibi behaved in a manner incompatible with his situation as a suspect or obstructed the proceeding.

177. Therefore, the Court finds that the State violated, to the detriment of Daniel Tibi, the right to be tried within a reasonable time, set forth in Article 8(1) of the American Convention.

b) In regards to the right to presumption of innocence

178. Article 8(2) of the Convention sets forth that:

[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law.

179. Likewise, Principle thirty-six of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment establishes that:

A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence. [FN162]
[…]

[FN162] United Nations, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, supra note 126, Principle 36.

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180. This Court has pointed out that the principle of presumption of innocence constitutes a basis for the right to fair trial. The provision set forth in Article 8(2) of the Convention gives rise to the obligation of the State not to restrict the liberty of the detainee beyond the limits of what is strictly necessary to ensure that he will not impede an efficient investigation or avoid law enforcement. In this regard, preventive imprisonment is a precautionary measure, not a punitive one. This concept is embodied in multiple international human rights instruments. The International Covenant on Civil and Political Rights establishes that preventive imprisonment of the accused must not be the general rule (Article 9(3).) Deprivation of liberty, for a disproportionate time, of persons whose criminal liability has not been established would breach the Convention. It would be the equivalent of advanced punishment, which contravenes the universally recognized general principles of law. [FN163]

[FN163] See Case of Suárez Rosero, supra note 145, para. 77.

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181. It has been proven that Mr. Tibi was detained from September 27, 1995 to January 21, 1998 (supra para. 90(11), 90(25) and 90(27)). This deprivation of liberty was unlawful and arbitrary (supra paras. 103 and 107). There was no evidence that would enable reasonably inferring that Mr. Tibi was involved in the "Camarón" Operation. Despite the fact that Article 108 of the Criminal Procedures Code forbade admitting the co-accused as witnesses, the State's action was based on a single incriminating statement, which was subsequently denied (supra para. 90(8), 90(11) and 90(21)). This shows that there was an attempt to incriminate Mr. Tibi without sufficient indicia to do so, presuming that he was guilty and violating the principle of presumption of innocence.

182. Taken as a whole, the data regarding the criminal proceeding against the accused not only do not show that he was treated as one who is presumed innocent, but rather they show that at all times actions regarding the accused were as if he were allegedly guilty, or a person whose criminal liability had been clearly and sufficiently proven.

183. Based on the foregoing, the Court finds that the State breached Article 8(2) of the American Convention, to the detriment of Daniel Tibi.

c) In regards to prior communication to the accused of the charges against him

184. Article 8(2)(b) of the American Convention establishes that

[d]uring the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
b. prior notification in detail to the accused of the charges against him;

185. It has been established that Daniel Tibi was not informed in a timely and complete manner of the charges against him in the court order to investigate the alleged crime (supra para. 90(18)), on which charges his arbitrary detention had, in fact, been based.

186. In this regard, in General Observation No. 13 on “Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14)”, the Human Rights Committee of the United Nations pointed out that:

the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3 (a) may be met by stating the charge either orally or in writing, provided that the information indicates both the law and the alleged facts on which it is based.

187. Article 8(2)(b) of the American Convention orders the competent judicial authorities to notify the accused of the charges against him, the reasons for them, and the crimes or infractions for which he is being accused, prior to the proceeding. For this right to fully operate and satisfy its inherent aims, it is necessary for said notification to take place before the accused renders his first statement. Without this guarantee, his right to adequately prepare his defense would be infringed.

188. It was proven in the sub judice case that the alleged victim was informed neither of the court order to investigate the alleged crime nor of the charges against him.

189. Therefore, this Court finds that the State breached Article 8(2)(b) of the American Convention to the detriment of Tibi.

d) Regarding the Right to Defense

190. Articles 8(2)(d) and 8(2)(e) of the Convention set forth:

[d]uring the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
[...]
d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

191. Principle seventeen of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states that

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the

interests of justice so require and without payment by him if he does not have sufficient means to pay. [FN164]

[FN164] U.N., Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, supra note 126, Principle 17.

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192. The Political Constitution of Ecuador established that "every person tried for a criminal offense will have the right to a defense counsel" (Article 19(17)(e)).

193. Despite the aforementioned constitutional provision, Daniel Tibi did not have access to an attorney during the first month of his detention. One day after said detention, on September 28, 1995, the alleged victim rendered his pre-trial statement before the Public Prosecutor, without the assistance of a defense counsel.

194. As was proven, in the court order to investigate the alleged crime, which opened the preliminary proceedings, issued on October 4, 1995, the Judge named a court-appointed defense counsel for Daniel Tibi and the other accused. This attorney did not visit the alleged victim and he did not intervene in his defense. While Mr. Tibi was subsequently able to communicate with a private attorney, he was not able to hire his services for lack of financial means. This situation entailed that during the first month of his detention he did not have the assistance of an attorney (supra para. 90(19)), and this did not allow him to have an adequate defense.

195. The Court notes, in turn, that Mr. Tibi, being a foreign detainee, was not informed of his right to communicate with a consular official of his country to seek the assistance recognized by Article 36(1)(b) of the Vienna Convention on Consular Relations (supra para. 90(17)). In this regard, the Court pointed out that the individual right of the national of a country to request consular assistance from his country "must be recognized and taken into account in the framework of minimal guarantees to provide foreigners with the opportunity to adequately prepare their defense and to have a fair trial." [FN165] Disregard for this right affected the right to defense, which is part of the guarantees of due legal process.

[FN165] See The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, supra note 133, para. 122.

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196. Based on the foregoing, the Court reaches the conclusion that the State abridged Articles 8(2)(d) and 8(2)(e) of the American Convention, to the detriment of Daniel Tibi.

e) In regards to the right not to incriminate oneself

197. Article 8(2)(g) of the Convention sets forth that:

[d]uring the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
[…]
g) the right not to be compelled to be a witness against himself or to plead guilty; and
[…]

198. It has been proven that Daniel Tibi was tortured by State agents, who affected his right to humane treatment, as well as the basic aspects of his right to fair trial. These acts were inflicted on him with the aim of breaking down his psychological resistance and forcing him to incriminate himself for certain criminal conduct, as mentioned above (supra para. 90(50)).

199. In light of the above, the Court concludes that the State breached Article 8(2)(g) of the American Convention, to the detriment of Daniel Tibi.

200. Based on the above, this Court deems that the State breached Articles 8(1), 8(2), 8(2)(b), 8(2)(d), 8(2)(e) and 8(2)(g) of the American Convention, in combination with Article 1(1) of that same Convention, to the detriment of Daniel Tibi.

XII. ARTICLE 17 OF THE AMERICAN CONVENTION (RIGHTS OF THE FAMILY)

Pleadings of the representatives of the alleged victim and his next of kin

201. In regards to the alleged violation of the right to protection of the family, embodied in Article 17 of the American Convention, the representatives of the alleged victim and his next of kin argued that:

a) Daniel Tibi was detained in the city of Quito and subsequently transferred to the city of Guayaquil, six hundred kilometers away from his family's place of residence, where he remained in jail twenty-eight months, and in this regard they referred to Principle twenty of the United Nations' Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment;
b) Mr. Tibi requested his transfer on February 24, 1997, not only because he was far from his family, but also because other inmates had threatened to kill him.Nevertheless, the transfer was never granted. Furthermore, there was no reasonable motive to justify taking Mr. Tibi from the city of Quito to Guayaquil, bearing in mind that the transfer was based on an alleged immigration control;
c) Mr. Tibi's unlawful, arbitrary, and protracted detention, the high costs incurred in his defense, together with the travel expenses from Quito to Guayaquil, Mr. Tibi's inability to conduct activities while he was in prison, subsequent loss of his work and unlawful confiscation of his property, which continues to date, directly affected Mr. Tibi's family and left them unprotected at very difficult times, given his wife's pregnancy, subsequent birth of his daughter, when he was still in prison, and how young the other girls were;
d) another consequence of the stress and suffering due to the abridgments of Mr. Tibi's human rights was the dissolution of his relationship with Beatrice Baruet and separation from his daughters; in addition to affecting Mr. Tibi as an individual, this harmed the family unit; and

e) the State did not adopt the necessary measures to protect Mr. Tibi's family, but rather caused its separation and dissolution of that family, breaching Article 17(1) of the American Convention.

Pleadings of the Commission

202. The Commission made no pleadings in regards to Article 17 of the American Convention.

Pleadings of the State

203. The State made no pleadings in regards to Article 17 of the American Convention.

Considerations of the Court

204. Article 17(1) of the American Convention sets forth that:

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.
[…]

205. This Court deems that the facts alleged in the instant case have already been examined regarding the conditions and period of detention of Mr. Tibi and in regards to their consequences for his family (supra para. 161).

XIII. VIOLATION OF ARTICLE 21 OF THE AMERICAN CONVENTION (RIGHT TO PROPERTY)

Pleadings of the Commission

206. In regards to the alleged violation of Mr. Tibi's right to property, embodied in Article 21 of the Convention, the Commission argued that:

a) when Daniel Tibi was detained, his automobile and all the securities and belongings he had with him, estimated at FRF 1,000,000.00 (one million French francs), were seized by the police and have not yet been returned to him;
b) it has been established that the belongings of the alleged victim, specified in a list, were seized at the time of his arrest. After the dismissal, the High Court of Justice of Guayaquil ordered the return of said belongings, which has not taken place;
c) the State has not contested these facts. It merely pointed out that Mr. Tibi had not submitted the appropriate claim for return of his belongings, but it did not specify the procedure to be followed; and
d) Article 10 of the Law on narcotics and psychotropic substances applies in the instant case, since there is a court order that dismisses the charges against Mr. Tibi. There is no need for any procedure to return the property, since it is the obligation of CONSEP or the institution in whose power it is to return it after the release.

Pleadings of the representatives of the alleged victim and his next of kin

207. In this regard, the representatives argued that:

a) the Commission deemed it proven that the car and all the securities and belongings that Mr. Tibi had with him were seized when he was detained, and to date they have not been returned to him;
b) Mt. Tibi's credit cards issued by "Ecuadorian and French banks were used while he was detained and when he returned to France he discovered that his bank account had been emptied, including a 6,000[.00 (six thousand] [United States)] dollars overdraft;"
c) when Mr. Tibi arrived in France he went to the Ecuadorian Embassy in Paris, together with his attorney, to claim his property. He was told that he could not return to Ecuador, because he had been declared an undesirable person;
d) pursuant to Article 110 of the Law on narcotics and psychotropic substances, Mr. Tibi's property should have been returned to him. While Mr. Tibi was not acquitted, because his case did not reach the plenary stage of the Ecuadorian criminal proceeding, the case was provisionally dismissed. The evidence against him was so scant that the Judge decided not to try him; and
e) there is no provision in the Law on narcotics and psychotropic substances that forces acquitted individuals or those whose charges have been dismissed, to follow an administrative, judicial or other procedure for return of their property. It is for the State to recover any property of the interested party that is in the hands of any public or private person, and to return it forthwith, as set forth in said Article 110.

Pleadings of the State

208. Regarding this point, the State argued that:

a) once the competent authorities had issued the dismissal, upheld by the Sixth Chamber of the High Court of Guayaquil in January 1998, the Eighteenth Criminal Judge of the Guayas ordered the return of the petitioner's property;
b) when the judge asked Mr. Tibi to prove pre-existence and property of the seized goods, Mr. Tibi, through his defense counsel, merely asserted that property of said goods was on record in the proceedings;
c) neither pre-existence of the alleged jewels nor their property have been proven in accordance with the law. Regarding the Volvo brand car that Mr. Tibi drove, with license plate PGN 244, the police agents found that the car's registration was in the name of Edgar Herrera Santacruz; and
d) since Mr. Tibi's property rights over the seized goods had not been legally proven, their return was not in order.

Considerations of the Court

209. Article 21 of the American Convention sets forth 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.
2. 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.
[…]

210. The 1996 Political Constitution of the Republic of Ecuador sets forth in Article 63 that:

Property, in any of its forms, is a right that the State recognizes and guarantees to organize its economy, as long as it carries out its social function […]

211. Ecuador's law on narcotics and psychotropic substances established, in Article 105, that

[t]hose who made the arrest [...] will identify all realty and personalty, substances, monies, securities, monetary instruments, banking, financial or commercial documents; as well as the alleged owner or owners, in separate records that they will forward to the criminal Judge within the following twenty-four hours. When the judge issues the court order to investigate the alleged crime, the Judge will order that all the property seized be deposited with CONSEP [Consejo Nacional de Control de Sustancias Estupefacientes Psicotrópicas] […]

212. Likewise, Article 110 of said law establishes that:

[i]f the accused who owns the seized property is acquitted, it will be returned by CONSEP when so ordered by the Judge, once the precautionary measures have been cancelled.
The Institutions to which the property has been given will return them to the state in which they were at the time they were received, save normal deterioration due to legitimate use. If they have been damaged, they must repair them or pay the compensation set by the judge, except in case of unavoidable accident or force majeure.
[…]
Legal action for compensation for damages due will be in order.

213. It has been proven that the belongings that Daniel Tibi had with him at the time of his detention were seized. The list drawn up for this purpose by the police includes 85 items, encompassing a larger number of objects (supra para. 90(40)). The State has not disputed this fact, but rather pointed out that when the judge asked Mr. Tibi to demonstrate "pre-existence and property" of the goods seized, all he did was argue that property of said goods was on record in the proceedings. According to the State, this is not sufficient to demonstrate said property in accordance with the law.

214. The September 23 or 29, 1998 ruling (supra para. 90(41)), issued by the Second Criminal Judge of the Guayas, Alternate Judge for the Eighteenth Criminal Court of the Guayas with seat in Durán, ordered return of Mr. Tibi's property, previously upheld by the Sixth Chamber of the High Court of Justice of Guayaquil, for which reason said ruling was consulted to the higher court. The Court has not been informed of the ruling that the High Court of Justice may have issued.

215. Ecuadorian legislation establishes that the property seized from a detainee will be returned to him when so ordered by the Judge. In the instant case there is a judicial decision ordering return of Mr. Tibi's property (supra para. 90(41)), which has not been executed despite the fact that it was issued six years ago.

216. Article 734 of the Ecuadorian Civil Code establishes that

[p]ossession is tenure of a given thing as lord or owner; whether the owner or the reputed owner has the thing on his own behalf, or in the name of and in place of another person.

The possessor is reputed owner as long as no other person justifies ownership.

217. In the instant case, Mr. Tibi was in undisputed possession of the goods at the time of his detention. Said possession was documented by a State agent when he drew up the respective record (supra para. 90(40)).

218. It is widely admitted that possession in itself establishes the presumption of ownership in favor of the possessor, and in the case of personalty, it serves as entitlement. This Court deems that Article 21 of the Convention protects the right to property in a sense that includes, among other things, the possession of goods.

219. Regarding the car that Mr. Tibi was driving when he was detained, while it is a personalty that can be registered, this registration is only necessary to object to claims by a third party alleging a right over the good. In the instant case there is no record of anyone having claimed ownership of the vehicle that was in Mr. Tibi's possession, for which reason it was not appropriate to presume that said good did not belong to him. Therefore, it was in order to respect the possession that he exercised.

220. In brief, Mr. Tibi was using and enjoying the goods seized from him when he was detained. Not returning them to him deprived him of his right to property. Mr. Tibi was not under the obligation to demonstrate pre-existence or property of the goods seized for them to be returned to him.

221. Therefore, the Court concludes that the State violated Article 21 of the American Convention, in combination with Article 1(1) of that same Convention, to the detriment of Daniel Tibi.

XIV. REPARATIONS APPLICATION OF ARTICLE 63(1)

Obligation to provide reparations

222. Pursuant to what has been stated in foregoing chapters, the State is responsible for violating Articles 5, 7, 8, 21 and 25 of the American Convention, all of them in combination with Article 1(1) of said Convention, as well as for not fulfilling the obligations set forth in Articles 1, 6 and 8 of the Inter-American Convention against Torture, to the detriment of Daniel Tibi. The Court also found a violation of Article 5(1) of the American Convention, in combination with

Article 1(1) of that same Convention, to the detriment of Beatrice Baruet, her daughters Sarah Vachon and Jeanne Camila Vachon, Mrs. Baruet's and Mr. Tibi's daughter Lisianne Judith Tibi, and Mr. Tibi's son Valerian Edouard Tibi. Article 63(1) of the American Convention sets forth that

[i]f the Court finds that there has been a violation of a right or freedom protected by [the] 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.

223. This provision reflects a rule of customary law that is one of the fundamental principles of contemporary International Law on the responsibility of the States. When there is an unlawful act attributable to a State, this immediately gives rise to the latter's international responsibility for abridgment of the international provision, with the entailing duty to make the consequences of the violation cease and to provide reparation for damage caused. [FN166]

[FN166] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 188; Case of the 19 Tradesmen, supra note 9, para. 220; and Case of Molina Theissen . Reparations, supra note 9, para. 40.

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224. Reparation of the damage requires restitutio in integrum, whenever possible, which consists of reestablishing the prior situation. If this is not possible, as in the instant case, this international Court must order that measures be adopted to ensure respect for the rights that were abridged, to avoid new violations, to remedy the consequences of the violations, and to ensure payment of compensation for damage caused. [FN167] The State that is under this obligation cannot invoke domestic legal provisions to modify or avoid complying with its obligations to make reparations, which are regulated in all aspects (scope, nature, modes, and establishment of the beneficiaries) by International Law. [FN168]

[FN167] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 189; Case of the 19 Tradesmen, supra note 9, para. 221; and Case of Molina Theissen . Reparations, supra note 9, para. 42.

[FN168] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 189; Case of the 19 Tradesmen, supra note 9, para. 221; and Case of Molina Theissen . Reparations, supra note 9, para. 42.

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225. Reparations seek to make the effects of the violations cease. Their nature and amount depend on the characteristics of the violations committed, of the legally protected interest that was affected, and of the pecuniary and non-pecuniary damage caused. They must not entail enrichment or impoverishment of the victim or the victim's successors. [FN169]

[FN169] See Case of the 19 Tradesmen, supra note 9, para. 223; Case of Cantos, supra note 143, para. 68; and Case of the Caracazo. Reparations, supra note 24, para. 78.

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226. In accordance with the evidence gathered during the proceeding and in light of the criteria set forth above, the Court will now analyze the parties' claims regarding reparations, and order such measures as it deems pertinent.

A) BENEFICIARIES

Pleadings of the Commission

227. The Commission deems that the beneficiary of the reparations must be Daniel Tibi.

Pleadings of the representatives of the victim and his next of kin

228. The representatives of the victim and his next of kin pointed out that:

a) Daniel Tibi must be the beneficiary of the reparations derived from the violation, by Ecuador, of Articles 1(1), 2, 5, 7, 8, 17, 21 and 25 of the American Convention and Articles 1, 6 and 8 of the Inter-American Convention against Torture; and
b) Beatrice Baruet, her daughters Sarah Vachon and Jeanne Camila Vachon, Mrs. Baruet's and Mr. Tibi's daughter Lisianne Judith Tibi, and Mr. Tibi's son Valerian Edouard Tibi, must be beneficiaries of the reparations derived from the violation of Articles 5(1) and 5(2) of the American Convention.

Pleadings of the State

229. The State did not refer to those entitled to reparations in the instant case.

Considerations of the Court

230. Pursuant to Article 63(1) of the American Convention, the Court deems the injured parties to be Daniel Tibi, as the victim of violations of Articles 5, 7, 8, 21 and 25 of the American Convention, in combination with Article 1(1) of that same Convention and of non-compliance with the obligations set forth in Articles 1, 6 and 8 of the Inter-American Convention against Torture; and Beatrice Baruet, her daughters Sarah Vachon and Jeanne Camila Vachon, Mrs. Baruet's and Mr. Tibi's daughter Lisianne Judith Tibi, and Mr. Tibi's son Valerian Edouard Tibi, as the victims of the violation of Article 5(1) of the American Convention, in combination with Article 1(1) of that same Convention.

B) PECUNIARY DAMAGE

Pleadings of the Commission

231. The Commission pointed out that:

a) in this case, it is not possible to apply the principle of restitutio in integrum, due to the nature of the damage suffered. Payment of fair compensation must be set in "sufficiently broad terms" to repair the damage insofar as possible; and
b) the damage to Mr. Tibi's reputation and his inability to carry out activities while he was in jail led to the loss of his occupational activity; he was unable to cover the expenses of his growing family, as he could generate no income at all; and the substantial goods that he had with him when he was detained were not returned to him.

Pleadings of the representatives of the victim and his next of kin

232. The representatives of the victim and his next of kin pointed out:

a) regarding reparations for loss of earnings, that

i. The goods that Mr. Tibi traded were taken from him, his commercial activity was interrupted, and he and his family lost those earnings. Compensation must be set beginning on September 27, 1995;
ii. given the gravity of the injuries suffered by Daniel Tibi, he cannot carry out productive activities, for which reason the lost earnings continue over time. Mr. Tibi earned approximately US$2,500.00 (two thousand five hundred United States dollars) monthly. Multiplied by the twenty-eight months that he was in prison, this amounts to US$70,000.00 (seventy thousand United States dollars; and
iii. the State must recognize a monthly salary from the date of Mr. Tibi's liberation, that is, beginning in January 1998, due to his inability to work.

b) in regards to compensation for consequential damages, the Court must consider the following expenses:

i. those incurred for travel of members of the family, especially Beatrice Baruet, to visit Daniel Tibi at the Cuartel Modelo in Guayaquil and at the Penitenciaría del Litoral. Daniel Tibi mentioned that his wife traveled 74 times from Quito to Guayaquil, and that she was accompanied several times by one of her daughters. In each case, Mrs. Baruet stayed about three days at the prison. The approximate cost of each trip (including the days that she stayed there) was US$100.00 (one hundred United States dollars), which adds up to US$7,400.00 (seven thousand four hundred United States dollars);
ii. those involved in the trip made by the minor Sarah Vachon to France in October 1995, due to the serious financial and family situation of the household. The approximate cost of the airfare was US$1,500.00 (one thousand five hundred United States dollars);
iii. those incurred for Daniel Tibi's survival in the prison, including food, clothes, cleaning implements and phone calls from and to the prison, adding up to approximately US$3,000.00 (three thousand United States dollars);
iii. those incurred for Mr. Tibi's 150 psychotherapy sessions, each one costing three hundred francs, equivalent to US$47.61 (forty-seven United States dollars and sixty-one cents), adding up to US$7,141.00 (seven thousand one hundred and forty-one United States dollars);

iv. those incurred for the special food that the victim required, treatment for his hearing, eyesight and respiratory problems, as well as physical treatments, in regards to which they asked the Court to set the respective amount in fairness;
v. those incurred for reparation of Mr. Tibi's teeth and purchase of dental prosthetics (8 implants in the upper maxillary, 8 implants in the jawbone, and 4 ceramic teeth), estimated at US$45,397.00 (forty-five thousand three hundred and ninety-seven United States dollars);
vi. those pertaining to the goods and securities that were seized by the police from Mr. Tibi at the time of his detention (the list made by the police specifies 84 such belongings), adding up to US$135,000.00 (one hundred and thirty-five thousand United States dollars), based on commercial appraisal of the gems and other objects seized. The appraisal included the victim's Volvo vehicle;
vii. those pertaining to the debit and credit cards that were seized and illegally used while Mr. Tibi was detained. His account in a French bank was "emptied," he lost US$6,000.00 (six thousand United States dollars) from the savings account, and US$4.857,00 (four thousand eight hundred and fifty-seven United States dollars) were charged to his credit card; and
viii. those regarding detriment to the family's assets to cover Mr. Tibi's defense, as he and Beatrice Baruet had to make enormous efforts and invest a great amount of money that they requested even from relatives and friends of the couple. The comfortable situation that the family had before the detention disappeared; the situation was so extreme that Mrs. Baruet sent Daniel Tibi all the money left over after paying the rent for the house where she lived. When the family returned to France they had lost everything. They had to sell their property. Going back to France entailed difficulties finding a job and earning enough to cover living expenses. Daniel Tibi cannot work normally and Beatrice Baruet was unemployed for several months. In France they were able to survive thanks to the generosity of Mrs. Baruet's parents. They ask the court to set reparations to family assets in fairness, and for these reparations to be paid to Mr. Tibi and Mrs. Baruet.

Pleadings of the State

233. Ecuador argued that Mr. Tibi's rights were not violated, and that therefore it is not in order to enter the reparations stage. Nevertheless, if the State is found responsible, it deems that the Court must:

a) estimate what the victim's average salary was, as it has done other times. It is ambiguous to state that it fluctuated between US$5,000.00 (five thousand United States dollars) and US$10,000.00 (ten thousand United States dollars) a month, on the one hand, and to state elsewhere that it was US$2,000.00 (two thousand United States dollars) a month;
b) estimate to what extent Mr. Tibi and his next of kin were affected by the violations to establish the monetary compensation; and
c) require the ownership documents of the goods seized from Mr. Tibi at the time of his detention, to establish exactly which belonged to him, in case the Court orders reparations regarding the right to property.

Considerations of the Court

234. The Court will now establish the pecuniary damages, which involve loss of or detriment to the victim's income and the expenses incurred by his next of kin due to the facts, [FN170] and it will set a compensation that seeks to redress the property-related consequences of the violations. For this, it will take into account the evidence gathered in this case, the Court's own jurisprudence, and the pleadings of the Commission, of the representatives of the victim and his next of kin and of the State.

[FN170] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 205; Case of the 19 Tradesmen, supra note 9, para. 236; and Case of Molina Theissen . Reparations, supra note 9, para. 55.

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a) Loss of earnings

235. The Court deems it proven that Daniel Tibi was a merchant who traded in gems and art (supra para. 90(1)) and received fluctuating monthly income (supra para. 90(44)).

236. This Court notes that due to the type of activity that Daniel Tibi carried out, it is not possible to establish the income he received at the time of his detention exactly. In this regard, taking into account the type of activity that the victim carried out to earn his living as well as the specificities of the instant case, the Court sets in fairness €33,140.00 (thirty- three thousand one hundred and forty euros), for loss of earnings both during the time he was detained and for reduction of his ability to conduct his normal work activities.

b) Consequential damages

237. Taking into account the claims of the parties, the body of evidence and the jurisprudence of the Court regarding this matter, the Court deems that compensation for pecuniary damages must also include:

a) the expenses incurred by the next of kin of the victim in numerous trips, especially those made by Beatrice Baruet and, sometimes, by one of the daughters who accompanied her, to visit Daniel Tibi at the Penitenciaría del Litoral, and while she stayed there; the trip made by minor Sara Vachon to France in October 1995; and Daniel Tibi's expenses to survive in prison. The Court deems it pertinent to set the amount, in fairness, at €7,870.00 (seven thousand eight hundred and seventy euros). Said amount must be given to Beatrice Baruet;
b) Mr. Tibi's 150 psychotherapy sessions. However, since vouchers were not provided to demonstrate said expenses, the Court sets the amount in fairness at €4,142.00 (four thousand one hundred and forty-two euros), which must be paid to Mr. Tibi;
c) the victim's expenses regarding special food, treatment for his hearing, eyesight, and respiratory problems, and other physical treatments. In this case, the Court sets the amount in fairness at €4,142.00 (four thousand one hundred and forty-two euros), which must be paid to Mr. Tibi;
d) the expenses incurred for reparation of Mr. Tibi's teeth, as well as purchase of dental prosthetics. While the file does not include suitable vouchers for all these expenses, the Court

deems it proven that Mr. Tibi incurred certain expenses to care for dental problems (supra para. 90.50, 90.52 and 90.53) and, therefore, sets the amount in fairness at €16,570.00 (sixteen thousand five hundred and seventy euros), which must be paid to Mr. Tibi; and

e) the goods and securities that were seized by the police from Daniel Tibi at the time of his detention, and which have still not been returned to the victim. This Court notes that, as it declared in another chapter of the instant Judgment (supra para. 220), the goods and securities seized belonged to Mr. Tibi, but it does not have the respective appraisal. Therefore, this Court orders the return of said goods and securities by the State, within six months of notification of the instant Judgment, and if this were not possible it sets the amount, in fairness, at €82,850.00 (eighty-two thousand eight hundred and fifty euros) which must be paid to Mr. Tibi as the value of the goods seized, including his Volvo brand vehicle. On the other hand, regarding the use of the debit and credit cards seized from Mr. Tibi, specifically the US$6,000.00 (six thousand United States dollars) that Mr. Tibi argues were taken from his bank account, as well as the use of the credit card for expenses adding up to US$4,857.00 (four thousand eight hundred and fifty-seven United States dollars), the Court will not issue a ruling, as the inappropriate use of those documents was not proven.

238. Based on all the above, the court sets the following amounts as compensation for the pecuniary damages due to the violations found in the instant Judgment:

Reparations for pecuniary damages			
	Loss of earnings	Consequential damages	Total
Daniel Tibi (victim)	€33,140.00	€107,705.00	€140,845.00
Beatrice Baruet (former spouse)		€7,870.00	€7,870.00
TOTAL	€148,715.00		

C) NON-PECUNIARY DAMAGES

Pleadings of the Commission

239. The Commission argued that:

a) Mr. Tibi not only suffered very much when he was beaten and tormented, but continuation of his unjustified detention extended the suffering over time and led to the break-up of his marriage;

b) Mr. Tibi's daughter was born while he was detained. Therefore, he was unable to support his spouse at that time. The family's scant resources were used to hire an attorney to obtain Mr. Tibi's release and on the trips to visit him in Guayaquil, where he was detained, even though he was arrested in Quito, where his family lived; and

c) the effect for Beatrice Baruet and their children is traumatic, especially bearing in mind that they were foreigners in Ecuador, unfamiliar with the judicial system. The most alarming cultural shock must have been to become aware that the authorities did not enforce Ecuador's laws.

Pleadings of the representatives of the victim and his next of kin

240. The representatives of the victim and his next of kin pointed out:

In regards to the "moral damage" to Daniel Tibi, that:

a) violation of his right to humane treatment entails suffering at various levels: physical, psychological, and moral. Eight years after the facts took place, they are reflected in the physical and psychological consequences that Daniel Tibi still suffers, and he will not be able to fully recover from all the harm caused to him by the Ecuadorian State. The torture caused the breakdown of his personality and of his family ties. His life changed radically, placing him in a disadvantageous situation which continues to date. Mr. Tibi has important psychological problems, such as: nightmares, irritability, depressive syndrome, depression, hyper vigilant behavior and fatigue;
b) the moral damage also originates in the unlawfulness and arbitrariness of his detention, the powerlessness to prove his innocence, lack of investigation of the torture, excessive duration of the preventive imprisonment, the extremely bad conditions in the prison, and the other violations specified in the application brief;
c) the State must pay him fair compensation, in the amount of US$100,000.00 (one hundred thousand United States dollars);
d) the harm caused to the victim and his family's suffering have brought enduring consequences that require medical and psychological treatment. It is necessary to include an item for future expenses for said treatments, and this amount must be given to all members of the family, especially to Mr. Tibi, who still suffers serious psychological and physical problems, such as cancer;
e) violation of his human rights deprived Mr. Tibi of the possibility of developing his "life plan," impeding attainment of the personal, professional, and family goals that he had set together with his family. Mr. Tibi had concrete professional and personal plans for his future; these plans ended when he was arbitrarily deprived of his liberty for over two years. The violations suffered by Mr. Tibi gravely altered what would otherwise have been the normal course of his life; they impeded attainment of his vocation, aspirations, potential, and led to his never being able to carry out normal physical activities. The representatives asked the Court to order the State to redress the damage caused to Mr. Tibi's "life plan;"

In regards to the "moral damage" to Daniel Tibi's next of kin, that:

f) they also suffered the consequences of the human rights violations. Beatrice Baruet traveled every Friday to Guayaquil and remained there over the weekend; she also traveled there during her vacations; she noted Mr. Tibi's injuries, and this caused her grief and despair. Minor Sarah Vachon, Beatrice Baruet's daughter, was sent to France and was unable to be with her family for about two years; Jeanne Camila Vachon, Beatrice Baruet's daughter, visited the victim at the Penitentiary with her mother and witnessed a fight, which traumatized her and thereafter she did not want to return to the prison. Lisianne Judith Tibi, Mr. Tibi's ad Mrs. Baruet's daughter, was born while her father was in prison and therefore was not with him during her first two years of life. Valerian Edouard Tibi, Mr. Tibi's son, was unable to see his father during the twenty-eight months that he was detained;

g) the "moral damages" suffered by Daniel Tibi's next of kin must be compensated by payment US$100,000.00 (one hundred thousand United States dollars) to each of them, adding up to US$500,000.00 (five hundred thousand United States dollars); and
h) the Court must order payment, in fairness, of compensation for non-pecuniary damages, as well as adoption of satisfactory measures to redress the intensity of the suffering caused to the victim and to his next of kin, changes in conditions of their existence, and other non-pecuniary consequences.

Pleadings of the State

241. The State pointed out that if it is found responsible, the Court must estimate to what extent Mr. Tibi and his next of kin were affected by the violations to set a monetary compensation.

Considerations of the Court

242. Non-pecuniary damage may include both the suffering and grief caused to the direct victims and their close relations, and detriment to very significant values of the individuals, as well as non-pecuniary changes in the conditions of existence of the victim or the victim's family. Since it is not possible to assign a specific monetary equivalent to non-pecuniary damage, it can only be compensated in two ways. First, by payment of an amount of money or delivery of goods or services that can be assessed in monetary terms, set by the Court by reasonably applying judicial discretion and in terms of fairness. And second, through acts or works that are public in their scope or repercussions, such as transmitting a message of official reproval of the human rights violations involved, and of commitment to efforts to ensure that they do not happen again, which have the effect, among others, of acknowledging the victim's dignity. [FN171] The first aspect of the reparation for non-pecuniary damages will be analyzed in this section, and the second one in section D) of this chapter.

[FN171] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 211; Case of the 19 Tradesmen, supra note 9, para. 244; and Case of Molina Theissen. Reparations, supra note 9, para. 65.
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243. International jurisprudence has repeatedly established that the judgment is per se a form of reparation. Nevertheless, bearing in mind the circumstances of the instant case, the intensity of the suffering caused by the facts to the victims, changes in the conditions of their existence, and the other non-pecuniary or non-material consequences they suffered, the Court deems it pertinent to order payment of a compensation for non-pecuniary damages, in fairness. [FN172]

[FN172] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 215; Case of the 19 Tradesmen, supra note 9, para. 247; and Case of Molina Theissen. Reparations, supra note 9, para. 66.
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244. In setting compensation for non-pecuniary damages in the sub judice case, it is necessary to take into account that Daniel Tibi was subjected to inhuman conditions of incarceration and that he was tortured, which caused him intense corporal pain, suffering, and psychological problems, as well as physical and psychological consequences that continue to date. Furthermore, the actions against him did not fulfill the requirements of due process (there was an unlawful and arbitrary detention, disregard for the right to fair trial and to judicial protection). Naturally, persons subjected to arbitrary detention experience profound suffering, [FN173] which is worsened if we take into account that the facts regarding the victim's torture have not been investigated. This Court deems that it can be assumed that this type of violations cause those who suffer them non-pecuniary harm. [FN174]

[FN173] See Case of Maritza Urrutia, supra note 8, para. 168; Case of Bulacio, supra note 129, para. 98; and Case of Juan Humberto Sánchez , supra note 3, para. 174.
[FN174] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 217; Case of the 19 Tradesmen, supra note 9, para. 248; and Case of Molina Theissen. Reparations, supra note 9, para. 67.

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245. It is reasonable to consider that the violations against Daniel Tibi clearly altered his life plan. His expectations for personal, professional, and family development, possible under normal conditions, were abruptly interrupted.

246. Due to all the above, the Court deems that Daniel Tibi should receive compensation for non-pecuniary damages, and sets the respective amount, in fairness, at €82,850.00 (eighty-two thousand eight hundred and fifty euros) in his favor.

247. In regards to the other victims, Mr. Tibi's unlawful and arbitrary detention and torture brought suffering, anguish and grief to his former spouse, Beatrice Baruet, to Sarah Vachon, to Jeanne Camila Vachon and to Lisianne Judith Tibi, gravely altering the conditions of their existence and their family and social relations, and causing detriment to their manner of living (supra paras. 160 and 161). The relationship of Valerian Edouard Tibi, Daniel Tibi's son, with his father was affected while he remained in prison (supra paras. 160 and 161).

248. Based on all the above, this Court deems that Mr. Tibi's next of kin must receive compensation. For this, it sets the amount, in fairness, at €57,995.00 (fifty-seven thousand nine hundred and ninety-five euros), in favor of Beatrice Baruet for non-pecuniary damages. It also sets the amount, in fairness, of €37,282.00 (thirty-seven thousand two hundred and eighty-two euros) to be distributed in equal parts among Lisianne Judith Tibi, Sarah and Jeanne Camila Vachon, for non-pecuniary damages. It also sets in fairness the amount of €12,427.00 (twelve thousand four hundred and twenty-seven euros), which must be paid to Valerian Edouard Tibi.

249. Having analyzed the pleadings of the representatives of the victim and his next of kin, as well as the body of evidence in this case, it is possible to establish that Daniel Tibi's physical and psychological problems continue to date (supra para. 90.53). Therefore, this Court deems, as it

has previously, [FN175] that compensation for non-pecuniary damages must also include future expenses for psychological and medical treatment. In this regard, it deems it pertinent to set the amount to be paid as compensation for this item, in fairness, at €16,570.00 (sixteen thousand five hundred and seventy euros) in favor of Daniel Tibi.

[FN175] See Case of Molina Theissen . Reparations, supra note 9, para. 71; Case of Myrna Mack Chang. November 25, 2003 Judgment, Series C No. 101, para. 266; and Case of Bulacio, supra note 129, para. 100.

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250. Bearing in mind the various aspects of the non-pecuniary damages that have been discussed above, the Court sets the value of compensations for this item, in fairness, as shown in the following table:

Reparations for non-pecuniary damages			
Victim and next of kin	Non-pecuniary damages	Expenses for medical and psychological treatment (future)	Total
Daniel David Tibi (victim)	€82,850.00	€16,570.00	€99,420.00
Beatrice Baruet (former spouse)	€57,995.00		€57,995,00
Sarah Vachon (stepdaughter)	€12,427.00		€12,427,00
Jeanne Camila Vachon (stepdaughter)	€12,427.00		€12,427,00
Lisianne Tibi (daughter)	€12,427.00		€12,427,00
Valerian Edouard Tibi (son)	€12,427.00		€12,427,00
TOTAL	€207,123.00		

D) OTHER FORMS OF REPARATION
(MEASURES OF SATISFACTION AND GUARANTEES OF NON-RECIDIVISM)

Pleadings of the Commission

251. In regards to other forms of reparation, the Commission argued that the violations committed against Mr. Tibi were a reiteration of those committed by the State against Rafael Iván Suárez Rosero. [FN176] In that case, the Court ordered the State to adopt such measures as might be necessary to avoid repetition of the violations found in the judgment of the Court. In the instant case, the Commission pointed out that the State must:

a) adopt such measures as may be necessary for the “amparo de libertad” remedy to be effective, as well as for its provisions to be implemented from the procedural and substantive viewpoints;

b) adopt such measures as may be necessary for the criminal judicial system to effectively comply with the provisions of Ecuadorian legislation;
c) create an internal mechanism pursuant to which the petitioners can submit complaints regarding the flaws of the criminal judicial system, regarding its timely and effective functioning, for them to be able to obtain reparations;
d) create mechanisms to file complaints and conduct monitoring to supervise conditions of detention, and then to provide access to information on said mechanisms to the inmates and their families;
e) adjust the conditions and practices of the prison system to applicable international standards for the protection of human rights and to establish a mechanism that enables review and oversight of enforcement of those modifications, allowing civil society and non-governmental organizations to participate in this process;
f) provide the pertinent mechanisms to ensure the inmates' access to adequate medical examination and treatment, periodically and with due follow-up. A protocol for medical care in the penitentiary context must be followed, including basic health programs, taking into account the epidemiological profile;
g) provide the penitentiary centers with basic medical equipment and staff, with mechanisms to enable continuous care and better training for the physicians, in accordance with applicable international standards;
h) prepare and train the guard staff regarding how the inmates must be treated, in accordance with generally accepted international standards, and
i) establish a system to investigate and punish torture and mistreatment, enabling punishment of those who commit said violations.

[FN176] This refers to the Case of Suárez Rosero, supra note 145, heard by the Inter-American Court.

Pleadings of the representatives of the victim and his next of kin

252. The representatives of the victim and his next of kin endorsed the request by the Commission, and asked that the State:

a) to investigate, try, and punish those responsible for the violations of Daniel Tibi's human rights and all those who by maliciously or by omission have allowed total impunity to prevail;
b) to publicly disseminate the results of the investigation, for society to know the truth;
c) to vindicate Mr. Tibi's image and to carry out a public act of acknowledgment of its responsibility in the instant case and to publicly apologize to Daniel Tibi, Beatrice Baruet and their family;
d) to publish, in the three most widely read newspapers in Ecuador, and to pay for another publication in the most widely read newspapers in France, of the part regarding the facts, rights, and operative paragraphs of the judgment issued by the Court, as well as an apology to the victim and his next of kin, and a commitment by the State to ensure that facts such as these will never happen again;
e) to publish the judgment of the Court in Ecuador's official gazette, Diario Oficial;

f) to produce a 30 minute video narrating the facts of the case, and publicly acknowledging participation of the agents of the State and lack of investigation on them;
g) to adapt domestic legislation to the international standards: American Convention and Inter-American Convention against Torture; to penalize torture as a specific crime; and to repair the damage caused to the victims of torture, by means of specialized treatment and fair financial compensation;
h) to adjust domestic procedural legislation so that preventive imprisonment is the exception rather than the rule, to ensure that detainees are not incarcerated indefinitely, and to only grant evidentiary value to confessions and statements rendered before judges;
i) to adjust prison conditions to international standards, and to provide the financial means for the Dirección Nacional de Rehabilitación Social to conduct said adjustments;
j) to conduct an administrative or disciplinary proceeding against the judges who heard Mr. Tibi's case;
k) to abstain from resorting to mechanisms such as amnesty, extinguishment and establishment of exemptions of liability, as well as any other measure geared toward impeding criminal prosecution or suppressing the effects of a conviction;
l) to implement the right to consular notification; and
m) to conduct a training and educational campaign for judicial, police, and penitentiary officials, as well as for physicians and psychologists, on how to prevent torture and document claims in regards torture. For this, it should follow the procedures and provisions of specialized international manuals such as the Istanbul Protocol.

Pleadings of the State

253. In regards to measures of non-recidivism, the State pointed out that if the Court finds it responsible, in case of apology it would be necessary to establish which State official should do so.

Considerations of the Court

a) Obligation to investigate the facts that gave rise to the violations, to identify, try, and punish those responsible

254. The Court has concluded, inter alia, that the State abridged Articles 5, 7, 8, 21 and 25 of the Convention, in combination with Article 1(1) of that same Convention, and it did not comply with the obligations set forth in Articles 1, 6 and 8 of the Inter-American Convention against Torture, to the detriment of Daniel Tibi. The State also breached Article 5(1) of the American Convention, in combination with Article 1(1) of that same Convention, to the detriment of Beatrice Baruet, Sarah and Jeanne Camila Vachon, Lisianne Judith Tibi and Valerian Edouard Tibi, in the specific terms set forth in this Judgment.

255. Impunity of those responsible for the violations prevails in the instant case. More than nine years after the facts took place, those responsible for the unlawful and arbitrary detention and the violations of Daniel Tibi's right to fair trial, and those responsible for the tortures suffered by the victim, have not been investigated or punished. This has generated a situation of

impunity that infringes the duty of the State, injures the victim and his next of kin, and fosters chronic recidivism of the human rights violations. [FN177]

[FN177] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 228; Case of the 19 Tradesmen, supra note 9, para. 257; and Case of Molina Theissen. Reparations, supra note 9, para. 79.

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256. This Court has repeatedly referred to the right of the victims and their next of kin to know what happened and who were the agents of the State responsible for the facts. [FN178] The Court has pointed out that "[w]henever there has been a human rights violation, the State has a duty to investigate the facts and punish those responsible, [...] and this obligation must be complied with seriously and not as a mere formality". [FN179]

[FN178] See Case of the Gómez Paquiyauri Brothers. supra note 8, para. 229; Case of the 19 Tradesmen, supra note 9, para. 258; and Case of Molina Theissen. Reparations, supra note 9, para. 80.

[FN179] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 229; Case of the 19 Tradesmen, supra note 9, para. 258; and Case of Molina Theissen, Reparations, supra note 9, para. 80.

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257. The victim of the human rights violation and their next of kin, when applicable, have the right to know the truth. [FN180] Therefore, the victims in this case have the right to know who was responsible for the unlawful and arbitrary detention, torture and violation of due process and of the right to fair trial, to the detriment of Daniel Tibi. This right to the truth has been developed by International Human Rights Law [FN181] and its recognition may be an important means of reparation.

[FN180] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 230; Case of the 19 Tradesmen, supra note 9, para. 261; and Case of Molina Theissen. Reparations, supra note 9, para. 81.

[FN181] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 230; Case of the 19 Tradesmen, supra note 9, para. 261; and Case of Molina Theissen. Reparations, supra note 9, para. 81.

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258. In light of the above, to redress, in this regard, the violations, the State must effectively investigate the facts of the instant case with the aim of identifying, trying, and punishing those responsible. Domestic proceedings must address the violations of the rights to Humane Treatment, to Personal Liberty, the Right to Judicial Protection and the right to Fair Trial, to which this Judgment refers. The victim must have full access and be able to act in all stages and levels of the investigation and of the respective trial, in accordance with domestic legislation and

the provisions of the American Convention. Results of this process must be made know to the public, for Ecuadorian and French society to know the truth.

259. The State must ensure that the domestic proceeding to investigate, try, and punish those responsible for the facts attains the appropriate effect. It must also refrain from resorting to mechanisms such as amnesty, extinguishment, and establishment of exemptions of liability, as well as from measures that seek to impede criminal prosecution or to suppress the effects of the conviction, as the Court has noted in other cases. [FN182]

[FN182] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 232; Case of the 19 Tradesmen, supra note 9, para. 262; and Case of Molina Theissen. Reparations, supra note 9, para. 83.

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b) Publication of the pertinent parts of the Judgment of the Court

260. Likewise, as the Court has ruled previously, [FN183] it deems that the State must publish, as a measure of satisfaction, within six months time from when it receives notice of the instant Judgment, at least once, in the official gazette Diario Oficial and in another daily with national coverage in Ecuador, both the Section on Proven Facts and operative paragraphs One to Thirteen of the instant Judgment, without the respective footnotes. The State must also publish the above, translated into French, in a widely read newspaper in France, specifically in the area where Mr. Tibi resides.

[FN183] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 235; Case of Molina Theissen. Reparations, supra note 9, para. 86; and Case of Myrna Mack Chang, supra note 175, para. 280.

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c) Written statement of acknowledgment of international responsibility and apology to the victims

261. As a consequence of the violations found in this Judgment, the Court deems that the State must publish a formal written statement issued by the high authorities of the State, acknowledging its international responsibility for the facts addressed in the instant ruling, and apologizing to Mr. Tibi and to the other victims of the instant case. Said statement must be published at least once, within six months of notification of the instant Judgment, in a nationally distributed daily in Ecuador, and its translation into French in a widely read newspaper in France, specifically in the area where Mr. Tibi resides. Said statement will have the effect of satisfaction and serve as a guarantee of non-recidivism.

d) Educational and training measures

262. Both the Inter-American Commission and the representatives of the victim and his next of kin asked the Court to order the State to train the staff of the judiciary, of the public prosecutor's office, of the police and of the penitentiary system, as well as the respective physicians and psychologists, regarding treatment of inmates, prevention of torture, and documentation of complaints, in accordance with generally accepted international standards. In this regard, the State must take into account that the detainees have the right to live in conditions of detention that are compatible with their personal dignity. The authorities of the State exercise total control over the person under their custody. The way a detainee is treated must be subject to the closest scrutiny, bearing in mind the detainee's special vulnerability. [FN184] The Court has established that the State, being responsible for the detention centers, is the guarantor of the detainee's rights, and this entails, among other things, that it must explain what happens to persons who are under its custody.

[FN184] See Case of Bulacio, supra note 129, para. 126

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263. In light of the above and of the circumstances of the instant case, this Court deems that the State must establish a training and education program for the staff of the judiciary, of the public prosecutor's office, of the police and of the penitentiary system, including the physicians, psychiatrists and psychologists, on the principles and provisions regarding detention of individuals, their legal rights and guarantees, the right to have an attorney, to receive visits, and for the indictees and the convicts to be lodged in different facilities. In short, the State must ensure application of international standards.

264. Design and implementation of the training program must include allocation of specific resources to attain its objectives, and its execution must involve civil society. For this, the State must establish an inter-institutional committee with the aim of defining and executing training programs on human rights and treatment of inmates. The State must report to this Court on establishment and functioning of this committee, within six months time.

XV. COSTS AND EXPENSES

Pleadings of the Commission

265. In regards to costs and expenses, the Commission argued that:

a) Mr. Tibi was originally represented by Arthur Vercken, a French attorney, from July 15 to November 9, 2001, in the actions before the Inter-American Commission;
b) since December 12, 2001, the case was taken up by two non-governmental organizations: CEJIL and the Clínica de Derechos Humanos del PUCE; and
c) it is essential to pay reasonable and justified costs and expenses, based on the information submitted by the representatives. The Court must take into account past costs and expenses, as well as those that will be necessary to continue the case before this Court, in all its stages, including compliance with a possible judgment.

Pleadings of the representatives of the victim and his next of kin

266. In regards to costs and expenses, the representatives of the victim and his next of kin asked the Court to grant them, at the appropriate procedural stage, the opportunity to submit a document with updated figures. They also requested payment of:

a) expenses incurred by Mr. Tibi in the domestic proceeding, regarding professional fees of his defense counsel, photocopies, travel of his attorneys to Guayaquil (transportation, food, lodging) and other procedural costs. In this regard, they pointed out that on November 13, 1995 attorney Nelson Martínez charged Beatrice Baruet US$1,544.00 (one thousand five hundred and forty-four United States dollars). This amount was projected over the twenty-eight months that Mr. Tibi was detained, which explains the total amount of US$30,000.00 (thirty thousand United States dollars). Therefore, they asked the Court to set the amount for costs incurred by Daniel Tibi and his family, taking into account the projection submitted;
b) attorney Arthur Vercken's services in the international proceeding. He was hired by Mr. Tibi to process his case before the Inter-American Commission, and he charged Mr. Tibi US$21,000.00 (twenty-one thousand United States dollars), and the representatives requested reimbursement of this amount;
c) Mr. Tibi's expenses in connection with his appearance before the Inter-American Commission, adding up to approximately US$3,000.00 (three thousand United States dollars);
d) the expenses incurred by the Clínica de Derechos Humanos del PUCE, in the international proceeding, in connection with travel of two persons from Quito to San José, twice, including perdiem for each trip, adding up to US$4,200.00 (four thousand two hundred United States dollars); expenses in connection with phone calls, fax, courier, stationery, etc., adding up to US$2,750.00 (two thousand seven hundred and fifty United States dollars); and professional fees of two attorneys, for 200 hours of work at US$15,00 (fifteen United States dollars) an hour, adding up to US$3,000.00 (three thousand United States dollars). Therefore, the total expenses of the Clínica de Derechos Humanos del PUCE add up to US$9,950.00 (nine thousand nine hundred and fifty United States dollars); and
e) expenses incurred by CEJIL, in the international proceeding, in connection with airfare from Washington to San José, and per diem for two persons twice, adding up to US$5,400.00 (five thousand four hundred United States dollars); expenses in connection with phone calls, fax, courier, stationery, etc., adding up to US$3,100.00 (three thousand one hundred United States dollars); and professional fees of two attorneys, for 400 hours of work, at US$15,00 (fifteen United States dollars) an hour, adding up to US$6,000.00 (six thousand United States dollars). CEJIL also incurred expenses for phone calls, courier, stationery, copies, and supplies; travel of two persons from the United States to France to prepare the psychological expert opinion and interview victims and witnesses; travel of CEJIL's attorney from Costa Rica to Ecuador to document the case and interview expert witnesses; travel of an expert witness to Guayaquil to prepare the expert opinion; travel of an attorney, the victim, Mr. Tibi's former spouse, and an expert witness from the United States, France, and Ecuador, respectively, to Costa Rica, to appear at the public hearing before the Court. These items add up to approximately US$20,000.00 (twenty-thousand United States dollars).

Pleadings of the State

267. The State did not refer to costs and expenses.

Considerations of the Court

268. The Court has pointed out that costs and expenses are part of the concept of reparations, embodied in Article 63(1) of the American Convention, since the activities carried out by the victim, his successors or his representatives to obtain international justice entail expenses and financial commitments, which must be compensated. [FN185] In regards to the reimbursement, it is for the Court to judiciously assess the amount, encompassing expenses incurred under domestic venue and those incurred in the proceeding before the inter-American system, taking into account certification of the expenses incurred, the circumstances of the specific case, and the nature of international jurisdiction for the protection of human rights. The estimate may be based on the principle of fairness and assessing the expenses demonstrated by the parties, as long as their quantum is reasonable. [FN186]

[FN185] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 242; Case of the 19 Tradesmen, supra note 9, para. 283; and Case of Molina Theissen. Reparations, supra note 9, para. 95.
[FN186] See Case of the Gómez Paquiyauri Brothers, supra note 8, para. 242; Case of the 19 Tradesmen, supra note 9, para. 283; and Case of Molina Theissen. Reparations, supra note 9, para. 95.

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269. Costs include both the stage of access to domestic justice and the international proceeding before the Commission and the Court. [FN187]

[FN187] See Case of Molina Theissen. Reparations, supra note 9, para. 96; Case of Maritza Urrutia, supra note 8, para. 183; and Case of Myrna Mack Chang, supra note 175, para. 290.

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270. For this purpose, the Court deems it equitable to order payment of €37,282.00 (thirty-seven thousand two hundred and eighty-two euros), which must be given to Daniel Tibi, for costs and expenses in the domestic proceeding and in the proceeding before the inter-American system for the protection of human rights. This amount includes €12,427.00 (twelve thousand four hundred and twenty-seven euros) for costs and expenses in the domestic proceeding, and €24,855.00 (twenty-four thousand eight hundred and fifty-five euros) for costs and expenses in the proceeding before the bodies of the inter-American system.

XVI. MANNER OF COMPLIANCE

271. The State must pay the compensations and reimburse the costs and expenses (supra paras. 235 to 238, 244 to 250 and 270) within one year of notification of this Judgment. In regards to other reparations ordered, the State must fulfill these measures within a reasonable time (supra

paras. 254 to 259 and 262 to 264), or within the time set forth in this Judgment (supra paras. 237(e), 260 and 261).

272. Payment of compensation in favor of the victims, as appropriate, will be made directly to them. If any of them were to die, payment will be made to their heirs.

273. Payments to cover costs and expenses incurred by the next of kin of Mr. Tibi and their representatives for steps taken in the domestic and international proceedings will be made to him (supra para. 270), and he will make the respective payments in the manner agreed upon by him with the representatives.

274. If for reasons due to the beneficiaries of the compensations they are unable to receive them within the one year term specified, the State will deposit said amounts in their favor in a deposit certificate or account in a solid French banking institution, in euros and under the most favorable conditions allowed by banking practices and legislation. If the compensation has not been claimed in ten years time, the respective amount will be returned to the State, together with interest accrued.

275. As regards the compensation ordered in favor of minors Jeanne Camila Vachon and Lisianne Judith Tibi, the State must deposit it in a solid French institution, in euros. The investment will be made within one year, under the most favorable conditions allowed by banking practices and legislation, while the beneficiaries are minors. They may withdraw it when they come of age, or before that if it is in the child's best interest, set forth in a ruling by a competent judicial authority. If the compensation is not withdrawn within ten years of when they attain majority, the amount will be returned to the State, together with the interest accrued.

276. The State must comply with the financial obligations set forth in this Judgment by means of payments in euros.

277. The amounts allocated in the instant Judgment for compensations, costs and expenses, must not be affected, diminished or conditioned by current or future fiscal reasons. Therefore, they must be delivered to the beneficiaries completely, in accordance with the provisions of this Judgment.

278. If the State incurs in arrearages, it will pay interest on the amount owed, in accordance with the bank interest rate on arrearages in Ecuador.

279. As was established and has been the practice in all the cases it has heard, the Court will oversee compliance with the instant Judgment regarding all aspects. This oversight is inherent to the jurisdictional authority of the Court, and it is necessary for due observance, by the Court itself, of Article 65 of the Convention. The case will be closed once the State has fully complied with the provisions set forth in the ruling. Within one year of notification of this Judgment, the State will submit its first report to the Court on steps taken to comply with this Judgment.

XVII. OPERATIVE PARAGRAPHS

280. Now therefore,

THE COURT,

DECIDES:

Unanimously,

1. To dismiss the first preliminary objection filed by the State regarding "non-exhaustion of domestic remedies".
2. To dismiss the second preliminary objection filed by the State regarding "lack of ratione materiae jurisdiction of the Inter-American Court to hear cases regarding violations of the Inter-American Convention to Prevent and Punish Torture".

AND DECLARES:

Unanimously, that:

3. The State violated the Right to Personal Liberty embodied in Article 7(1), 7(2), 7(3), 7(4) and 7(5) of the American Convention on Human Rights, in combination with Article 1(1) of that same Convention, to the detriment of Daniel Tibi, in the terms set forth in paragraphs 94 to 122 of the instant Judgment.
4. The State violated the Rights to Personal Liberty and to Judicial Protection embodied in Articles 7(6) and 25 of the American Convention on Human Rights, in combination with Article 1(1) of that same Convention, to the detriment of Daniel Tibi, in the terms set forth in paragraphs 126 to 137 of the instant Judgment.
5. The State violated the Right to Humane Treatment embodied in Article 5(1), 5(2) and 5(4) of the American Convention on Human Rights, in combination with Article 1(1) of that same Convention, and it failed to comply with the obligations set forth in Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Daniel Tibi, in the terms set forth in paragraphs 142 to 159 and 162 of the instant Judgment.
6. The State violated the Right to Humane Treatment embodied in Article 5(1) of the American Convention, in combination with Article 1(1) of that same Convention, to the detriment of Beatrice Baruet, Sarah and Jeanne Camila Vachon, Lisianne Judith Tibi and Valerian Edouard Tibi, in the terms set forth in paragraphs 160 to 162 of the instant Judgment.
7. The State violated the Right to Fair Trial, embodied in Article 8(1), 8(2), 8(2)(b), 8(2)(d), 8(2)(e) and 8(2)(g) of the American Convention on Human Rights, in combination with Article 1(1) of that same Convention, to the detriment of Daniel Tibi, in the terms set forth in paragraphs 167 to 200 of the instant Judgment.
8. The State violated the Right to Property, embodied in Article 21 of the American Convention on Human Rights, in combination with Article 1(1) of that same Convention, to the detriment of Daniel Tibi, in the terms set forth in paragraphs 209 to 221 of the instant Judgment.

AND ORDERS:

Unanimously, that:

9. This Judgment constitutes per se a form of reparation, in the terms set forth in paragraph 243 of the Judgment.

10. The State must, within a reasonable term, effectively investigate the facts of the instant case, with the aim of identifying, trying, and punishing all those responsible for the violations committed against Daniel Tibi. The results of this process must be publicly disseminated, in the terms set forth in paragraphs 254 to 259 of the instant Judgment.

11. The State must publish, at least once, in the official gazette Diario Oficial and in another Ecuadorian daily with a national coverage, both the Section on Proven Facts and operative paragraphs One to Sixteen of the instant Judgment, without the respective footnotes. The State must also publish the above, translated into French, in a widely read daily in France, specifically in the area where Daniel Tibi resides, in the terms set forth in paragraph 260 of the instant Judgment.

12. The State must make public a formal written statement issued by the high authorities of the State, acknowledging the international responsibility of the State for the facts addressed in the instant case, and apologizing to Mr. Tibi and to the other victims mentioned in the instant Judgment, in the terms set forth in paragraph 261 of this Judgment.

13. The State must establish a training and education program for the staff of the judiciary, the public prosecutor's office, the police and penitentiary staff, including the medical, psychiatric and psychological staff, on the principles and provisions regarding protection of human rights in the treatment of inmates. Design and implementation of the training program must include allocation of specific resources to attain its goals, and it will be conducted with participation by civil society. For this, the State must establish an inter-institutional committee to define and execute the training programs on human rights and treatment of inmates. The State must report to this Court on the establishment and functioning of said committee, within six months, as set forth in paragraphs 262 to 264 of the instant Judgment.

14. The State must pay the total amount of €148,715.00 (one hundred and forty-eight thousand seven hundred and fifteen euros) as compensation for pecuniary damages, in the terms set forth in paragraphs 235 to 238 of the instant Judgment, distributed as follows:

a) to Daniel Tibi, €57,995.00 (fifty-seven thousand nine hundred and ninety-five euros), in the terms set forth in paragraphs 235, 236, 237.b, 237.c, 237.d and 238 of the instant Judgment;

b) the State must return to Daniel Tibi the property seized when he was detained, within six months of the instant Judgment. If this is not possible, the State must pay him €82,850.00 (eighty-two thousand eight hundred and fifty euros) in the terms set forth in paragraphs 237.e and 238 of the instant Judgment; and

c) to Beatrice Baruet, €7,870.00 (seven thousand eight hundred and seventy euros), in the terms set forth in paragraphs 237 and 238 of the instant Judgment.

15. The State must pay the total amount of €207,123.00 (two hundred and seven thousand one hundred and twenty-three euros), as compensation for non-pecuniary damages, in the terms set forth in paragraphs 244 to 250 of the instant Judgment, distributed as follows:

a) to Daniel Tibi, €99,420.00 (ninety-nine thousand four hundred and twenty euros), in the terms set forth in paragraphs 244 to 246, 249 and 250 of the instant Judgment;

b) to Beatrice Baruet, €57,995.00 (fifty-seven thousand nine hundred and ninety-five euros), in the terms set forth in paragraphs 247, 248 and 250 of the instant Judgment;

c) to Sarah Vachon, €12,427.00 (twelve thousand four hundred and twenty-seven euros), in the terms set forth in paragraphs 247, 248 and 250 of the instant Judgment;

d) to Jeanne Camila Vachon, €12,427.00 (twelve thousand four hundred and twenty-seven euros), in the terms set forth in paragraphs 247, 248, 250 and 275 of the instant Judgment;

e) to Lisianne Judith Tibi, €12,427.00 (twelve thousand four hundred and twenty-seven euros), in the terms set forth in paragraphs 247, 248, 250 and 275 of the instant Judgment; and

f) to Valerian Edouard Tibi, €12,427.00 (twelve thousand four hundred and twenty-seven euros), in the terms set forth in paragraphs 247, 248 and 250 of the instant Judgment.

16. The State must pay Daniel Tibi €37,282.00 (thirty-seven thousand two hundred and eighty-two euros), for costs and expenses incurred in the domestic proceeding and in the international proceeding before the inter-American system for the protection of human rights, in the terms set forth in paragraphs 268 to 270 of the instant Judgment.

17. The State must pay its pecuniary obligations in euros.

18. Payments for pecuniary and non-pecuniary damages and costs and expenses ordered in the instant Judgment may not be affected, diminished, or conditioned by current or future fiscal reasons, as set forth in paragraph 277 of the instant Judgment.

19. The State must carry out the measures of reparation and the reimbursement of expenses, as ordered in the instant Judgment, within one year of notification of the Judgment, save when different deadlines are set.

20. The Court will oversee comprehensive compliance with the instant Judgment. The case will be closed once the State has fully complied with the provisions of the instant ruling. Within one year of notification of this Judgment, the State must submit its first report to the Court on the steps taken to comply with this Judgment.

Judges García Ramírez, Cançado Trindade, and Salgado Pesantes made known to the Court their Separate Opinions, attached to this Judgment.

Drafted in Spanish and English, the Spanish text being authentic, in San José, Costa Rica, on September 7, 2004.

Sergio García-Ramírez
President

Alirio Abreu-Burelli
Oliver Jackman
Antônio A. Cançado Trindade
Cecilia Medina-Quiroga
Manuel E. Ventura-Robles
Diego García-Sayán

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Judge ad hoc

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So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

SEPARATE CONCURRING OPINION OF JUDGE SERGIO GARCIA-RAMIREZ IN THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF TIBI v. ECUADOR, OF SEPTEMBER 7, 2004

I. Meaning and significance of the rulings of the Inter-American Court

1. In this Separate concurring opinion that I am attaching to the Judgment on preliminary objections, merits and reparations in the CASE OF TIBI V. ECUADOR, issued by the Inter-American Court on September 7, 2004, I intend to refer to several issues addressed in said ruling, as well as to the meaning that the judgments and advisory opinions of the Inter-American Court of Human Rights have, and the significance they should have. In 2004, this Court is completing twenty-five years of work since it was established on September 3, 1979, in reliance on the American Convention on Human Rights, signed in San Jose, Costa Rica, on November 22, 1969. As I examine those specific issues –especially due process and conditions of detention- I will make remarks and state arguments that are an approximation to the jurisprudence of the Inter-American Court over these years.

2. As has often been said, inter-American jurisprudence is not and does not intend to be a new and ultimate instance in proceedings begun and heard under domestic venues. Its role is not to review domestic proceedings, the way this is done under domestic venue. Its purpose is a different one: to address the acts and situations generated in the national framework from the standpoint of the provisions of the international treaties that give the Court jurisdiction over adjudicatory matters, especially the American Convention on Human Rights, to issue –on this basis- guidelines with a broad value as indications for the States Party to the Convention, in addition to their mandatory efficacy –the binding nature of the judgment, as an individualized legal norm- regarding the State that is formally and materially a party to the proceeding.

3. In a certain sense, the task of the Court is similar to that of the constitutional courts. The latter examine the challenged acts –decisions with a general scope- in light of the legal standards, principles, and values of the basic laws The Inter-American Court, in turn, analyzes the acts that are brought before it in connection with the legal standards, principles, and values of the treaties on which it bases its adjudicatory jurisdiction. In other words, if constitutional courts oversee "constitutionality," the international human rights court decides on the "conventionality" of those acts. By controlling constitutionality, the domestic bodies seek to ensure that activities of the public authorities –and, perhaps, of other social agents- are in accordance with the order that is inherent to the Rule of Law in a democratic society. The inter-American Court, in turn, seeks to ensure that this activity is in accordance with the international order set forth in the convention

that founded the inter-American jurisdiction and was accepted by the States Party exercising their sovereignty.

4. Just as a constitutional court could not and does not intend to bring before it all cases in which the constitutionality of acts and legal standards is questioned, an international human rights court does not have the aspiration –and has it even less so than the national body- of solving a large number of contentious cases that reproduce violations previously brought before it, and on whose essential themes it has already issued judgments that express its criterion as the natural interpreter of the legal standards that it has the responsibility of applying, that is, the provisions of the international treaty invoked by the litigants. This design, which clearly expresses a function of the Court, also suggests the characteristics that matters brought before it may have.

5. It would be impossible, in addition to undesirable, taking into account the ancillary or complementary nature of international jurisdiction, for it to receive a large number of contentious cases on identical or very similar facts, to reiterate, again and again, the criteria set forth in previous contentious cases. We must insist that the States themselves, guarantors of the inter-American human rights system, are at the same time essential components of this system, in which they participate through a political and juridical will that is the best guaranty of the true effectiveness of the international system for protection of human rights, based on the effectiveness of the domestic system for protection of those rights.

6. Therefore, in the logic of the system –and of the institutional aspirations of the Inter-American Court, as a component of the system- there lies the idea that the rulings of the Court must be reflected, in the manner and according to the terms set forth in domestic Law -as the bridge between the international and the national systems- in domestic legislation, in domestic jurisdictional criteria, in specific programs in this field, and in the daily actions of the State regarding human rights; they must, ultimately, be reflected in the national experience as a whole. This –a power to influence, rebuild, guide, inform- is what explains and justifies, ultimately, an international venue that does not have the possibility or the capacity to hear thousands of cases of identical litigation, reproducing both reasoning and rulings that have been set forth and reiterated previously.

II. Patterns of violation

7. The Inter-American Court of Human Rights has ruled on facts that constitute, in a way, a traditional pattern of violation of rights. Recently, the Court has addressed different themes, on the border between the so-called first generation and second generation rights, or issues pertaining to the former that had not been brought up before and that enable opening new areas of jurisdictional reflection, which in turn propose new human rights frontiers in the Americas, in accordance with the interpretation given by the Inter-American Court.

8. Despite the gradual appearance of themes that are different from those covered during the eighties and even during the nineties, in the broad set of cases brought before the Court, some that are “traditional” in nature persist. Not only have they not declined or disappeared, as would have been desirable and seemed natural, but they have undertaken new expressions or have

continued to be present, and this constant presence expresses the need, which I referred to above, to review the state of these issues under domestic venue to adjust it, without more ado, to international standards. The international court does its part as best possible when it identifies the major issues in the contentious cases that it hears or in the opinions that it issues and generates the jurisdictional doctrine contained in its considerations. The following stage must be carried out by the domestic venue, not only due to its legal competence but –especially- due to the real ability that it has to encompass all the problems that arise in the domestic sphere.

9. Those international standards do, in fact, coincide to a very large extent, or perhaps completely, from the standpoint of the legal provisions in force, with the purpose and the mandates reflected in the supreme national legal orders, and even in much of the secondary legislation.Therefore, it is necessary for the political and juridical will of the States to once and for all suppress the most frequently observed violations and usher in the new stages of protection of fundamental rights. Otherwise, we will continue to face the same facts that abridge those rights, arguing the same points and issuing the same opinions or rulings, without this penetrating our nations' life as deeply as it should.

III. Criminal justice and human rights

10. In view of these considerations, it seems to me that it is useful to discuss two central themes in the adjudicatory case on which the Court decided in its September 7, 2004 judgment, and to which I attach this Opinion. These are themes that the Court addresses once again, in a manner and in terms that have already been expressed before, regarding its more significant aspects, in other rulings issued by means of adjudicatory decisions or advisory opinions. I am referring to due legal process in criminal matters –but also, pursuant to the Court's jurisprudence, in other types of contentious issues- and to the system of institutions regarding deprivation of liberty, whether preventive or protective, whether punitive or executive, both for adults and for minors. Proceedings and prisons have been, are and perhaps will be –although we hope not- the scene for the most reiterated, grave, and notorious violations of human rights. It is time to look at those scenes, in regards to which there are constant complaints but insufficient reforms, to radically modify them.

11. Both themes have certain common denominators. One and the other are, as has often been said, a crucial space for effective exercise of human rights. Strictly speaking, so-called criminal justice –or, in less pretentious terms, the penal system- is a critical area for human rights. In it, those rights are at very grave risk, and within it they are most severely affected, in a manner that is painfully frequent. That is due to the fact that criminal prosecution places the State, which has greater strength because it has the monopoly of –supposedly legitimate- violence, and has the greatest capacity to intervene in people's lives, with the individuals who are indicted, prosecuted or convicted, who are identified as "enemies of society" and who certainly do not have, even in the more developed legal systems, the juridical and material strength that the State does have. As I have underlined, the epigraph of some proceedings is eloquent, when it states the identity of the contenders and suggests the relative weight of each one on their pan of the scale: The State versus X, The Republic against Y, The King against Z, and so forth. There could hardly be a better basis for the balancing or equalizing trend that is a characteristic of modern proceedings.

12. It is therefore precisely there, in the domain of criminal justice, where it is most necessary to "work" on the issue of human rights –without neglecting other areas- through categorical proclamations, imperative legal standards and inflexible practices, all of them ensured through the vigor and effectiveness of guarantee instruments in suitable hands: competent, independent, impartial, whose strength and integrity ensure effective exercise of rights in a terrain that is especially favorable to violations. This process of ensuring essential, radical, irreducible rights, also runs into the problem of public perception running astray due to posing of false dilemmas that oppose the requirements of public security to the "weaknesses" that protection of human rights allegedly entails. Authoritarian trends that threaten the proceedings and the prisons, although not only them, circulate through the passageway opened by false dilemmas.

IV. The "guarantor" State

13. In the judgments in the Tibi and the "Juvenile Reeducation Institute" cases, as well as previously in the rulings on the cases of Hilaire, Constantine and Benjamin (June 21, 2002 judgment) and Bulacio (September 18, 2003 judgment), and also in Advisory Opinion OC-17/02, issued on August 28, 2002, on the juridical situation and the rights of the child, the Inter-American Court has asserted the specific role of the State as guarantor regarding the rights of those deprived of or restricted in their liberty in State institutions and under the responsibility of agents of the State.

14. In criminal law, the guarantor of the interest protected by law must answer - under the form of nonfeasance -for not impeding injurious results, when the guarantor could and should have done so. The jurisprudence of the Court has included the concept of the guarantor, in terms that are conceptually close to those of the legal systems in this regard: on the one hand, the existence of an obligation that derives from a given source; on the other hand, the presence of a typical injurious result, attributed to the obligor.

15. Of course, the State must provide certain living conditions and conditions for development to all persons under its jurisdiction. To do so –specifically, though not exclusively, regarding security and justice- even constitutes a "raison d'être" of the State, and therefore a reference point to assess the justification and efficiency of public authority. Now, this obligation and the consequent responsibility become extreme and much more intense, and they are even more enforceable, with all that this entails, when those entitled to rights are at the mercy of the State –for example, in a "total institution" where everything is regulated and supervised- and cannot, on their own, exercise their rights and impede the harassment of those who abridge them.

16. In these hypotheticals there is a situation of weakness, helplessness or vulnerability, due to procedures established by the State that place the lot of the citizen in the hands of the agents of public authority. "In the instant case –reads the judgment of the Inter-American Court- it has been proven that during March and April 1996 the (accused) was subjected by the prison guards to sessions of physical violence with the aim of obtaining his self-incrimination." What protection does the inmate have, in the darkness of the jail, in a small invisible city, against guards who violate their mission?

17. If in the hypothetical of criminal nonfeasance the position of guarantor derives from the law or the contract, in that of detention it derives from a de jure situation and a de facto one, stemming from the former. On one hand, the immense restriction of liberty in procedural detention or in punitive incarceration; on the other hand, the real situation generated by this restriction. Of course, the same applies to various conditions in which the State undertakes the almost total responsibility for the exercise of individual rights and protection of human dignity: that is the case in centers where children, adolescents and youths are committed, in public security institutions that fully control the individual's activity, in health centers, especially those in charge of caring for the mentally ill, and other similar ones.

18. In my Concurring Opinion in the judgment issued in the Case of Hilaire, Constantine and Benjamin, I referred to the role of the State as guarantor, which in this matter entails: a) omitting all that might inflict on the individual privations beyond those strictly necessary for purposes of the detention or fulfillment of the conviction, on the one hand, and b) to provide everything that is pertinent –in accordance with the applicable law- to ensure the aims of the incarceration: security and social adjustment, regularly, on the other.

19. In brief, it is necessary to continue insisting on the existence of that special position of guarantor and on its consequences for the State and for the individual. This encompasses behavior of the agents of the State –who systematically abridge the rights of the inmates in the course of prison life-., through action or omission, as shown by the Tibi and Panchito López cases, to which we must add another recent, explosive situation in the Urso Branco prison, where violent deaths of inmates have continued, despite the provisional measures ordered by the Inter-American Court.

20. Reiteration of the violations, despite projects and promises, and even despite actions that will yield medium- and long-term results, led me to point out in the Concurring Opinion that I attached to the July 7, 2004 ruling on measures, in regards to conditions prevailing in the Urso Branco prison: "It is good that there be a penitentiary reform, that new legislation be enacted regarding this matter, that inmates be classified, that penitentiary institutions be modernized, that the officials who will act as guards and be responsible for sentence execution be carefully recruited, that there be adequate alternatives to prison sentences, that visits to prisoners take place under decent conditions, that there be medical care to protect the inmates' health, that schools, workshops and work units be set up. All this, and more, is absolutely indispensable, because it reflects current standards regarding deprivation of liberty, both preventive and penal, a measure that currently is severely questioned. – But none of this, which must be done as soon as possible, can substitute immediate adoption of the necessary measures to avoid a single additional death in the Urso Branco Prison."

V. Right to fair trial and judicial protection

21. In criminal Law there is concurrence of criminal offenses, which generally entails a more severe applicable sentence. For this, an assessment of the overall situation is the basis for a ruling. Something similar happens in human rights Law. Rarely is there an isolated abridgment of a juridical right that is protected by a precept of a convention. There are many examples of

this in the jurisprudence of the Inter-American Court. Abridgments are usually multiple, beginning with a single unlawful conduct (as in the case of forced disappearance: violation of various rights, as the Court pointed out already in its early judgments: thus, in the judgment on the merits in the Velásquez Rodríguez case, on July 29, 1988) or, in the course of successive facts or acts, in close succession. It is perfectly possible that during a criminal prosecution proceeding, which may take place rapidly, there are various violations: arbitrary detention, torture, irrational severity of preventive detention, breaches of due process, flaws in the judgment. Nevertheless, each one has its own specificity.

22. Things may have been seen otherwise –but at the time there was no protection of human rights as there is today- when there was "aggravated" capital punishment, that is, one carried out with major use of means to carry the suffering of the convict to the extreme. There are numerous examples: such is the case of Damiens, referred to in the first pages of Discipline and Punish. Thus, torture was part of punitive death, it was incorporated into this punishment, which did not separate purgatory torment, on the one hand, and fulminating death, on the other. Even so, it is possible to naturally establish a distinction between the suffering inflicted and the death caused: the former violates –as we say today, in the language of Article 5 of the American Convention- the right to humane treatment, and the latter violates the right to life recognized in Article 4.

23. There is, therefore, a constellation of events, with barely a break in continuity, if it exists at all, which the judge must observe, analyze, and decide upon. This will be the starting point for establishing the responsibility of the State and the consequences in accordance with the violations committed. The subsequent finding that establishes its responsibility will take this set, not only each of its parts, into account, and the conceptual separation will not deny the relations that exist among certain legally protected interests, the respective rights, and the events in which the former were harmed and the latter abridged.

24. The above can be seen in various points, and especially in the analysis of Articles 8 (Right to Fair Trial) and 25 (Right to Judicial Protection). In both instances, they refer to effective judicial protection, in accordance with conditions established in the course of protracted evolution regarding this matter. Deficiencies regarding due process (abridgments of Article 8) are combated with judicial remedies (the instrument of Article 25), in which new violations of due process may in turn occur, now in the venue of the protective proceeding established by the latter precept. Of course, it is also possible that this same instrument -habeas corpus, amparo and similar means- may be invoked to protect rights contained in all or almost all the provisions of the American Convention.

25. There is, therefore, a borderline that persists between legally protected interests and rights, in their respective hypotheticals, that may be analyzed separately. This judgment does that, for example, inasmuch as it studies abridgment of Article 25 from the standpoint of the violation of Article 7(6), regarding control over lawfulness of the detention. I do not set aside the hypothetical, more complex than the one I mention now, that there may be a distinction between the guarantees judge –or one acting as such-, who acts in the criminal trial itself, to ensure respect for legality regarding evidence and precautionary measures (which is another way to comply with the mandate of Article 7(6)) and the judge who oversees the lawfulness or constitutionality of actions by the authorities, established as a tribunal that is external to the

criminal proceeding, and to whom one resorts based on Article 25 of the Convention and on the numerous domestic provisions that regulate this matter.

26. Regarding this same point, we must take into account that, under the terms of Article 27(2) of the Convention, there is the possibility of suspending the right to fair trial set forth in Article 8, but this possibility does not exist regarding those guarantees that are indispensable for the protection of the substantive rights whose suspension is forbidden, and these are precisely those mentioned in Article 25, as the Inter-American Court has pointed out in advisory opinions regarding amparo and habeas corpus and in adjudicatory matters in which this criterion has been applied. In this regard, we must consider, especially, Advisory Opinions OC-8/87, on "Habeas Corpus in Emergency Situations," of January 30, 1987, and OC-9/87, regarding "Judicial Guarantees in States of Emergency," of October 6, 1987. There is doubtless a need to take into account the requirements of due legal process when assessing compliance with Article 25. It would be unacceptable for the protection offered by this Article to be diminished or cancelled through procedures that disregard indispensable procedural rights before the habeas corpus or amparo jurisdiction.

VI. Due process.

27. The Anglo-Saxon term due process -translated in some countries as "garantías esenciales del procedimiento" [essential procedural guarantees]- is one of the most formidable tools for protection of rights. It is also, in itself, a right and a guarantee for the defendant. It enables or realizes effective judicial protection. It involves access to formal justice, such as a hearing, evidence, and pleadings, and to material justice, as the means to obtain a just judgment. It entails clean and balanced use of the arms that both the accuser and the defendant are allowed to use, as well as objectivity, serenity, and the will of the court to give to each one what is due; in brief, fair trial. All these concepts, each of which has been characterized and positioned in the domestic legal systems, have a common denominator in their origin, development, and objective, and they come together under the concept of due process.

28. We had gained much ground in the endeavor for due process. The Court has referred to it –thus, for example, in Advisory Opinion OC-16/99, on "The right to information on consular assistance," of October 1, 1999, to which I added a separate Opinion in which I analyzed this point- as a system of guarantees with expansive power. The static aspect of due process, sheltered in certain acts, rights, and guarantees that are non-revocable, has been reinforced by the modern dynamics of this concept: a constant progress that has brought with it, alongside consolidation of democracy and the Rule of Law, new rights and emerging guarantees, which together constitute the more advanced idea and practice of due process.

29. This evolution led to the addition and blossoming of the right to silence, timely assistance by defense counsel, the right to immediate information on the charges that give rise to the proceeding, restrictions on preventive imprisonment, judicial guarantees in adoption of precautionary measures or in conduct of certain investigative acts, the right to information on consular assistance for the benefit of foreign defendants, the public and oral nature of the proceeding, discredit of evidence based on confessions, to mention just a few breakthroughs that have become a part of due process, surpassing its original nucleus.

30. I stated that we had gained this ground, yet now we must note, once again, that no progress is definitive –the struggle for the law, in more than one sense, is the only possible banner in this field- and that a disturbing erosion of human rights has begun to take place in the scope of the proceeding. Persistence of old forms of crime, the appearance of new expressions of crime, systematic attacks by organized crime, the extraordinary virulence of certain extremely grave crimes –such as terrorism and drug trafficking- have determined a sort of "exasperation or desperation" which is ill advised: it suggests setting aside progress and going back to systems or measures that already demonstrated their enormous ethical and practical flaws. In one of its extreme versions, this has generated phenomena such as the "guantanamonization" of the criminal proceeding, recently questioned by the jurisprudence of the Supreme Court of Justice of the United States itself.

31. There is often leeway given to practices and, worse yet, to legal provisions that derogate rights and guarantees in the framework of the struggle against very grave crimes that seem to "justify" this type of regressions. The consequences of this, which by the way has not managed to prevent, impede or reduce these crimes, is clearly visible in broad areas of contemporary procedural experience. Not only do these incorporated provisions construct a special or exceptional procedural system, alongside the regular procedural system with its guarantees, lacking in the special one. Obviously, this also leads to the appearance and strengthening of a devastating practice that resorts to all kinds of arguments to "legitimize" the gravest violations. These often remain in shadows; sometimes they appear before the eyes of public opinion and of the courts, as in the case judgment to which I attach this Opinion.

VII. Presumption of innocence

32. The idea of "presumption of innocence" –or better, perhaps, of a "principle of innocence or non-guilt," for the benefit of those who object to the "presumptive" nature of this concept- has existed for two hazardous centuries. One could hardly find a principle that is more consistent with democratic criminal justice, which entrusts the State as accuser with proving the allegations and the State as judge with deciding on them. Our American Convention embodies the principle: "Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law" (Article 8(2)). The Inter-American Court has also stated in its November 12, 1987 judgment on the Suárez Rosero case, and reiterates it in the judgment on the instant case, that the principle of presumption of innocence is the foundation for the right to fair trial. The latter is, in fact, built around the idea of innocence, which does not block criminal prosecution, but rationalizes and channels it. Historical experience supports this approach.

33. This principle is in the heading of the provisions on defendants, in the 1955 Standard Minimum Rules for the Treatment of Prisoners: "Unconvicted prisoners are presumed to be innocent and shall be treated as such" (rule 84.2). And principle 36 of the body of provisions for the protection of all persons under any form of detention or imprisonment, in 1988, sets forth: "A detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence."

34. Of course, I am aware of the obstacles to full application of this presumption or principle. They are, undoubtedly, the often debated precautionary measures in the criminal proceeding, first and foremost preventive incarceration, to which there have always been objections.Another obstacle is the very fact that the criminal procedure is based on the opposite idea: reasonable evidence of criminality, probable criminal liability, the existence of data that provide grounds to believe that a given individual participated in a specific criminal act, and so forth.

35. Nevertheless, this presumption or this principle is an extremely valuable reference for the construction of the proceeding, to address doubts that may arise during the proceeding, to recover guarantees and to reduce disproportionate interference. The nature and outcome of the procedural acts and of the proceeding as a whole are very different when the defendant is treated "as if he were guilty," which is a trait of the inquisitorial system, and when he is treated "as if he were innocent," which is a trait of the accusatory one. Ultimately, what the presumption or principle of innocence seeks is to exclude prejudice –advanced, general and condemnatory judgment against the defendant, without being based on the evidence of the facts and of the liability- and to avoid advanced punishment based on vague appearances.

VIII. Arbitrary detention

36. The case that this Opinion refers to shows, once again, the great flaw at the outset of the proceeding, or at least the one that most often and overwhelmingly victimizes the defendant –the one "presumed innocent"- and weighs on the rest of the data of the prosecution by the State: arbitrary detention. It is not easy, now, to find legal standards that do not address the lawfulness of this very significant, delicate, and devastating measure. Efforts have been made to surround it with conditions: that detention must be based on the law, that it must be conducted by a competent authority, that it must be ordered by a judicial authority, that it must be recorded in writing, that the detainee must be presented. This catalogue of good intent, duly reflected in the fundamental laws, collides with frequent practice. One bad day two agents detain a person driving his car down a city street. They say that he is required for "migration control." They take him, without informing him about his rights or of the charges against him, to a prison six hundred miles away from where he was detained. He remains there twenty-eight months. Ultimately, his trial will be discontinued, if only provisionally.

37. The Inter-American Court's jurisprudence also addresses this problem. Most, if not all cases of extra-legal execution, torture, forced disappearance, irregular proceedings, etcetera, etcetera, were preceded by a detention in which there was not even a remote respect for conditions that legitimize detention and that enable a distinction between an action of the State based on the Constitution and the kidnapping of a citizen, committed by "law enforcement" agents who impose their personal will on the general will reflected in the legal principle.

38. Rather than being unheard of, cases in which there was an arbitrary detention seem to be the majority –or at least they are very numerous and evident. From then on, the proceeding can become a labyrinth that is full of traps, and which certainly is not in accordance with the idea of a legal proceeding –an "ethical," in addition to juridical, idea-, associated with the Rule of Law and which is, in fact, one of its most eloquent expressions or one of its most revealing negations.

Describing this prosecutional labyrinth –as can be seen in the case that the Inter-American Court has decided on in this judgment- evokes in an absolutely natural manner the vicissitudes of defendant Joseph K, whom Kafka allows to wander around the uneven ground of the proceeding, without knowing what it is all about and where he is being taken.

IX. Information on the charges

39. Helplessness in the proceeding itself –against which we must strive every day, with infinite patience and perseverance- is shown by attacks against certain rights and guarantees that constitute the democratic, civilized, evolved version of prosecution. One of these is the right to information on the charges against the defendant, which are the basis for the State's action; this information goes hand in hand with the right to timely defense and that of the accused to remain silent. We cannot comprehend how these rights can still be systematically excluded, despite the accrual of constitutional provisions, legislation, and provisions of conventions, as well as the jurisprudence that asserts them and the political discourse that proclaims them.

40. What should be is set forth in Article 8(2)(b) of the American Convention: the right to "prior notification in detail to the accused of the charges against him." And also, specifically, in principle 10 of the aforementioned set: "Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him." However, the distance between the principle and the facts still shows up with a disquieting regularity in the cases brought before the Inter-American Court.

41. As regards the moment in which the right to information on the charges and the right to defense must become effective, the judgment issued by the Inter-American Court in the Case of Tibi is once again explicit: at the time of detention and before the accused renders his first statement before the authorities. It cannot be otherwise. This had already been asserted in the enlightening North American jurisprudence based on the Miranda formula, often defended as well as criticized, and it has been the opinion of the Court, in regards to a specific topic, when it issued Advisory Opinion OC-16/99. The former, citing significant precedents, asserts: "The person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation". In a similar vein, OC-16/99 asserted the right of foreign detainees to receive information on their right to seek and receive consular assistance of the State of which they are nationals, pursuant to the Vienna Convention on Consular Relations.

42. This cannot be otherwise, if we want rights to serve the purpose for which they are enacted and to have the effect attributed to them, which of course is not impunity, but justice. When we say "before the statement", we mean: prior to any statement before any authority –not only the Public Prosecutor's Office, not only the court- on which the outcome of the prosecution and, therefore, of the accused and, ultimately of justice, which is put to a test in each concrete case, may depend. It is very well known that, despite statements and efforts to the contrary, the first statement usually defines the direction of the proceeding and determines its outcome.

X. Judicial control

43. The Judiciary has been conceived, essentially, to ensure the rule of law in social relations: those among private persons and those between political authorities and citizens. It is the "guarantor power" par excellence.This is the reason why those who exercise judicial functions are required to have so many qualities, and even virtues –above and beyond those usually required of those exercising other types of authority, including those who act as representatives-, and this is also why private individuals are promised access to justice by means of independent, impartial, and competent tribunals. Procedural immediacy is party to this promise. The examining judge, the guarantees judge, the judge who hears the case, have this substantive function. This is what the defendant expects, for the hands of the police or of the public prosecutor not to be the only ones guiding his fate from the moment when the criminal controversy arises.

44. However, many circumstances hinder fulfillment of this promise, inherent to the Rule of Law and to juridical certainty of citizens, who believe they are protected by it. We must note how carefully the constitutional and international texts stipulate that the detainee –whose capture must be based on a court order, unless there is flagrancy- must be brought as soon as possible before a judge, and not before any other agent of authority, for the judge, with all the juridical and ethical authority of his mastery of the law, to ascertain whether the conditions that make his detainment legitimate have been met, whether said detainment should continue, and whether it is appropriate to take the following steps along the harsh path of the proceeding.

Any omission of this appearance before the judge impedes access to justice, renders the defendant helpless, alters the juridical project of the Rule of Law, transform lawfulness into arbitrariness. In many cases –and certainly in the one that gave rise to the judgment to which I attach my own Opinion- this has not been so: the accused does not meet his judge until the proceeding is well advanced; there is no immediacy; individualization becomes rarified; disclosure is lacking. Can we justify that the first judge a citizen meets is the justice of an international court, when it is not an international court but rather domestic justice that must be the front line –the indispensable, decisive, fundamental front: this we must underline- in the protection of subjective rights?

XI. Amparo

45. Article 25 of the American Convention establishes a precious guarantee, which is exactly, the "guarantee of guarantees," the "right that serves all rights." This guarantee, this right, is the culmination of a protective system that ultimately places its expectations in a means of defense that all may resort to and that all may satisfy. This provision states that "(e)veryone 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 (...)." Likewise regarding this point and apropos of the judgment in the instant case, but also in a large number of cases –actually, all those heard by the Inter-American Court-, we must ask ourselves about the "effectiveness of effective recourse," about the simplicity and promptness that define it in the strict and sufficient terms of the Convention, which does not go much farther than the point reached by many national constitutions.

46. Is the recourse foreseen truly “effective,” in the sense that it enables a real defense of fundamental rights, always and under all circumstances? Is it truly “simple”, in that it can be known, understood, used by any citizen –since it was established to protect any citizen- who needs that protection? Is it truly “prompt,” in the sense that it ensures very rapidly, not after months or years, protection of a right whose protection admits no delay without causing severe and irreparable damage to the person entitled to that right? Has an effective system of remedies been built, overcoming unnecessary complexities, useless technicalities, inadmissible obstacles? The panorama that the Court usually has before it does not attest to this, as shown by the frequency with which it finds violations of Article 25. Observance of the latter would remove from its venue the vast majority of matters heard by the international court.

XII. Defense

47. Defense of the accused continues to be in a predicament. As far as I know, there is no domestic legal order that does not stipulate his right to defense against the charges against him, as well as the right to have legal counsel to assist him in the difficult period of prosecution, when his most valued interests are at stake. This is, even, a personage that integrates, as has been said, the procedural personality of the accused. Yet numerous cases that have been heard by the Court (and thousands more awaiting their turn: not to come before the inter-American court, but to benefit, through domestic legal systems and venues, from the progress set forth in international instruments) in which there has been no defense at all, or it has been nominal: distant and foreign to the accused, inactive, indifferent, or lacking a real possibility and genuine opportunities to fulfill a mission that is recognized, but not fostered.

48. Reform of the proceeding, based on the requirements of the national Constitutions and of international instruments, and providing full access to justice, must establish a true and effective defense system that strives to ensure the rights of the accused, with the same perseverance and consistency that Inhering recommends that we struggle for the law. Otherwise, of what use is this auxiliary means of the accused, which is also, in the best sense, an auxiliary to justice? This urges us to move toward new means to ensure access to justice. Traditional court-appointed counsel -usually overloaded with cases and with officials whose work conditions are not always, or are only rarely, appropriate to effectively carry out their responsibility- can hardly be sufficient. The problems of court-appointed counsel have been evident in several cases brought before the Inter-American Court.

49. Having an appointed counsel does not, in itself, ensure defense during the prosecution. This has been noted, very often, in the proceedings before this Court. If it is not, then, just any –nominal- defense, bur rather true defense –as the satisfaction of any human right should be-, we should specify its characteristics, which would require independence, sufficiency, competence, gratuitousness, completeness and timeliness, and provide the means for it to exist. Otherwise, protection of the human rights of the accused will, once and again, stumble on the deficiencies of the defense, ultimately reflected in violation of the law, poorly disguised by apparent exercise of this right, one that does not stand up to even the slightest analysis.

XIII. Sufficient evidence

50. Another point that stands out in the Judgment to which I attach this Opinion is what we might call "sufficient evidence." I do not confuse probatory sufficiency for an arrest warrant with that for a definitive judgment, respectively. Obviously there is a difference. Nevertheless, all acts that involve an exercise of State power and procedural and/or criminal restriction of liberty must be based on "sufficient evidence." There can be no action without any evidence, and there should be no action based on weak evidence. Procedural law must emphasize this point, taking into account that, clearly, the proceeding is a probatory channel and its results depend on gathering, admission, and assessment of evidence. There can be no issue more delicate than this one as regards legislators' reflection and justices' performance.

51. Confession –whose excessive credence fosters torture; we see this in the instant case- was once seen as the "queen of evidence." Fortunately, that is no longer so. Yet still today certain legal systems –or certain investigative and procedural practices- have filled this niche with devotion regarding the statement of the accomplice, of the fellow traveler along the road of crime, of the informant who seeks exoneration from liability or exemption from punishment by throwing the former or directing the latter toward another person, who may be guilty or innocent. It would be best if the conviction that the co-perpetrator's testimony, in itself, is insufficient, spread and became the rule.

52. Article 108 of the Criminal Procedures Code in force in the State when the facts took place, establishes that "in no case will a judge admit the co-defendants as witnesses." This provision may be extreme, but it states a commendable concern. In the case examined, the apparently coerced statement of a hypothetical participant in a crime, who was also the singular witness and only means of "certainty," unsupported by other evidentiary instruments, determined the prosecution and protracted incarceration of the accused, contrary to logic and even to the legal standard in force at the time of the facts brought before the Inter-American Court. Said prosecution and incarceration were groundless, as would be established years later.

XIV. Reasonable term

53. The issue of reasonable term also comes up in this case, as it has in many others. It is, certainly, one of the issues that have been examined most often by international human rights jurisprudence. It addresses the difficult problem of the duration of preventive detention, in addition to that of the duration of the proceeding as a whole. Justice delayed, according to the well-known adage, is justice denied. It is bad when the person awaiting that justice, which moves hesitantly and arrives very late, is deprived of his liberty; worse yet when the deprivation of liberty is an arbitrary one.

54. The Inter-American Court, in consonance with the doctrine of the European Court, has insisted on the aspects that must be taken into account to establish, in a specific case, whether there was an unacceptable delay, in other words, whether there has been disregard for the rule of the reasonable term: complexity of the matter, procedural initiative of the interested party, and conduct of the court (or whoever conducted the proceeding, as this point may be examined going beyond criminal prosecution: insofar as there is a proceeding to decide on rights that have been denied, claimed or in doubt).

55. The instant case has addressed the dies a quo and the dies ad quem of the judgment for purposes of reasonable term. It is often said that the proceeding begins when the charges are filed and it concludes when there is a definitive judgment, and that the time between both moments, with their characteristic acts, is subject to measurement under the concept of reasonable term. In principle, this specification may provide guidance and even be sufficient. However, to arrive at conclusions that respond to the concern that is at the basis of reasonable term, we must examine the characteristics of each national prosecution. The panorama is not homogeneous. Therefore, it suggests different solutions, all of them seeking to address the need for the time that an individual is subject to a criminal proceeding –which is a time of reduction, compression, suspension of rights, despite arguments, based on technicalities, that it is otherwise- to truly be the least possible time, precisely to avoid prevalence of uncertainty and to avoid affecting, beyond what is strictly indispensable, the individual's rights.

56. Saying that reasonable term begins when an individual is detained does not lead to a satisfactory solution in all cases. Actually, it may be that before that moment there has been an ongoing, protracted investigative, and even judicial, proceeding. During this proceeding, the individual was already subjected to pressure and to oppression of his rights. The lawfulness behind this conduct of the State does not in itself –so to speak- legitimize the abuse that may result from an extreme delay in deciding matters during the initial stages of the procedure. That is why it is good that some legal systems have established a certain term –which may be more or less broad- to exhaust an investigation and to decide whether a case will be brought before a judge, when the investigation has been conducted by the Public Prosecutor's Office, or before the court that hears the case, when the investigation was conducted by an examining judge.

57. It is also possible for the proceeding to take place without the accused being subject to preventive incarceration, whether because he receives the benefit of conditional freedom, or because in his case the law does not allow precautionary measures that restrict liberty. But even in these hypotheticals, it is possible for the prosecution to last an unreasonable amount of time, even if, when it ends, the "alleged innocent" who is accused has not suffered preventive incarceration.

58. We must also pay attention to situations –as in the instant case- when the proceeding enters into a sort of fixed-term "limbo", as well as others in which the procedure is suspended –whether in the investigative phase or during the trial- for an indefinite time, which only concludes when the statute of limitations enters into effect, but this can be interrupted by acts that seek only said result. It is not always a matter of the old acquittal of action, generally reproved, but rather a sort of "new opportunity" for investigation that hangs like a sword of Damocles over the defendant.

59. Temporary or provisional stays, debatable in themselves, must be foreseen and used with great restraint and, I would add, also with great reserve or reticence.This parenthesis of legal non-definition serves justice poorly. The State must rigorously and scrupulously pursue the investigation to open a proceeding, not trust that there will always be a "second opportunity" to correct errors, gaps or flaws of the initial investigation, and while this opportunity comes and the State takes advantage of it –if it does occur and the State does in fact take advantage of it- legal security is suspended and justice takes a vacation.

60. We must also review the dies ad quem. We say that measurement of the reasonable term extends until the definitive judgment. Very well, but only in principle. When measuring that term, we must take into account the second instance, when there is one, which may last several months, and sometimes several years. Should we not, then opt for the unappealable judgment, which is the definitive one that cannot be challenged through regular means of recourse? Of course, these measurements must be applied in light of the specific case and taking into account the aspects that European jurisprudence has outlined and that inter-American jurisprudence has adopted, as I mentioned before: complexity of the matter, strategy of the interested party, conduct of the court.

XV. Preventive detention

61. Every time the Inter-American Court examines matters such as those of the Case of Tibi, the problem of preventive detention comes up. Certainly, it can arise in connection with reasonable term, which in said conditions should be especially strict and restricted, but also in connection with the very justification of this precautionary deprivation of liberty. Beccaria deemed it to be the punishment before the judgment, and expression that shows the strange nature of preventive detention and its debatable justification. If it is only based on practical reasons (rooted in the inability of justice to find a substitute that at the same time ensures development of the proceeding and security of participants in it, and that enables re-floating of the presumption of innocence), clearly there is a need to contain and contract it: for it to truly be the exception rather than the rule.

62. Despite doctrinal consensus and public discourse on the indispensable reduction of preventive incarceration –which would be another expression of the "minimal" nature of the criminal system in a democratic society, now not only regarding the legal definitions and the punishments, but also regarding the instruments of the proceeding-, what has actually occurred is something different. In our countries preventive detention is liberally applied, in association with systems of prosecution that foster slowness of the proceeding. The number of unconvicted prisoners is very high, as the Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), headquartered in San José, Costa Rica, as well as the Inter-American Court, have highlighted. A major part of the effort to further the reform of criminal prosecution –not, incidentally, a "blackboard reform" that functions in the classroom and the seminar, but not in the intractable reality- must have the objective of drastically reducing this army of accused –in other words, "alleged innocents"- who are often a greater number, in the prisons, than their already convicted companions in captivity.

63. Reference to this measure allows us to move ahead in the discussion of other topics that stand out in the set of facts and, of course, in the text of the judgment in the Case of Tibi. Imprisonment was, first, an instrument of retention while the proceeding took place and a judgment was issued. This is the stage reflected in the well-known characterizations of Ulpianus, the Seven-Part Code, and Beccaria himself, already mentioned above: it sought to secure, not punish, the accused, while the trial took place and the judgment was issued. Of course, this careful and compassionate intention was always contradicted by reality: imprisonment is imprisonment, despite any technical distinctions.

XVI. The state of prisons

64. Despite the abundant literature regarding official deprivation of liberty, the most disquieting matters that have persisted throughout the history, a long history, of this means of prevention and punishment, are in plain view, with all their obvious problems. That literature encompasses not only the accounts of prisoners and witnesses of captivity, the studies of criminologists and specialists in penitentiary matters, and critical interpretations, but also, most exuberantly, the explicit intentions in government programs and projects, as well as abundant and detailed provisions: from constitutional laws to circular letters, edicts, and regulations that announce one of the most often proclaimed and least fulfilled endeavors: penitentiary reform. A reform that goes beyond public statements and resolutions to enter, as it must and is expected to do, the prison aisles, the corridors, the cells and the dungeons that still, despite everything, are a widespread trait of the geography of prisons.

65. Criminal and penitentiary congresses of the 19th century and the 20th century efforts, including those sponsored by the United Nations, have led to multiplied recommendations, statements, provisions, principles, and programs geared toward improving the preventive or penitentiary internment system, for minors or for adults. The First United Nations Congress on the Prevention of Crime and Treatment of Offenders (Geneva, 1955) issued half a century ago a set of rules –which I mentioned above- that have provided very useful guidance. They brought together the two trends that were in vogue: a humanitarian one, derived from classical Law –the territory of reformers-, and the therapeutic or finalist one, originating in the best ideas on social defense, without sliding into the "dangerous dangerousness." Afterwards, other documents have reaffirmed, in legal texts, the "standards" for management and treatment of inmates: for example, the aforementioned set of principles of the United Nations for the protection of all persons subject to any form of detention or imprisonment, adopted on December 9, 1988, and the United Nations basic principles for the treatment of inmates, adopted on December 14, 1990. If these are the standards, which no one rejects –setting aside, of course, frontal challenges of criminal Law and prison itself-, how has this been reflected in the reality of prisons?

66. Prison is, ultimately –less than capital punishment, but that depends on the circumstances under which each of them operates, specifically, on the dual level of prevention and execution-, an extreme act of force by the State against a citizen, legitimized by certain conditions that make it inevitable –rather than desirable or commendable- and that, at the same time, strictly define its borders. Therefore, precautionary or penal measures that entail deprivation of liberty must be rigorously based on the requirements of lawfulness, necessity, and proportionality. This must apply throughout the prosecutional function of the State: from criminal commination (substantive Law, preventive establishment of punishability) and concrete procedural matters (procedural law, ordering of precautionary measures) to execution of punishment (executory law, final judicial adjustment of the legal consequences ordered in the judgment of conviction or in the condemnatory section of a judgment that encompasses the declaratory ruling and conviction).

67. A deprivation of liberty is unacceptable if it is not set forth specifically in the law –understood as the Court has in Advisory Opinion OC-6/86, of May 9, 1986, regarding the term 'laws' in Article 30 of the American Convention on Human Rights-, if it is not truly necessary

and if it is disproportionate in regards to the unlawful act: capital punishment or life sentence for trifling crimes, an excess widely documented in historical experience and not unknown in current experience. This radical moderation of the violence exercised by the State must be reflected in the conditions of compliance with procedural precautions and execution of punishment. The Court has asserted this several times.

68. This moderation –strictly speaking, rationality- in the use of force involved in measures regarding the individual's liberty encompasses provisional measures, such as those set forth in the September 13, 1996 ruling, in the Loayza Tamayo case. The description given then continues to reflect the conditions of the detainees in many prisons. In that case, the accused –stated the ruling- "is subjected to a regime of inhuman and degrading treatment caused by incommunicado detention and by being enclosed for 23 1/2 hours a day in a damp, cold cell measuring approximately 2 meters by 3 meters, without direct ventilation, containing cement bunks, a latrine and a hand-basin... The cell has no direct lighting and is only dimly and indirectly lit from the fluorescent tubes in the corridors. She is not allowed neither a radio, newspapers nor magazines. She is allowed into the sunlight for only 20 to 30 minutes a day."

69. Of course, moderation encompasses the whole process of incarceration, including acts that may have as their objective the prevention or punishment of unlawful behavior or reduction of resistance to authority. Regarding the latter type of situation, the judgments of the Court in the Neira Alegría and Durán and Ugarte cases are very significant, in regards to containment of a prisoners' riot through a massively destructive use of explosives, which caused the death of dozens of inmates.

70. At this time of assessment of the situation of human rights in the Americas, fifty-five years after the American Declaration of the Rights and Duties of Man, thirty-five after the signing of the American Convention, and twenty-five since the establishment of the Inter-American Court, we must take note of the horrors that persist in many prisons, flagrantly violating the most basic rights of inmates. In this regard, the condition of helplessness, exposition, vulnerability that I referred to above when I mentioned the crucial role of the "guarantor" State in this field, is especially noteworthy and evident. We have only advanced a short distance from Howard's complaints, which continue to be valid two centuries and many years after the English philanthropist documented them in a couple of admirable works.

71. In several rulings of the Inter-American Court -both provisional measures and judgments on the merits and reparations- the true state of the prisons has been shown quite clearly, together with absolutely abusive treatment of the inmates, the irrational nature of punishment inflicted inside the prison walls, lack of training and extreme cruelty of the guards, impunity of the guilty ones. This is proven. The respondent parties are found responsible. And nothing happens, or very little. This situation not only breaches the commitments undertaken by signing the respective international instruments and the obligations to suppress obstacles and to adopt domestic legal measures –normative ones, yes, but also practical and effective ones in accordance with the former-, pursuant to Articles 1(1) and 2 of the American Convention, but also constitutes a source of very grave problems. Prisons are "time bombs," as has been said, and they can explode at any moment. These explosions are becoming more and more frequent or visible.

72. Those who study the criminal system and the jurisprudence of the Inter-American Court, those who resort to it seeking to examine violations, prepare a diagnosis and undertake corrective measures, may take a complete census of prison wrongs based on the items provided by the adjudicatory cases and the advisory opinions. These supplement the efforts made by the domestic constitutional courts, which belatedly sought to apply to prisons, prisoners and guards the constitutional review that should apply to all public functions and agents of the State; and the still isolated, fragmentary, and insufficient efforts of the enforcement courts, which incorporate the principle of lawfulness in this generally obscure field, in which those in charge of execution controlled lives and property, and those subject to that enforcement were "objects of the administration."

73. Just regarding recent months, and even for the session in which the judgment on the Case of Tibi was issued, we should mention, as I did above, the provisional measures ordered in regards to the Urso Branco prison, where dozens of inmates have lost their lives under very violent circumstances, or study the situations in which children and youths lived and died in the "Juvenile Reeducation Institute". The situations described by Howard and those in other accounts of prison conditions can hardly reveal more violent and censurable events than those in said "institutions," nominally geared toward social adjustment –such is the motto- of the inmates. If that is the situation in the prisons –of course, I am not saying that this is the case in all prisons-, the time has come, or rather, it came long ago, to carry out the task that this demands: immediate, in-depth, constant, rigorous reform, until the time –seemingly distant- when prisons, once welcomed hopefully, yield to other more rational and fruitful measures.

74. We need not to go very far to collect evidence of the violations that occur more and more often in prisons. Obviously, it is not merely in certain prison in a given country. This happens, clearly, in various countries –obviously not only of our hemisphere- and in many jails, which have contributed to the disrepute of preventive detention, debatable in itself, as we have said, and of sentences involving deprivation of liberty, which is nevertheless the most frequently invoked, foreseen and applied penal reaction in some places. Too much is expected of the latter, with no grounds for said expectations.

75. Reality of prisons –we must insist on the abyss that separates that reality from the ideal embodied in domestic and international standards- is far from what it would be if the States rigorously fulfilled their role as set forth in the judgment of the European Court, for example, in the Kudla v. Poland case, quoted in the judgment to which I attach this Opinion: "the State must ensure that a person is detained in conditions which are compatible in regards for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance."

76. Growing acceptance of preventive detention, on the one hand, and excessive use of punitive incarceration, on the other, have led to overpopulation in the prisons which, in turn, is another source of violations. There, one of the basic, constantly proclaimed rules of prison classification flounders: the separation of indictees –"presumed innocent" and convicts –"found guilty". This problem is evident in the case we are now discussing, as in some others there

continues to be promiscuity between adults and minors, contrary to all recommendations and rules. An expert witness who reported to the Court on this case argued –in a description applicable to many prisons in more than a few countries of our continent- that "protracted criminalization prior to sentencing is currently the most serious problem of the criminal justice system" in the State.

77. There is a great distance between the classical, dark prisons with individual cells and the promiscuous, noisy ones, but they are both devastating for the inmate. He is destroyed both by incarceration in cells, condemned by Silvio Pellico, and by the undesirable promiscuity described by Dostoyevsky. Mateo Alemán, in his "Guzmán de Alfarache", had already described the noisy, crowded prison in Seville: " a jumbled republic, a brief hell, a protracted death, a bridge of sighs, a vale of tears, a madhouse where each one screams out and treats madness as his own." At the Penitenciaría del Litoral -which is not an unheard of abyss in the landscape of prisons- there was an area, one hundred and twenty square meters, called the "quarantine," where there were "three hundred inmates sleeping on the ground," according to the statement of an expert witness. In the case we are discussing here, this promiscuous prison, without the slightest classification –disregarding constitutional provisions and international standards-, exercised its demolishing power.

78. The statement of the victim is an eloquent one and it is not contradicted by other information in the proceeding before the Inter-American Court. The respondent's plea addressed various aspects of the case, but not the prison conditions at the so-called Penitenciaría del Litoral. "One night (there) –stated the detainee- is like hell. A normal human being cannot bear it. Those who had no cells spent the time in the aisles, climbing the walls, moving from one cell-block to another and trying to steal through the cell bars. They also went into the cell-blocks to smoke crack. One could buy anything in this prison, there were drug deals, cocaine, alcohol and weapons. People went around armed." One is surprised and filled with admiration that the spouse of the accused, together with their young daughter, could bear to remain with him over the weekends at the Penitenciaría del Litoral. She visited him seventy-four times, and these must have been an equal number of anguishing episodes.

79. This case and many others have been documented, throughout the contemporary world, by literature and films that reflect the worst aspects of this "black genre." A chronicle with the suggestive title Midnight Express en Equateur was mentioned in the trial that led to the September 7, 2004 judgment. Part of what happened there has to do with principle 1 –a very well numbered principle that governs the rest- of the body of principles that I mentioned above, and which reads: "All persons under any form of detention or imprisonment shall be treated in a humane manner and in regards for the inherent dignity of the human person."

80. Precautionary and penal deprivation of liberty affect multiple rights of the inmates, and even the rights of third parties not involved in the crime, linked to the inmate by love or dependence. This is inevitable, as long as there are prisons. But it would be necessary to review penitentiary doctrine and provisions, and to ensure that the negative effects in both situations are minimal insofar as possible. However, in many cases the conditions under which incarceration is ordered and practiced are far from fostering this "minimization" of the negative effects, which would be a natural and reasonable consequence of restricted use of the penal system. Excessive

severity and unwarranted restrictions may improve the lot of those in charge of the investigation or custody of the accused. This opens the panorama of corruption in the prosecution of crimes. There are jails where everything has a price –exactly like in Howard's chronologically remote time, actually very near- and the inmate must find ways to survive.

81. Having seen the prisons through the Case of Tibi, which is only one observatory among thousands, not an exceptional, uncommon case, we must inquire about the "reasons" –allow me this expression- for prison, which is a complete confinement, under perfectly controlled or at least controllable conditions, to paradoxically entail the greatest insecurity for the inmates, always at risk of losing their lives or of suffering severe detriment to their physical safety –as shown by the reports on Urso Branco-; or the loss of their health, as happened in this case; or the absolute lack of working conditions, despite what has always and everywhere been said about the therapeutic, redeeming, adaptive virtues of work. Are these three aspects –safety, health, and work- not part of the sought-after image of the modern prison?

XVII. Protection of possession

82. The judgment in the Case of Tibi moves forward in the interpretation of Article 21 of the American Convention, which –in combination with Article 1(2) of this same instrument- refers to the property of natural persons, that is, individuals. This is the scope of subjective protection of American Convention. Now, this protection of an individual right may be exercised immediately and directly, regarding the person's ownership of rights that he or she owns exclusively, or in a mediate and indirect manner, regarding his or her participation in collective property, which absorbs – but in no way eliminates- his or her right over goods or assets, even if this right is exercised in a way that is also indirect. This can be seen in various cases decided by the Inter-American Court, each of them with its own characteristics and in its specific context: Mayagna (Sumo) Awas Tigni Community, regarding the collective rights of indigenous communities, whose property, constituted and governed by an ancestral and specific legal order, involves rights for natural persons subject to protection under the American Convention, and Ivcher, regarding the rights of an individual, whose property rights follow the path of the commercial corporate legal system.

83. In light of a case that requires an interpretation of Article 21, the Court now deems that this Article protects real rights and legitimate forms of control over goods included in the broad scope of the person's property. It is not possible to disregard –instead, it is necessary to acknowledge- the heterogeneous composition of said individual property, which includes not only the real property right over goods legally subject to it, but also those that were once called "detachments of property" -use, usufruct, right of habitation- and other expressions of legitimate possession that ordinary law protects in a manner similar to property.

84. Would the rights of a member of an indigenous community or an "ejidal" [community-owned land] group, who are not owners, strictly speaking, but who are entitled to certain rights over the land granted to the community or to the "ejido", and to the products obtained from the land, be excluded from protection of Article 21? Certainly not. This was the opinion of the Court in the Mayagna Awas Tingni case. Would the rights of an individual in regards to a commercial company which, in turn, owned a certain property, be excluded from said protection? They

would not either. This was the position of the Court in the Ivcher case. The same can be said of lawful possession, which is, in fact, the way in which many people, in our countries, exercise certain rights over realty and personalty. In the Case of Tibi, the Court has kept in mind the unequivocal fact of unchallenged possession, which in itself would merit the protection offered by the Convention to the human person's right to property, as well as the claim to property by the one in possession of the goods, and in any case the court order to deliver them. It would be a different matter if, by other means, it were possible to challenge lawful possession of goods or the perfection of the legal act from which the property right derived.

XVII. Protection of the family and life plan

85. In the Loayza Tamayo case, the Court undertook the examination of a topic that still requires further development and consolidation: the life plan. This involves more than opportunities, chances, expectations. It is linked, as we stated in this case, to reasonable goals, well-founded hopes, accessible projects, which together constitute the course for the individual's development, one that is deliberate and feasible, based on certain conditions that support and justify it. Let us add to this the possibility of a concrete decision by the person entitled to the rights that were infringed, a decision based on those factors, and not merely on suppositions, presumptions, or inferences of the external observer.

86. All this would seem to be so in the case that we are discussing. A project had been developed and its realization had begun. Apparently, all circumstances were favorable to it. It had to do with personal life, with the household community, with work, with the place where all this was developing and would develop, as well as with decisions reached by the adult members of the family. All of this was destroyed, abruptly and damaging many lives, due to the facts in violation of the Convention, heard by the Inter-American Court. This life plan was destroyed and another, unwanted life course appeared. This has been taken into account in the decision on reparations, which nevertheless cannot reinstate said project. This, while desirable, is not feasible in the framework of the instant case.

87. The above motivates a reflection on the right set forth in Article 17 of the convention, which the San Salvador Protocol takes up once again through Article 13: protection of the family. The application filed by the Inter-American Commission did not mention the abridgment of Article 17, which was, instead, raised in the pleadings of the representatives of the alleged victim. This argument did not bring up facts other than those included in the application, but rather the possibility that those mentioned in it might constitute abridgments of precepts not invoked in it. The Court, exercising the jura novit curia principle, has accepted the pertinence of considering those pleadings. Restriction of the hearing of the facts, inherent to the accusatory system –which is the one adopted in international human rights proceedings-, does not impede the court, once the former have been stated and proven, to issue such juridical considerations as may be pertinent in light of the provisions of the American Convention.

88. Paragraph one of Article 17 states, as an assumption, that "the family is the natural and fundamental group unit of society," and it asserts that the family "is entitled to protection by society and the state," the two institutions to which the obligation set forth in that provision applies. Article 1(1), in turn, ensures respect for and guarantee of the person's rights set forth in

the Convention, understanding that, for purposes of the Convention, "'person' means every human being" (Article 1(2)).

89. Therefore, the State is under the obligation to i) create conditions for the family to receive the recognition and protection due to it, in general, to guarantee and assert its role as "the natural and fundamental group unit of society;" and ii) respect and protect the rights of the individuals who are part of the family or intend to become part of it, and these rights must be analyzed, in the case in point, based on their connection with said references about the family unit. Said rights would be injured in several possible situations: for example –and only as an example-, if the State were to act in a way that was not consistent with recognition of the family as the "natural and fundamental group unit of society," impeding its establishment or abridging the rights set forth in the other paragraphs of Article 17.

90. Article 17 of the Convention mentions the origin of the family in marriage and, on this basis, sets forth certain protections for its members. Article 13 of the San Salvador Protocol, signed two decades after the Pact of San José, no longer refers to this juridical act as the foundation for the family, which Article VI of the American Declaration of the Rights and Duties of Man does not refer to either. Clearly, marriage, as a contract or institution of civil Law, is not –and even less so in many countries of the hemisphere- the only way to establish a family. Modern family Law has shifted substantially in the direction imposed by liberty, equity, and reality. These other ways to constitute the household unit, as a result of the free decision of individuals, merits respect and protection by the law and by institutions, as comparative Law has asserted.

91. In the case to which the judgment of the Inter-American Court refers, and to which I attach this Opinion, the facts involving violations severely affected Mr. Tibi and Mrs. Baruet, as well as their child and the woman's children, who lived with the couple and were members of the family unit in the manner that its adult members had freely decided. The abridgment may have influenced, together with other causes –which it is not for the Court to analyze- the breaking up of the family group and scattering of its members. In the process of hearing numerous cases of grave human rights violations, including more than a few regarding executions, forced disappearances, torture, or arbitrary detention, we have seen how the members of the family group of those who suffered those attacks directly have also suffered their consequences.

92. There could hardly be violations, among the most serious ones, to which those in closest emotional contact with the victim, based on family ties –broadly understood- were indifferent, and which did not entail dissolving pressures on the union. The facts in violation have had various types of repercussions on these individuals: scattering the members of the family, depriving them of legitimate income, forcing them to incur extraordinary expenses, interfering in communication amongst them, altering or suppressing shared life, negatively affecting legitimate plans and projects, weakening household ties, generating physical or mental ailing of the next of kin, and so forth.

93. In accordance with the circumstances of each case, it is possible to raise the possibility of analyzing these facts as a consequence or projection of other violations that were committed or as a direct violation of Article 17 of the Pact of San José, independently of said abridgments,

although also in connection with them. The Court chose the first option, precisely bearing in mind the circumstances of this case. I believe that, under those circumstances, this was the right decision. Family disintegration was a consequence, among others, of the violations committed against the accused, his spouse, and the children who constituted, with them, the family group. The Court has not omitted recognition and assessment of said violations: they were examined elsewhere in the judgment, and on this basis the Court reached the conclusion that both Mrs. Baruet and the children mentioned in said ruling are, themselves, victims of the facts in violation, and not merely entitled, for other reasons, to property-related reparations.

XVIII. Restitutio in integrum

94. It has been customary for the Court to reflect, in its judgments on reparations, the well-known idea that "reparation of the damage requires, whenever possible, full restitution (restitutio in integrum), which consists of reestablishment of the prior situation." And it has also been customary for it to immediately add: "When this is not possible, as in the instant case...". This is so in the Tibi judgment. I also sign this statement because I agree that the best reparation would be "reestablishment of the prior situation" before the violation. However, this is not possible, as I have stated before (for example, in my Concurring opinion in the judgment on the Bámaca Velásquez case, issued on November 25, 2000). It would be like turning the hands of the clock back and returning the person whose right was abridged to the situation before that event.

95. Full restitutio is logically and materially unfeasible, except regarding formal, virtual violations, with no impact on any life, which may be suppressed, like when the erroneous or undesirable words are expelled from a computer. It involves disregarding the fateful nature of the consequences –even if they cannot be perceived immediately- of the violation committed. That is why judgments on reparations invariably state that "in the instant case" it is not possible to apply restitutio. If restitutio is not possible in any case, it may be time to go directly to what is feasible. This was graphically expressed in some early judgments of the Court, regarding the impossibility of complete reparation of all the consequences of the violation committed, as they open and expand like concentric circles on a pond when a stone is thrown into it.

XIX. Taxation

96. In some of my previous Opinions I questioned the pertinence of ruling that compensations, costs and expenses –all of them items of the same type: material reparations- will be subject to no taxes. I said several times –most recently, in my Opinion attached to the November 25, 2003 judgment in the Myrna Mack Chang case- that this judicial provision entailed a modification of the tax system of a country, insofar as it led to establishing a specific assumption of tax exemption. This generally requires a concerted effort of the legislative and administrative authorities, through general or specific provisions, which are difficult and unnecessary for the purposes sought by the property-related reparations system for victims of violations. What the judgment seeks is to avoid taxation being imposed that diminishes the reparations ordered, making them illusory. Instead, it seeks to ensure that they reach the beneficiaries in full, as ordered. If that is so, then it is sufficient to say so in those or in similar terms –as the judgment to which I attach this Opinion does- without the need to generate difficult issues regarding generally observed tax rules.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary

SEPARATE OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. In the instant Judgment in the Case of Tibi versus Ecuador, in which I have concurred with my vote, the Inter-American Court of Human Rights has ruled on a new case that adequately reflects the contingencies of the human condition and the importance of the realization of justice and of guarantees of non-recidivism regarding acts injurious to human rights as a measure of reparation. Given the concerns raised by the instant case, and the significance of the matter addressed by the Court, I feel the obligation to state, in the instant Separate Opinion, my personal reflections as the basis for my position on the matter dealt with here. I will focus my reflections on four basic points: a) the impact of arbitrary detention and conditions of incarceration on the human conscience; b) self-rehabilitation as a defense and reparatio of the affronts of the world; c) the reaction of ratione personae Law (the central position of the victims in the legal system); and d) the reaction of ratione materiae Law (absolute prohibition of torture).

I. The Impact of Arbitrary Detention and Conditions of Incarceration on the Human Conscience.

2. D.D. Tibi, like Josef K., was detained without knowing why. “Somebody had slandered Josef K.", - wrote Franz Kafka at the very beginning of The Process (1925), - "as without having done anything wrong he was detained one morning” (chapter I). D.D. Tibi was more fortunate than banker Josef K., but they both suffered something incomprehensible, if not absurd. Josef K. could only await his summary execution, shortly before which he exclaimed: "Where was the judge whom I never saw? Where was the high court before which I never appeared?” (chapter X). From the beginning of the saga to its end, his efforts were futile in face of the arbitrariness of a cruelly virtual and discouraging “justice”.

3. D.D. Tibi was less unfortunate than Kafka's character, because he recovered his liberty and, also, he lives in a time in which, alongside the national courts (with their idiosyncrasies) there are also international human rights courts. The instant Judgment, just adopted by the Inter-American Court, can contribute to recovery of his faith in human justice. In his case, a portrait of daily life in the jails not only of Latin America but throughout the world speaks eloquently of the insensitiveness, indifference, and irrationality of the world that surrounds us all.

4. There are few testimonies of the suffering resulting from arbitrary detention as eloquent as Antonio Gramsci’s well-known Prison Notebooks (1926-1936). In a manner that is even literary, he wrote that, during the initial period of his detention, it already seemed to him that time was thicker, as space no longer existed for him; and he described the rose that was “completely reborn,” that flowered more the following year, and did not even exclude the

possibility of another “timid little rose” from flowering during that year (so he hoped), and he confessed that he felt the seasonal cycle as “flesh of his flesh”. When he took a train, after 10 years of detention, “thrown on the fringes of the world,” and after not having seen for years those same roofs, those same walls, those same “turbid faces," he “experienced a terrible impression” when he saw that “during this time the vast world had continued to exist with its meadows, its forests, the common people, the groups of children, certain trees;” that he experienced a terrible impression especially when he saw himself in the mirror after so much time. [FN1]

[FN1] A. Gramsci, Cartas do Cárcere, Rio de Janeiro, Edit. Civilização Brasileira, 1966 (reed.), pp. 135-136 and 370.

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5. Three decades before Gramsci, in the late 19th century, Oscar Wilde gave the history of universal thought his personal testimony of the suffering caused by his incarceration, in his renowned De Profundis (1897). From the Reading prison, he wrote that, for those unfairly detained,

"there is only one season, the season of sorrow. The very sun and moon seem taken from us. Outside, the day may be blue and gold, but the light that creeps down through the thickly-muffled glass of the small iron-barred window beneath which one sits is grey and niggard. It is always twilight in one's cell, as it is always twilight in one's heart. And in the sphere of thought, no less than in the sphere of time, motion is no more." [FN2]

[FN2] O. Wilde, De Profundis, Madrid, Ed. Siruela, 2000 (repr.), p. 54.

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6. It is possible that étranger D.D. Tibi experienced the same feeling as étranger Mersault that matters pertaining to the detention and the proceeding were treated “leaving aside” the detainee, reflecting the “tender indifference” of the exterior world (chapters IV-V). As for Gramsci, almost the only thing left to the étranger of Albert Camus (L'étranger, 1949) was the passing of time; as “light and shadows alternated” it was “the same day ceaselessly passing in the cell,” and the worst hour was when “the noise of the night came from all the floors of the prison in an entourage of silence” (chapter II). Mersault also had only the memories of a life that no longer belonged to him (chapter IV). For him, all days passed “watching, in their face, the decline of the colors that lead from day to night,” the latter being “like a melancholic truce” (chapter V).

7. In his critical pages on conditions of incarceration, immortalized in his renowned Memoirs from the House of the Dead (1862), F.M. Dostoyevsky reflected that

"le fameux système cellulaire n'atteint, j'en suis convaincu, qu'un but trompeur, apparent. Il suce la sève vitale de l'individu, l'énerve dans son âme, l'affaiblit, l'effraie, puis il vous présente comme un modèle de redressement, de repentir, une momie moralement desséchée et à demi folle. (...) Les souffrances morales pèsent plus lourdement que les tourments physiques." [FN3]

Hence the importance and pressing need –the great universal writer added- of humane treatment of detainees:

"(...) un détenu, un réprouvé, il connaît les distances qui le séparent de ses supérieurs, mais ni les chaînes, ni les marques de flétrissure ne lui font oublier qu'il est un homme. (...) Un traitement humain peut relever jusqu'à ceux chez qui l'image de la divinité semble obscurcie! C'est précisément avec ces `malheureux' qu'il faut se comporter le plus humainement possible, pour leur salut et pour leur joie." [FN4]

[FN3] F.M. Dostoyevski, Souvenirs de la maison des morts, Paris, Gallimard, 1977 (repr.), pp. 51 and 115.
[FN4] Ibid., p. 174.

II. Self-rehabilitation as Defense and Reparatio of the Injuries of the World.

8. The above does not necessarily mean that there is no antidote against the cruelty of the absurd and of indifference. In the midst of omnipresent suffering, one may seek refuge in an enhanced inner life, in remembrance of beloved ones, and in luminous moments of the past; human beings are capable of accepting their suffering and their destiny insofar as they entail, even under the most adverse conditions, “adding a deeper meaning to their life”. [FN5] Remembering does in fact have “an ethical value in and of itself. (...) The belief that remembering is an ethical action is set in the depths of our human nature (...). Insensitiveness and amnesia seem to go together.” [FN6]

[FN5] See V.E. Frankl, El Hombre en Busca de Sentido, 22d. ed., Barcelona, Herder Edit., 2003, pp. 63-65 and 101, and see pp. 102, 156 and 158.
[FN6] S. Sontag, Ante el Dolor de los Demás, Bogota, Alfaguara, 2003, p. 134.

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9. Writing on his detainment conditions and his efforts to flee both the suffering and the degeneration of the spirit, Oscar Wilde, referring to the "Zeitgeist of a heartless period”, reflected that time and space are “mere accidental conditions of thought,” and that in prison what he had before him was only his past. [FN7] There is always the possibility of refuge in one’s own inner life. As Wilde expressed it, the wretched, “when they are imprisoned, although denied the beauty of the world, are at least safe, to a certain extent, from the world’s deadliest blows,” since

"they can hide in the darkness of their cells, and turn their very misfortune into something akin to a sanctuary. The world, once it has obtained what it wanted, goes on its way, and it lets them suffer in peace.” [FN8]

[FN7] O. Wilde, De Profundis, op. cit. supra n. (2), pp. 113 and 127.

[FN8] Ibid., pp. 62-63.
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10. In his incisive meditations in De Profundis, Wilde addressed the need for rehabilitation of prison victims:

"There is not a single degradation of the body which I must not try and make into a spiritualising of the soul. (…) I am advised by others to try on my release to forget that I have ever been in a prison at all. I know that would be equally fatal. It would mean that I would always be haunted by an intolerable sense of disgrace, and that those things that are meant for me as much as for anybody else - the beauty of the sun and moon, the pageant of the seasons, the music of daybreak and the silence of great nights, the rain falling through the leaves, or the dew creeping over the grass and making it silver - would all be tainted for me, and lose their healing power, and their power of communicating joy. (...) For just as the body absorbs things of all kinds, things common and unclean …- so the soul in its turn has its nutritive functions also, and can transform into noble moods of thought and passions of high import what in itself is base, cruel and degrading; nay, more, may find in these its most august modes of assertion, and can often reveal itself most perfectly through what was intended to desecrate or destroy.
The fact of my having been the common prisoner of a common gaol I must frankly accept (…) must accept the fact that one is punished for the good as well as for the evil that one does. (…) Society takes upon itself the right to inflict appalling punishment on the individual, but it also has the supreme vice of shallowness, and fails to realise what it has done. When the man's punishment is over, it leaves him to himself; that is to say, it abandons him at the very moment when its highest duty towards him begins. It is really ashamed of its own actions, and shuns those whom it has punished (…) (...) if I realise what I have suffered, society should realise what it has inflicted on me; and (…) there should be no bitterness or hate on either side." [FN9]

[FN9] Ibid., pp. 69-71.
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11. These reflections, over a century ago, are today more contemporary than ever, and they are moved by recurrent abuse that continues to take place in prisons around the world. In prison, most often, contrary to what the social milieu seems to assume, one does not learn to distinguish between good and evil, but rather to live in growing intimacy with the evil of brutalization imposed by the indifference of that very social milieu. In an impressive testimony published in 1996 on the in loco inspections conducted in European jails, a former President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment [FN10] pointed out that

"conditions of detention are still very backward in most European States. (...) No European country is blameless. Many have overcrowded jails, with inadequate sanitation (...). In other cases solitary confinement is applied far too frequently. (...) What is a prison? It is a place where one loses not only one's liberty, but one's dignity, too. (...) In other States it is the police stations that invite criticism (...). In other States the detention centres for immigrants or for asylum seekers are unhygienic and inhuman. (...) In some (only three perhaps) torture is embedded in

police methods; in others the police tend sporadically to ill-treat and brutalize their detainees; in other States the prisons reveal aspects censurable as inhuman or degrading; elsewhere single instances of arbitrary behaviour by law enforcement officers can be discerned, or there are single cases of unacceptable treatment or conditions in prisons or hospitals. Despite the many different degrees of substandard treatment, not one European State fully conforms to the parameters of the best and most enlightened traditions and the more recent studies in criminology." [FN11]

[FN10] Of the European Council at Strassburg.
[FN11] A. Cassese, Inhuman States - Imprisonment, Detention and Torture in Europe Today, Cambridge, Polity Press, 1996, pp. 125-126.

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12. This is an evil that knows no borders, and one that reflects the indifference and brutalization of the world around us. Today, the characters of Kafka and Camus are dispersed and forgotten in prisons of all continents. Many of the detainees are innocent, and those who are not, having been aggressors, become new victims. Their survival no longer has a spatial dimension, and the temporal one is what they may, perhaps, fathom in the hidden depths of their inner life. Anyhow, their life, in their relations with others, is no longer theirs. And they survive in closer and closer intimacy with evil and with the overwhelming brutalization imposed on them. The Law cannot remain indifferent to all this, to the world's indifference, especially in the pathetically self-named "post-modern" societies.

13. Actually, abuse of detention and abuse against the detainees are no recent phenomenon. In his classical work on Of Crimes and Punishments (1764), Cesare Beccaria warned about the fact that "the punishment is often greater than the crime," and the "refined ordeals" conceived by human intellect "seem to have been invented for tyranny rather than for justice." [FN12] As time passed, the need for administrative and legislative as well as judicial control and oversight of detention conditions (the latter being especially important) was acknowledged, and domestic legal control was transferred to international law in the mid-20th century.

[FN12] C. Beccaria, De los Delitos y de las Penas (with comments by Voltaire), 11th. repr., Madrid, Alianza Ed., 2000 (repr.), p. 129, and see p. 149.

III. The Reaction of Ratione Personae Law: the Central Position of the Victims in the Legal System

14. It was the reaction of the Law, gaining strength, and the impact of International Human Rights Law was decisive. Today there is, for example, a vast jurisprudence on Article 5 of the European Convention on Human Rights, asserting the ordre public nature of the oversight, under the European Convention, of all measures that could breach the right to the human person's liberty and security; detention –necessarily ordered by law- can only be justified in regards to one of the requirements set forth in Article 5(1) of the Convention. [FN13] At the same time, based on the experience accrued by the European Committee for the Prevention of Torture and

Inhuman or Degrading Treatment or Punishment, Antonio Cassese has suggested that when a person has been detained and this person has four rights (those of being promptly informed of his or her basic rights, of prompt notification of the detention to his or her next of kin, of access to an attorney, and of being promptly examined by a physician),

"then there is an objective chance that the police will find it difficult to inflict inhuman or degrading treatment on him or her. On the other hand, if these rights, or some of them, are not enshrined in legislation or are not applied in practice, we know we have entered a `danger zone': the objective defences are lacking that make ill-treatment less likely." [FN14]

[FN13] J.L. Murdoch, Article 5 of the European Convention on Human Rights - The Protection of Liberty and Security of Person, Strasbourg, Council of Europe, 1994, pp. 7-55.
[FN14] A. Cassese, Inhuman States..., op. cit. supra n. (11), p. 21.

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15. I am moved to another reflection by the instant case of Tibi versus Ecuador, as a microcosm of what happens in the daily life of prisons in various places. Under the infrahuman incarceration conditions that prevail in so many countries throughout the world, the detainees – including the aggressors- as stated before, often become “institutional victims,” increasing the spiral of violence issuing from a “pathological social order” that especially punishes marginalized persons. [FN15] Punitive justice, given the conditions under which it is executed, thus becomes a sinister vicious circle, [FN16] as shown by the instant case, among many others.

[FN15] Ibid., pp. 139-140.
[FN16] Ibid., pp. 140 and 150.

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16. In a broad dimension, International Human Rights Law has contributed to recovery of the central position of the victim [FN17] in the legal order. Criminology itself has sought to pay greater attention to the victim (and not only to the agent of the violation of his or her rights), but efforts in this direction are unable to transcend the approach on the victim as the passive subject of the crime, while it would be necessary to go further. [FN18] In the conceptual universe of International Human Rights Law the role of the victim does in fact transcend that of the passive subject of the crime, as the victim there becomes the true active subject of international legal action in defense of the rights inherent to him or her as a human being.

[FN17] As in victimology, on a rather circumscribe level; see, e.g., G. Landrove Díaz, Victimología, Valencia, Ed. Tirant Lo Blanch, 1990, pp. 22-23 and 25-26.
[FN18] L. Rodríguez Manzanera, Victimología - Estudio de la Víctima, 8th. ed., Mexico, Ed. Porrúa, 2003, pp. 25 and 67.

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17. As stated above, International Human Rights Law, rather than domestic or international criminal law, recovered the central role of the victim as a subject of law –and an active subject of the juridical relationship- in the international legal order. While criminal law –both under domestic and international venues- is primarily geared toward the criminal, relegating the victim to a marginal position, International Human Rights Law, instead, restores the central position of the victim, even as an active subject of international action for implementation of the responsibility of the State for injuries to his or her rights.

18. Work for the international protection of human rights soon showed that the contraposition of the respondent States to the individual applicants was essential to it. It was precisely in this domain of protection that –as I underlined in my Separate Concurring Opinion in the Castillo Petruzzi et al. versus Peru case (Preliminary Objections, Judgment of 04.09.1998)- "the historical rescue of the position of the human being as subject of International Human Rights Law, endowed with full international procedural capacity" took place" (para. 5). This recovery was implemented through enshrinement of the right to individual international petition, granted in the broadest terms, to any person, by Article 44 of the American Convention on Human Rights.

19. This right has in fact been exercised, under the American Convention, by persons who survive under extreme adversity (poor and marginalized persons, "street children," incarcerated individuals, the next of kin of missing persons, among others). It is under circumstances such as these that International Human Rights Law attains its fullness and realizes its ultimate aim. Protection of victims and reparations for the damage they have suffered constitute its raison d'être. This noteworthy development –I added in my aforementioned Separate Concurring Opinion in the Castillo Petruzzi et al. case - entailed a real transformation of the international legal order itself, by recognizing that

"the necessity that all the States, in order to avoid new violations of human rights, are made responsible for the way they treat all human beings who are under their jurisdiction. This would simply not have been possible without the consolidation of the right of individual petition, amidst the recognition of the objective character of the obligations of protection and the acceptance of the collective guarantee of compliance with these latter. This is the real meaning of the historical rescue of the individual as subject of International Human Rights Law." (para. 12)

20. The victims themselves (apparently the weakest party vis-à-vis public authorities) took the initiative of activating the international action to defend their rights. As I reflected in my aforementioned vote in the Castillo Petruzzi et al. case,

"In the public hearings before the Inter-American Court, in distinct cases, (...) a point which has particularly drawn my attention has been the observation, increasingly more frequent, on the part of the victims or their relatives, to the effect that, had it not been for the access to the international instance, justice would never have been done in their concrete cases. (...) The right of individual petition shelters, in fact, the last hope of those who did not find justice at national level. I would not refrain myself nor hesitate to add, - allowing myself the metaphor, - that the right of individual petition is undoubtedly the most luminous star in the universe of human rights." (para. 35)

The next step that needs to be taken, in the framework of the inter-American system for the protection of human rights, is –as I have argued for several years- to ensure evolution from locus standi in judicio to jus standi of the individuals before the Inter-American Court itself, thus enhancing their full international juridical capacity. [FN19]

[FN19] On this point, see A.A. Cançado Trindade, El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos, Bilbao/Spain, Universidad de Deusto, 2001, pp. 9-104; A.A. Cançado Trindade, Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección, vol. II, 2d. ed., San Jose, Costa Rica, Inter-American Court of Human Rights, 2003, pp. 1-64.

IV. The Reaction of Ratione Materiae Law (Absolute Prohibition of Torture)

21. The practice of torture, in all its perversion, is not limited to the physical injuries inflicted on the victim; it seeks to annihilate the victim's identity and integrity. It causes chronic psychological disturbances that continue indefinitely, making the victim unable to continue living normally as before. It worsens the victim's vulnerability, causes nightmares, generates a loss of trust in others, hypertension, and depression. Several expert opinions rendered before this Court in various cases in recent years have asserted this unanimously. A person tortured in prison loses the spatial dimension and even that of time itself.

22. Furthermore, the practice of torture (whether to obtain a confession or information or to cause social fear) generates a disintegrating emotional burden that is transmitted to the next of kin of the victim, who in turn project it toward the persons they live with. The widespread practice of torture, even though it takes place within jails, ultimately contaminates all the social fabric. The practice of torture has sequels not only for its victims, but also for broad sectors of the social milieu affected by it. Torture generates psychosocial damage and, under certain circumstances, it can lead to actual social breakdown.

23. Thus, I find contemporary attempts by those who exercise power and their co-opted subservients to play down the prohibition of torture under certain circumstances, such as combating drug trafficking and the so-called "war on terrorism" [FN20] truly dreadful. At the appropriate time, in the recent Judgment in the case of the Gómez Paquiyauri brothers versus Peru (of 08.07.2004, paras. 111-112), as well as in the instant Judgment in the Case of Tibi versus Ecuador, the Court warned that

"there is an international legal system of absolute prohibition of all forms of torture, both physical and psychological, a system that today falls under the domain of jus cogens. Prohibition of torture is complete and non-revocable, even under the most difficult circumstances, such as war, 'the struggle against terrorism' and any other crimes, states of siege or of emergency, of civil commotion or domestic conflict, suspension of constitutional guarantees, domestic political instability, or other public disasters or emergencies" (para. 145).

[FN20] For this, there are international conventions that must be applied to combat those wrongs under the Law. Said attempts (of the self-proclaimed “realists”) set aside more than a century of progress of the Law, and they show the way back to savagery. As Jean Pictet pointed out quite appropriately in 1966, in a visionary –if not prophetic- manner, “it would be a disastrously regressive step for humanity to attempt to struggle against terrorism with its very weapons.” J. Pictet, The Principles of International Humanitarian Law, Geneva, ICRC, 1966, p. 36. – For a recent example of the current and alarming deconstruction of the Law (even in the field of habeas corpus, the due process of law and the presumption of innocence), in the midst of the apparent indifference or unawareness of the juridical circles in so many countries, see: "Antiterrorisme: une cour de Londres légitime des `preuves' obtenues sous la torture", in Le Monde, Paris, 14.08.2004 (in connection with the “evidence” obtained in the interrogations of ten foreign detainees at the United States base in Guantánamo, and derogation by the United Kingdom of Article 5 of the European Convention on Human Rights).

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24. The practice of torture is a hellish threat to civilization itself. One of the infallible criteria of civilization is precisely the treatment given by public authorities of any country to detainees or incarcerated persons. F.M. Dostoyevsky warned about this in his aforementioned Memoirs from the House of the Dead (1862); for him, the degree of civilization attained by any social milieu can be assessed by entering its jails and detention centers. [FN21] Torture is an especially grave violation of human rights because, in its various forms, its ultimate objective is to annul the very identity and personality of the victim, undermining his or her physical or mental resistance; thus, it treats the victim as a “mere means” (in general to obtain a confession), flagrantly violating the basic principle of the dignity of the human person (which expresses the Kantian concept of the human being as an “end in himself”), degrading him, in a perverse and cruel manner, [FN22] and causing him truly irreparable damage.

[FN21] See F.M. Dostoyevski, Souvenirs de la maison des morts, op. cit. supra n. (3), pp. 35-416.

[FN22] J.L. de la Cuesta Arzamendi, El Delito de Tortura, Barcelona, Bosch, 1990, pp. 27-28 and 70.

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25. The basic principle of humanity, rooted in the human conscience, rises against torture. Torture is clearly prohibited, as a grave violation of human rights and of International Humanitarian Law, by the universal juridical conscience. This is a definitive attainment of civilization, one that admits no regression. A real international juridical system against torture has in fact developed in the present. [FN23] It includes the United Nations Convention (of 1984, and its recent Protocol of 2002) and the Inter-American (1985) and European (1987) Conventions against torture, in addition to the Special Rapporteur against Torture (since 1985) of the United Nations Human Rights Commission, HRC) and the Working Group on Arbitrary Detention (since 1991) of that same HRC (which pays special attention to the prevention of torture). [FN24] The three aforementioned co-existing Conventions to combat torture are basically complementary. [FN25]

[FN23] See, e.g., N. Rodley, The Treatment of Prisoners under International Law, Paris/Oxford, UNESCO/Clarendon Press, 1987, pp. 17-143.

[FN24] In addition to these mechanisms, there is the United Nations Voluntary Contributions Fund for Victims of Torture (since 1983).

[FN25] See, in this regard, A.A. Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos, vol. II, Porto Alegre/Brasil, S.A. Fabris Ed., 1999, pp. 345-352.

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26. The absolute prohibition of torture in any and all circumstances –as the Inter-American Court has asserted in the instant Judgment in the Case of Tibi versus Ecuador- today falls under international jus cogens (see supra). As I pointed out in my Separate Concurring Opinion in the case of the Urso Branco prison versus Brazil (Provisional Protection Measures, of 07.07.2004), "the State's obligation of due diligence applies under any and all circumstances, to avoid irreparable damage to persons under its jurisdiction and custody" (para. 16). Due diligence is an even greater obligation in regards to incarcerated persons, who are in an especially vulnerable situation, under State custody.

27. The European Court of Human Rights, in turn, asserted, in the Soering versus the United Kingdom case (Judgment of 07.07.1989), that the absolute prohibition of torture (even in times of war and other national emergencies) expresses one of the "fundamental values of [contemporary] democratic societies" (para. 88). More recently, in the Kalashnikov versus Russia case (Judgment of 15.07.2002), the European Court stated that Article 3 of the European Convention on Human Rights

"enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour" (para. 95).

28. In the Selmouni versus France case (Judgment of 28.07.1999), the European Court categorically reiterated that Article 3 of the European Convention

"enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organized crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment. Unlike most of the substantive clauses of the Convention and of Protocols ns. 1 and 4, Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15(2) even in the event of a public emergency threatening the life of the nation (...)" (para. 95).

29. In that same Judgment, the European Court expressed its understanding that "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" (para. 101). In the cas d'espèce, in regards to France –as in the instant Judgment of the Inter-American Court that has found the respondent State responsible for the torture inflicted on the étranger Tibi (para. 165) – the

European Court also found the respondent State responsible for the torture inflicted on étranger Selmouni (paras. 105-106).

30. The Ad Hoc International Criminal Tribunal for the former Yugoslavia stated unequivocally, in the A. Furundzija case (Judgment of 10.12.1998), that the absolute prohibition of torture is a jus cogens rule (paras. 137-139, 144 and 160). Jurisprudence of various international tribunals is, thus, perfectly clear in stating the reaction of ratione materiae Law, regarding absolute prohibition of torture, in all its forms, under any and all circumstances –a prohibition that, in our days, falls under international jus cogens, with all its juridical consequences for the States responsible.

31. In my Concurring Opinion to Advisory Opinion n. 18 (of 17.09.2003) on La Condición Jurídica y los Derechos de los Migrantes Indocumentados, I stated my understanding that jus cogens is not a closed juridical category, but rather one that evolves and expands (paras. 65-73). In brief,

"On my part, I have always asserted that an ineluctable consequence of the affirmation and the very existence of peremptory norms of International Law is their not being limited to the conventional norms, to the law of treaties, and their encompassing every and any juridical act. Recent developments point in the same direction, that is, that the domain of the jus cogens, beyond the law of treaties, encompasses likewise general international law. Moreover, the jus cogens, in my understanding, is an open category, which expands to the extent that the universal juridical conscience (the material source of all Law) awakens to the necessity to protect the rights inherent to each human being in every and any situation.
Evolution of International Human Rights Law has emphasized the absolute character of the non-derogable fundamental rights. The absolute prohibition of the practices of torture, of forced disappearance of persons, and of summary and extra-legal executions, leads us decidedly into the terra nova of the international jus cogens. (...)" (paras. 68-69).

32. And I concluded, in this regard, in that same Concurring Opinion to Advisory Opinion n. 18:

"The concept of jus cogens in fact is not limited to the law of treaties, and it likewise pertains to the law of the international responsibility of the States. The Articles on the Responsibility of the States, adopted by the International Law Commission of the United Nations in 2001, bear witness of this fact. (...) In my understanding, it is in this central chapter of International Law, that of international responsibility (perhaps more than in the chapter on the law of treaties), that jus cogens reveals its real, wide and profound dimension, encompassing all juridical acts (including the unilateral ones), and having an incidence (even beyond the domain of State responsibility) on the very foundations of a truly universal international law." (para. 70)

In addition to this horizontal expansion, jus cogens also expands on a vertical dimension, that of the interaction between the international and national legal systems in the current domain of protection. The effect of jus cogens, on this second (vertical) dimension, is to invalidate any and all legislative, administrative or judicial measures that, under the States' domestic law, attempt to authorize or tolerate torture. [FN26]

[FN26] See E. de Wet, "The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law", 15 European Journal of International Law (2004) pp. 98-99.

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33. The absolute prohibition of torture as a reaction of ratione materiae Law that we are addressing here, in both the horizontal and the vertical dimensions, has implications regarding reparations due to the victims. It is in no way surprising that reparations in cases of torture have revealed a dimension that is both individual and collective or social. Impunity worsens the psychological suffering inflicted both on the direct victim and on his or her next of kin and other persons with whom he or she lived. Actually, it causes new psychosocial damage. Covering up what happened, or indifference regarding the criminal acts, constitutes a new aggression against the victim and his or her next of kin, disqualifying their suffering. The realization of justice is, therefore, extremely important for the rehabilitation of the victims of torture (as a form of reparation), since it attenuates their suffering, and that of their beloved ones, by recognizing what they have suffered.

34. This is still an evolving matter, but the right of those victims to fair and adequate reparation is addressed today on the basis of recognition of the central role of the integrity of said victims. [FN27] The instant Judgment of the Inter-American Court in the Case of Tibi versus Ecuador is an example of the reaction of the Law to the aforementioned wrong. The Law has been unable to do much in the present context, but it is something, and at least it helps keep alive the hope of a minimum of human justice. The reaction of the Law reflects acknowledgment that rehabilitation of the victims of arbitrary detention and torture cannot be restricted merely to the psychological resources that they may have to defend themselves from that wrong, worsened by the indifference of the exterior world.

[FN27] See I. Bottigliero, Redress for Victims of Crimes under International Law, Leiden, Nijhoff, 2004, pp. 13-38, 111-191 and 249-253.

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35. Realization of justice, with due reparations, helps reorganize human relations and restructure the psyche of all the victims. Realization of justice must take place from the standpoint of the integral nature of the personality of the victims. Reparations rather soothe the suffering of the victims when they corroborate the realization of justice. Finally, as I pointed out in my Separate Opinion in the case of the “Street Children” (Villagrán Morales et al. versus Guatemala, Reparations, Judgment of 26.05.2001),

“Human suffering has a dimension which is both personal and social. Thus, the damage caused to each human being, however humble he might be, affects the community itself as a whole. As the present case discloses, the victims are multiplied in the persons of the surviving close relatives, who, furthermore, are forced to live with the great pain inflicted by the silence, the indifference and the oblivion of the others.” (para. 22).

Reparations are, therefore a dimension that is necessarily both individual and social.

36. As the Judgment of the Inter-American Court in the instant Case of Tibi versus Ecuador shows, the Law also protects those who are forgotten in prison, in the house of the dead, which Dostoyevsky critically portrayed so brilliantly in the 19th century. Said reaction of the Law, both ratione personae and ratione materiae, indicates that the human conscience has awoken to the pressing need for and the aim of decisively putting an end to the scourges of arbitrary detention and torture. The general principles of the Law play a very significant role here. With this, there is a reason to hope that the D.D. Tibis, the Joseph K.s, and the Mersaults will gradually diminish in number, until they no longer suffer in the prisons of the "post-modern", insensitive, indifferent and brutalized world in which we live.

Antônio Augusto Cançado Trindade
Judge

Pablo Saavedra-Alessandri
Secretary

SEPARATE OPINION OF HERNAN SALGADO-PESANTES

I have concurred with the majority vote in the instant case because I deem that the violations of the basic rights of Daniel Tibi and of members of his family have been proven. Knowing of these grave violations of the rights of a person and being an Ecuadorian citizen leads me to the following considerations.

2. The State of Ecuador cannot allow and must not tolerate violations of the most basic rights to fair trial due to the irresponsibility of certain judges and members of the police force, whether part of INTERPOL or of the judiciary. They are an affront against the country.

3. Ecuador must absolutely eradicate torture and cruel and inhumane treatment as means of investigation of a crime. I would hope that by the current time (2004) those methods have been left behind. The Ecuadorian State ratified (in 1999) the Inter-American Convention against Torture, and therefore its provisions have become a part of our legal system, as have the provisions of the American Convention.

4. It is not possible for Ecuadorian criminal judges, such as those who acted in the instant case, to transform preventive custody into life-long burial, with respect to which one might evoke Dante's inscriptions on the doors to hell. If, as in the instant case, the judge objectively observes that there is no evidence to serve as grounds for preventive custody, how can it be maintained with no time limit? It would seem that these judges become unaware of the irreversible damage done to a human being in those months and even years of "preventive detention."

5. Justice bodies must act within legal and reasonable terms to issue their rulings and decisions. The remedies regarding judicial liberty must be decided immediately to protect the

detainee against arbitrariness. And if these remedies are in order –according to the Law- they cannot be denied under any pretext.

6. The judges who acted in the instant case, especially the first one who began the proceeding, are responsible for this supra-national ruling against the Ecuadorian State; the State has the right of repetition, against them and against the policemen who acted, for all the compensations that it pays, in addition to the criminal liability.

7. There must be no place for impunity, which also breaches the Ecuadorian Constitution that proclaims the effectiveness of human rights as a fundamental duty of the State.

Hernán Salgado-Pesantes
Judge

Pablo Saavedra-Alessandri
Secretary