Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Fermin Ramirez v. Guatemala
Doc. Type:	Judgement (Merits, Reparations and Costs)
Decided by:	President: Sergio Garcia Ramirez; Vice President: Alirio Abreu Burelli; Judges: Oliver Jackman; Antonio A. Cancado Trindade; Cecilia Medina Quiroga; Manuel E. Ventura Robles; Diego Garcia-Sayan; Arturo Alfredo Herrador Sandoval
Dated:	20 June 2005
Citation:	Ramirez v. Guatemala, Judgement (IACtHR, 20 Jun. 2005)

In the case of Fermín Ramírez,

The Inter-American Court of Human Rights (hereinafter "the Court", "the Inter-American Court", or "the Tribunal"), pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Articles 29, 31, 56, and 58 of the Court's Rules of Procedure (hereinafter "the Rules of Procedure"), delivers the present Judgment.

I. INTRODUCTION OF THE CASE

1. On September 12, 2004, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") submitted an application against the State of Guatemala (hereinafter "the State" or "Guatemala") to the Court, originating from petition No. 12,403, received at the Commission's Secretariat on June 9, 2000.

2. The Commission submitted the application pursuant to Article 61 of the American Convention, for the Court to decide if the State has violated "its international obligations and therefore, […] incurred in the violation of Articles 4 (Right to life), 8 (Right to a Fair Trial), and 25 (Judicial Protection), 1(1) (Obligation to Respect Rights) and/ or 2 (Domestic Legal Effects) of the American Convention […], through the imposition of the death penalty on Fermín Ramírez without giving him the opportunity to exercise his right to a defense, with regard both to the variation of the acts charged in the indictment as well as their legal classification, which occurred when the Guatemalan judicial authorities issued a conviction against him on March 6, 1998". The Commission also requested the Court to order that the State adopt a series of pecuniary and non-pecuniary measures of reparation.

II. JURISDICTION OF THE COURT

3. The Court is competent to hear the present case, in the terms of articles 62 and 63(1) of the Convention, since Guatemala ratified the American Convention on May 25, 1978 and accepted the Court's obligatory jurisdiction on March 9, 1987.

III. PROCEDURE BEFORE THE COMMISSION

4. On June 9, 2000 the Institute of Public Criminal Defense Services presented a petition before the Inter-American Commission. On that same date, the petitioner requested precautionary measures in favor of the alleged victim, which was later reiterated.

5. On October 9, 2002, during its 116th regular meeting, the Commission approved Report No. 74/02, in which it declared the admissibility of the case and decided to proceed to the consideration of its merits.

6. On February 9, 2004, the State was informed of the decision of the Inter-American Commission to grant precautionary measures in favor of Mr. Fermín Ramírez.

7. On March 11, 2004, during its 119th regular meeting, the Commission approved the Report of Merits No. 35/04, in which it concluded that:

[…] Based on the considerations of fact and law included in the present report, the Commission reiterates its conclusions that the State of Guatemala is responsible for the following:

a. The State is responsible of the violation of Mr. Fermín Ramirez's right set forth in Article 8(2)(b) of the American Convention because the Guatemalan authorities abstained from previously communicating in a detailed manner the facts on which the conviction to the death sentence was based.

b. The State is responsible of the violation of Mr. Fermín Ramírez's right set forth in Article 8(1) of the American Convention because the Guatemalan judicial authorities prevented his exercise of the right to be heard regarding the facts and circumstances he was charged with in the conviction.

c. The State is responsible of the violation to Mr. Fermín Ramírez's right set forth in Article 8(2)(c) of the American Convention because through the inclusion of new facts charged in the judgment and the abrupt change in the judicial classification in the conviction it prevented the technical defense counsel from orienting its activity in a reasonable manner, with the adequate time and means for its preparation.

d. The State is responsible of the violation to Mr. Fermín Ramírez's right set forth in Article 25 of the American Convention by imposing the death penalty in a criminal procedure that did not adjust to the rules of the due process and because the Guatemalan judicial authorities abstained from exercising an effective protection of the rights that were violated during said process.

e. The State is responsible of the violation of the right set forth in Article 4 of the American Convention with regard to Article 1(1) of the same instrument due to the possible execution of the death penalty imposed on Fermín Ramírez in a criminal process in which the rights to a due process of law and an effective judicial protection were violated.

Based on the analysis and the conclusions of the Report, the Commission made the following recommendations to the State:

1. Grant Fermín Ramírez reparations that include leaving without effect the sentence imposed and the realization of a new trial with complete observance of the due process of law.

2. Take the necessary measures to prevent that the acts that originated the violations established in [said] report be repeated.

8. On March 12, 2004, the Commission forwarded the Report on Merits No. 35/04 to the State and asked it to inform of the measures adopted to comply with the recommendations included in said report, within two months as of the date on which it was sent. Through a note of the same date, the Commission informed the petitioner that it had approved Report No. 35/04, and requested that it provide the information referred to in Article 43(3) of its Rules of Procedure, with regard to its position over the possibility to present the case before the Inter-American Court.

9. On March 31, 2004, the petitioners presented their response to the Commission's communication of March 12, 2004, in which they stated that it was pertinent to submit the case to the Inter-American Court, since this could avoid the predominance of the internal jurisprudence criterion according to which no prior warning is required from the Court for the variation of the legal classification of the crime, and that the defendant's right to a defense be violated in the cases of murder, by demanding that the accusation courts prove and discuss the danger of the convicted author in order to impose the death penalty.

10. On September 9, 2004 the Commission decided to present the case before the Court "due to lack of compliance by the State of the recommendations of the report."

IV. PROCEEDING BEFORE THE COURT

11. On September 12, 2004 the Commission submitted the application to the Court (supra para. 1).

12. The Commission appointed Mrs. Susana Villarán and Mr. Santiago A. Canton as delegates, and Messrs. Ariel Dulitzky, Victor Hugo Madrigal, and Mrs. María Claudia Pulido as legal advisors.

13. On October 7, 2004 the Secretariat of the Court (hereinafter "the Secretariat"), prior preliminary examination of the application by the President of the Court (hereinafter "the President"), notified it along with its appendixes to the State and informed it of the terms for its reply and appointment of their representation in the process. On that same day the Secretariat, following the President's instructions, informed the State of its right to appoint a judge ad hoc to participate in the consideration of the case.

14. On October 7, 2004, in accordance with that stated in Article 35(1)(d) and (e) of the Rules of Procedure, the Secretariat notified the representatives of the alleged victim (hereinafter "the representatives"), specifically the Institute of Public Criminal Defense Services of

Guatemala and the Institute of Compared Studies on Criminal Sciences of Guatemala, of the application.

15. On November 26, 2004 the State, after having been granted an extension, appointed Mr. Alejandro Sánchez Garrido as judge ad hoc. On that same day, the State appointed Mr. Herbert Estuardo Meneses Coronado as Agent and Mr. Luis Ernesto Cáceres Rodríguez as Deputy Agent.

16. On December 3, 2004 the representatives presented their brief of pleadings, motions, and evidence (hereinafter "brief of pleadings and motions").

17. On December 9, 2004 Mr. Alejandro Sánchez Garrido, who had been appointed as judge ad hoc, stated that, "in compliance with Article 19 of the Statute of the Court[, he had the duty to excuse himself from knowing [of said case as judge ad hoc] and requested that this excuse be accepted."

18. On December 10, 2004 the Secretariat, following the President's instructions, in accordance with Articles 10 and 19 of the Statute and the attributions granted by Articles 4 and 29(2) of the Rules of Procedure, once again invited the State to appoint, in accordance with the practices of the Court, a Judge ad hoc to participate in the consideration of the case, within the following 30 days.

19. On January 17, 2005 the State appointed Mr. Arturo Alfredo Herrador Sandoval as judge ad hoc.

20. On February 11, 2005 the State presented its response to the petition and its observations to the brief of pleadings and motions.

21. On February 23, 2005 the Institute of Comparative Studies in Criminal and Social Sciences of Argentina (INECIP), represented by Mr. David Baiguin and Mrs. Silvina Ramírez presented an amicus curiae in the present case.

22. On March 7, 2005 Mr. Eugenio Raúl Zaffaroni presented an amicus curiae in the present case.

23. On April 28, 2005 the President issued a Ruling through which, in accordance with Article 47(3) of the Rules of Procedure, he required that Mr. Fermín Ramírez, proposed as a witness by the representatives, and Messrs. Eduardo Montealegre Lynett and Alberto Martín Binder, proposed as expert witnesses by the Commission, and Messrs. Alejandro E. Álvarez, César Barrientos Pellecer and Rodolfo Francisco Kepfer Rodríguez, proposed as expert witnesses by the representatives, offer their testimony or expert opinions through statements given before a notary public (affidavits), which must be sent by the Commission and the representatives no later than May 9, 2005. Likewise, it requested that the representatives and the State present, on that same date, certain documents as evidence to facilitate adjudication of the case. Besides, the President granted a non-postponable term of 7 days, as of the date it received said affidavits, for the Commission, the representatives, and the State to present the observations

they consider appropriate. Similarly, the President informed the parties that they had until May 27, 2005 to present their final written allegations with regard to the merits, reparations, and costs. Finally, in response to the request made by the representatives that it was "important that the decision of the […] Court, with regard to not summoning a public hearing, [be] carefully [re]valuated taking into consideration the importance of presenting their arguments in voce and being able to directly refute the State's positions, thus affirming the principle of the presence of the parties to dispute," the President considered that it was not appropriate to agree to said request, based on the following:

[…] according to that stated in Article 40 of the Rules of Procedure, the President "shall call such hearings as may be necessary", which expresses a discretional power of the President to summon the parties to public hearings in cases with objects and circumstances that indicate that the exercise of said right results appropriate and necessary. The above is also deduced from the reading of several provisions of the Rules of Procedure that include the possibility of calling a hearing on preliminary objections, provisional measures, receipt of evidence or procedures of advisory opinions. [FN1] Besides, the power referred to is consistent with the regulation of said practice in other international courts of the same nature. [FN2] The exercise of said right results even more appropriate before the need to adequately attend the cases subject to the consideration of the Court, whose number has increased considerably and continues to increase constantly. If the Court or the President decide not to summon a public hearing, this may not be considered a lack of observance or a limitation to the right to a defense and presence of the parties, who maintain their opportunity to present their arguments in their final written allegations. In this sense, the fact that this type of practices is authorized is in benefit of the group of pending cases before the Tribunal, in attention to the fact that the Court does not meet permanently. […]

[FN1] Cfr. Article 25(7) ("The Court, or its President if the Court is not sitting, may convoke the parties to a public hearing on provisional measures"); Article 37(5) ("When the Court considers it indispensable, it may convene a special hearing on the preliminary objections, after which it shall rule on the objections"); Article 45(4) ("The Court may, at any stage of the proceedings: […] Commission one or more of its members to hold hearings, including preliminary hearings, either at the seat of the Court or elsewhere, for the purpose of gathering evidence"); and Article 63(4) ("At the conclusion of the written proceedings, the Court shall decide whether there should be oral proceedings and shall fix the date for such a hearing, unless it delegates the latter task to the President […]"), all of the Rules of Procedure.

[FN2] Cfr. Article 59(3) and 59(4) of the Rules of Procedure of the European Court of Human Rights: "The Chamber may decide, either upon request of a party or by its own initiative, to summon a hearing on the merits of the case if it considers that the exercise of its functions under the Convention so requires it;" and "the President of the Chamber may, when appropriate, set the written and oral proceedings" (free translation of the Secretariat).

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24. On May 13, 2005, the Inter-American Commission sent, after having granted an extension, the statements given by the expert witnesses Eduardo Montealegre Lynett and Alberto Martín Binder before a notary public (affidavits).

25. On May 13, 2005 the representatives presented, after having been granted an extension, the documents requested as evidence to facilitate adjudication of the case, and the statements offered by the expert witnesses Alejandro E. Álvarez, César Barrientos Pellecer, and Rodolfo Kepfer Rodríguez before a notary public (affidavits). Similarly, they forwarded the statement given by Mr. Fermín Ramírez on May 3, 2005 before the notary Rafael Francisco Cetina Gutiérrez "through video recording", as well as the document in which the mentioned notary gives faith that the video was recorded before him. The Commission did not present any observations in this regard.

26. On May 13, 205, the Irish Centre for Human Rights of the National University of Ireland (Galway) presented an amicus curiae in the present case.

27. On May 17, 2005, the Secretariat reiterated to the State the appeal that it present the evidence requested to facilitate adjudication of the case (supra para.23). Since said evidence had not been presented and the representatives had already submitted part of it, the State was requested to, following the President's instructions, forward the missing evidence as soon as possible.

28. On May 24, 2005 the representatives presented their observations to the statements offered before a notary public (affidavits) by the Inter-American Commission.

29. On May 27 and 28 and on June 1, 2005 the representatives, the Inter-American Commission, and the State presented, respectively, the brief of final pleadings with regard to the merits and reparations, and costs.

30. On June 1 and 14, 2005 the State presented, after having been granted an extension, the documents requested as evidence to facilitate adjudication of the case (supra paras. 23 and 27).

31. On June 7, 2005 the State presented its observations to the testimonial and expert statements presented by the Inter-American Commission and the representatives (supra paras. 24 and 25).

V. PROVISIONAL MEASURES

32. On December 3, 2004 the representatives, upon presentation of their brief of pleadings and motions, requested, inter alia, that "in order to save Mr. Fermín Ramírez's life" the Court "issue provisional measures in [his] favour […]. Based on that stated in Article 63(2) of the American Convention […]", in virtue of the fact that, despite the validity of the precautionary measures issued by the Commission of February 9, 2004, "the jurisprudence established by the Constitutional Court of Guatemala [in judgment of December 19, 2001] represents a great concern, in the sense that the cautionary measures dictated by the Inter-American Commission […] do not have binding effects for the Guatemalan courts."

33. On December 8, 2004 the Secretariat, following the President's instructions, requested that the representatives, in consideration of the validity of the precautionary measures imposed by the Inter-American Commission since February 9, 2004 and that the mentioned judgment of

the Constitutional Court of Guatemala was issued in the year 2001, inform in detail of the existence of the conditions of extreme seriousness and urgency and irreparability of the damages established in Article 63(2) of the American Convention that justified the adoption, by the Tribunal, of provisional measures in the situation of the present case at that time.

34. On December 13, 2004 the representatives presented their arguments regarding the alleged existence of the conditions of extreme seriousness and urgency and irreparability of the damage. In this regard they stated, inter alia, that said conditions existed due to the possibility that Mr. Fermín Ramírez be executed. Similarly, they stated that even though the Commission issued precautionary measures, there was no guarantee that the State would obey them, and thus they were ineffective in stopping the execution.

35. On December 14, 2004 the Secretariat, following the President's instructions, sent the representative's brief to the State and the Commission, and asked that they present, no later than December 16, 2004, the observations considered appropriate to said request of the representatives for provisional measures, as well as their opinion on their admissibility.

36. On December 14, 2004 the State presented its observations to the representative's request to adopt provisional measures and stated, inter alia, that it had taken actions to comply with the precautionary measures issued by the Commission on February 9, 2004 and that as of the determination of the precautionary measures, the life of Mr. Fermín Ramírez had not been at risk at any time nor had their been any attempts to execute the sentence imposed, reason for which there were not enough motives or considerations of extreme seriousness to justify an order of provisional measures in favour of the alleged victim.

37. On December 16, 2004 the Inter-American Commission presented its observations to the representative's request to adopt provisional measures and stated that it considered that the adoption of these was admissible since, inter alia, even though the precautionary measures had been effective, "the Tribunal must preserve its jurisdiction and issue the corresponding measures, since the matter was pending before the Court and the considerations established by Article 63(2) of the American Convention were present" and, also, in other cases, the State had executed people protected by precautionary measures. It also stated that there was an imminent damage due to the definitive nature of the conviction issued against Mr. Fermín Ramírez and that the history of execution of the death sentence in Guatemala indicates that the time-period between the issuing of said ruling and the date established for its execution is short.

38. On December 21, 2004 the President of the Court issued a Determination of Urgent Measures, in which it ordered that the State protect the life and personal integrity of Mr. Fermín Ramírez. In this Determination the President considered, inter alia, that:

[…] despite the fact that up to now the precautionary measures issued by the Commission have been effective, in the present case the conviction issued against Mr. Fermín Ramírez seems to be definitive. Also, the Commission and the representatives presented precedents regarding the execution, by the State, of people protected by precautionary measures […]. That is, the situation described by the representatives and the Commission in this case […] reveal prima face the existence of a situation of extreme seriousness and urgency, that makes the avoiding of

irreparable damages to the right to live and personal integrity of Mr. Fermín Ramírez necessary, as well as the avoidance of the frustration of a possible reparation that the Court may determine in favour of the alleged victim.

39. On March 12, 2005 the Inter-American Court issued a Ruling, through which it decided to:

1. Ratify the Ruling of the President on Urgent Measures of December 21, 2004 in all its terms.
2. Call upon the State to adopt, without delay, the measures necessary to protect the life and personal integrity of Mr. Fermín Ramírez, in order to avoid any hindering of his case before the Inter-American system for the protection of human rights.
3. Call upon the State to inform the Inter-American Court of Human Rights of the measures adopted in complying with this Ruling no later than March 21, 2005.
4. Call upon the representatives of the alleged victim, beneficiary of the urgent measures ordered, to present their observations to the State's report within a one-week term as of the receipt of the mentioned state report, and upon the Inter-American Commission of Human Rights to present its observations to the State's report in a two-week period as of its receipt.
5. Call upon the State to, after its first communication (supra operative paragraph 3), to continue informing the Inter-American Court of Human Rights, every two months, of the measures adopted and call upon the representatives of the alleged victim, beneficiary of the urgent measures ordered, and upon the Inter-American Commission on Human Rights to present their observations to said State Reports within a four and six-week period respectively, as of the receipt of the mentioned State reports. […]

40. The State has presented three reports on the provisional measures ordered and the representatives have submitted their corresponding observations. The Commission presented its observations to the two first State reports. Said provisional measures are in force at the time this Judgment was issued.

41. The application presented by the Inter-American Commission before the Court in the present case refers to the facts that originated the issuing of the provisional measures ordered by this Tribunal in favour of Mr. Fermín Ramírez. In consideration of the nature of this matter, the Tribunal considers that the corresponding analysis must be reserved for the determination of the merits regarding the controversy presented.

VI. EVIDENCE

42. Before turning to the analysis of the evidence received, the Court, pursuant to Articles 44 and 45 of the Rules of Procedure, will make reference to certain general considerations applicable to the specific case, most of which have been developed in the jurisprudence of this Tribunal.

43. The principle of the presence of the parties to dispute applies to evidentiary matters, and it involves respecting the parties' right to a defense, being this principle one of the foundations of

Article 44 of the Rules of Procedure, in what refers to the time frame in which the evidence must be submitted, in order to secure equality among the parties. [FN3]

[FN3] Cfr. Case of Caesar. Judgment of March 11, 2005. Series C No. 123, para. 41; Case of the Serrano Cruz Sisters. Judgment of March 1, 2005. Series C No. 120, para. 31; and Case of Lori Berenson Mejía. Judgment of November 25, 2004. Series C No. 119, para. 63.

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44. According to the practices of the Tribunal, at the beginning of each procedural stage the parties must state, on the first opportunity given to them to go on record in writing, the evidence they will offer. Also, in exercise of the discretional powers contemplated in Article 45 of its Rules of Procedures, the Court or its President may request additional evidentiary elements to the parties as evidence to facilitate adjudication of the case, without this turning into a new opportunity to extend or complement the allegations, unless the Tribunal allows it expressly. [FN4]

[FN4] Cfr. Case of the Serrano Cruz Sisters, supra note 3, para. 32; Case of Lori Berenson Mejía, supra note 3, para. 63; and Case of Molina Theissen. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of July 3, 2004. Series C No. 108, para. 22.

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45. The Court has pointed out, with regard to the receipt and assessment of the evidence, that the proceeding followed before them is not subject to the same formalities as domestic judicial actions, and that the incorporation of certain elements into the body of evidence must be done paying special attention to the circumstances of the specific case and taking into account the limits imposed by the respect to legal security and the procedural balance of the parties. The Court has also taken into account that international jurisprudence, when it considers that international courts have the power to appraise and assess the evidence according to the rules of competent analysis, has not established a rigid determination of the quantum of the evidence necessary to substantiate a ruling. This criterion is especially valid for international human rights tribunals that have, for the effects of determining the international responsibility of a State for the violation of a person’s rights, ample powers in the assessment of the evidence presented before them regarding the relevant facts, pursuant to the rules of logic and based on experience. [FN5]

[FN5] Cfr. Case of Caesar, supra note 3, para. 42; Case of the Serrano Cruz Sisters, supra note 3, para. 33; and Case of Lori Berenson Mejía, supra note 3, para. 63.

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46. Based on the aforementioned, the Court will proceed to examine and assess the set of elements that make up the body of evidence of the case within the corresponding legal framework.

A) Documentary Evidence

47. Among the documentary evidence presented by the parties, the Commission, and the representatives there are the sworn statements offered by the alleged victim and the expert witnesses before a notary public (affidavits), pursuant to that stated by the President in Judgment of April 28, 2005 (supra para. 23). The Tribunal considers it appropriate to summarize below the relevant parts of said statements:

a) Affidavit of Mr. Fermín Ramírez, alleged victim

He has been en three Criminal centers: the Granja Canadá, Sector 11 of Zone 18, and "el Infiernito", where he is currently located.
The cell he was assigned to in Sector 11 was of three by two meters, with a two and a half meter patio and a one and a half meter bathroom. This cell only had one window though which he received his food, which was of bad quality. Due to the size of the place it was not possible to exercise and he could only go outside 10 minutes on Mondays. For two years he was alone, and afterwards he was with two other people, and since the cell only had two cots, one of them had to sleep on the floor.
In "el Infiernito" he sleeps in Sector B4 and "he can live a little bit more." Due to the heat he cannot stay in his cell, but he has the possibility to spend a lot of time outdoors. He exercises one hour every day. He goes out to the hall to bathe or to work making wallets and purses, but the materials are not given to him, he must buy them. The authorities only provide notebooks. Water is scarce. The food is "really bad", reason for which he gets sick to his stomach. However, "his needs make him eat". He receives three meals per day, of which lunch is the best; at breakfast they give him coffee, bread and, sometimes, cream of wheat; and for dinner they give him beans, bread, four tortillas, and coffee. Lately the authorities have improved the quality of the food.
He was subject to threats when he was in Granja Canadá and Sector A "for the crime he was accused of." He knew who was making those threats. Currently, the threats are more moderate.
Before being transferred to Sector 11, he was in Sector A with two inmates named Tomás Cerrate Hernández and Amilcar Cetino for almost a year. They spoke of God and brought him close to the teachings of the church. They became very close friends, shared their food and they taught him how to make purses. Later, they were executed. He saw their executions on TV. This made him panic and "he only thought of the time in which he would go to the place they had gone." After said executions, he was transferred to Sector 11 where "he started [his] short life" and he only hoped they would take his family to see him.
He suffers of gastric ulcer, thus coffee and fat are not good for him. He has been seen twice in the San Juan de Dios Hospital, but they have never performed an ultrasound or X-rays. He has been given prescriptions but has not been able to buy the medicine and they do not give them to him in the prison, even though there is a nursing department, but it does not have specialized medications.
He also considers that the media has hurt his family. The pressure of the press and newspapers have depressed them and made them lose their strength and have even caused one of the members of his next of kin a psychological trauma.
The death penalty "starts killing the families." In his case it has psychologically destroyed his family and affects his relationship with them. He has separated himself from his family due to society, which has marked them. He has not seen his children in a year and doesn't have any type of communication with them, because their mother doesn't want it. The only person who visits

him every three or four months is his aunt. The most difficult thing for him is being away from his family. If they were to revoke the death penalty it would change his relationship with his family, since "with the elimination of the death penalty, […] he feels […] the liberty [and] the opportunity to move on." He stated that he can be a good father and that his children, as they become older, may understand the mistake he made when he abandoned them.
He regrets having been convicted to death without having been informed of it at the time of the debate and without having had the opportunity to defend himself, which he considers were mistakes of the authorities.
The imposition of the death penalty is useless, since "it will never change the world." Those sentenced to death carry a very heavy load and suffer an illness, since they always think about the sentence and in what their families and children will think.He trusts the people that are fighting for his "forgiveness" and has hopes because his case is "blooming".

b) Expert report of Mr. Alejandro E. Álvarez, specialist in Criminal Law

The expert witness referred to the way in which the crimes of aggravated rape and murder are regulated in Guatemala, the difference in the sentences contemplated for them, the aggravating circumstances that permit the application of the death penalty, and their relationship with the exercise of the right to a defense and the right to a fair trial in the criminal process, especially in the processes for crimes for which the death penalty may be imposed. He also referred to the supposition of social dangerousness, which in his opinion contains elements contrary to the fundamental principles of human rights. Likewise, he made an analysis of the specific case of Mr. Fermín Ramírez, in which he pointed out the irregularities in which, in his opinion, the legal authorities had incurred.

c) Expert report of Mr. César Barrientos Pellecer, specialist in Criminal Procedural Law

The expert witness referred to the forms of the Guatemalan criminal procedures, specifically to those regarding the modification of the attributable acts and their legal classification.
He mentioned that the Code of Criminal Procedures of Guatemala did not establish a real system for the presentation of charges due, inter alia, to the real misunderstanding about it, the fears due to the lack of participation of the judge in the investigation, the doubts over the performance of the Office of the Public Prosecutor, and the national legal tradition based on the interference of the judge in the investigation.
The expert witness made an analysis of Mr. Fermín Ramírez's specific case, where he pointed out the irregularities in which, in his opinion, the legal authorities had incurred.

d) Expert report of Mr. Rodolfo Kepfer Rodríguez, Pschyiatrist

The expert, based on the interviews he had with Mr. Fermín Ramírez, Mrs. Ana Lucrecia Sis and Fernando, Marvin, and Eliseo Adonai Ramírez Sis, referred to the psychiatric damage and suffering experimented by Mr. Fermín Ramírez and his next of kin as a consequence of him being on death row.
Mr. Fermín Ramírez has been submitted to intense conditions of chronic stress, with which moral panic is associated (extended demoralization and sensation of chronic helplessness),

anxiety and repressed fear, consequences of the prolonged stay in death row in the maximum security prisons where he has been held.

Likewise, the alleged victim presents a rigidly defensive emotional system, he makes efforts to deny and rationalize his experiences of fear and suffers of anxiety due to the constant threats upon him in death row. On the other hand, Mr. Ramírez expressed that he wishes to forget the existence of his children, because he believes he will never see them again. However, he mentioned that if the death penalty were revoked he would try to rebuild his life and establish contact with his children.

Mr. Kepfer diagnosed that Mr. Fermín Ramírez suffered from chronic situational disorder (chronic stress syndrome), with somatoform nature (psychologically conditioned somatizations). He also suffers of a personality disorder of a mixed nature, with impulsive/ aggressive characters and addictive tendencies (use of alcohol), even though since he was admitted into prison he has stopped drinking. However, the expert ruled out that Mr. Ramírez suffered a psychotic disorder or loss of contact with reality.

Mr. Ramírez suffers severe gastrointestinal problems, difficulty to sleep regularly, nervousness, constant alarming sensation, and need to anxiously watch over his surroundings. However, he is not given adequate medical or psychiatric assistance, which causes him a chronic mental torture.

Mrs. Ana Lucrecia Sis and her children have suffered stigmatization due to the publicity given to Mr. Ramírez's case. Mrs. Fermín Ricardo stated that Fermín Ricardo, her eldest son, died 4 years ago because "his loved his father a lot" and expressed that her "son would not have died if it weren't for what happened to his father." The three eldest children of Mr. Ramírez and Mrs. Sis have developed academic problems. Mr. Fermín Ramírez's children are not willing to visit him.

The family suffers emotional disorders and disturbances that have not been properly dealt with, in what refers to social support and psychotherapeutical assistance. The chronic deterioration of the socio-familiar situation of both the children and the mother is evident and has brought on, as a consequence, a feeling of rejection, isolation, rage, and confusion. The fact that the children are not willing to visit their father has a very negative impact on the mental health, not only of Mr. Ramírez, but also his family, thus having a disturbing and demoralizing effect. Currently there are situations of confusion and ambivalence towards the father figure, which have a negative impact on the family's mental health.

On the other hand, Mr. Kepfer Rodríguez made reference to the incarceration conditions experimented by Mr. Fermín Ramírez. The expert pointed out that the subject has insisted that the most oppressive thing for him is the obligatory lack of activity and the lack of resources and materials with which he could make some kind of craft, neither of which are supplied by the prison or his family.

Finally, the expert stated that Mr. Fermín Ramírez must receive a brief but consistent psychotherapy and, for his psychosocial recovery, it is fundamental that he be transferred to another detention center. Referring to Mr. Ramírez's next of kin, the expert considered that they should receive immediate and consistent psychosocial support in order to avoid further emotional disturbances. Despite the fact that Mrs. Sis "does not want to know anything" about Mr. Ramírez and much less be subject to publicity, she must also receive psychosocial support "in order to obtain from it certain support and impartiality in what refers to the children's contact with their father."

e) Expert report of Mr. Alberto Martín Binder, specialist in Criminal Law

The expert witness referred to the Guatemalan criminal procedure, specifically to the changes of the facts attributable and their legal classification. Likewise, he analyzed the principle of consistency, and on the other hand, referred to the dangerousness, by stating that it is a discernment about the future and, therefore, it escapes the logics of the process of a hearing that in all aspects demands evidence of the facts over which a decision will be made.
Mr. Binder stated that in a process where the death penalty may be imposed the State is obliged to maximize the conditions of demandability of the truth of the facts that serve as a foundation for that sentence.
He also made an analysis of the specific case of Mr. Fermín Ramírez where he pointed out the irregularities in which, in his opinion, the judicial authorities incurred.

f) Expert report of Mr. Eduardo Montealegre Lynett, specialist in Criminal Law

The expert witness referred to the right to a defense and other judicial rights in the criminal process, especially those processes for crimes where the applicable sanction is the death penalty. Likewise, he made reference to the principle of consistency, which demands a provision under which the identity between the indictment and the judgment is maintained.
Mr. Eduardo Montealegre Lynett analyzed the case of Mr. Fermín Ramírez and pointed out the irregularities in which, in his opinion, the judicial authorities had incurred.

B) Evidence Assessment

48. In this case, as in others, [FN6] the Tribunal admits the probative value of the documents presented in a timely fashion by the parties, that were not disputed or objected, and whose authenticity was not questioned.

[FN6] Cfr. Case of Caesar, supra note 3, para. 46; Case of the Serrano Cruz Sisters, supra note 3, para. 37; and Case of Lori Berenson Mejía, supra note 3, para. 77.
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49. Regarding the statement offered by the alleged victim (supra paras. 23, 25, and 47), this Tribunal accepts it in what it is consistent with its object, stated in Judgment of April 28, 2005 (supra para. 23). In this sense, since the alleged victim has a direct interest in the case, his statements may not be evaluated in an isolated manner, but instead within the entire body of evidence, applying the rules of competent analysis. [FN7]

[FN7] Cfr. Case of Caesar, supra note 3, para. 47; Case of the Serrano Cruz Sisters, supra note 3, para. 40; and Case of Lori Berenson Mejía, supra note 3, para. 78.
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50. In what refers to the sworn statements (affidavits) of the expert witnesses Eduardo Montealegre Lynett, Alberto Martín Binder, Alejandro E. Álvarez, César Barrientos Pellecer, and Rodolfo Kepfer Rodríguez (supra paras. 24, 25, and 47), the Court admits them in what they

are consistent with its object and assesses them within the entire body of evidence, applying the rules of competent analysis.

51. Regarding the articles published by the press, the Tribunal considers that even though they do not have the nature of documentary evidence mentioned, they may be assessed when they include public or notorious facts or statements of State employees or they corroborate that established in other documents or statements received during the process. [FN8]

[FN8] Cfr. Case of the Serrano Cruz Sisters, supra note 3, para. 43; Case of Lori Berenson Mejía, supra note 3, para. 80; and Case of "Juvenile Reeducation Institute". Judgment of September 2, 2004. Series C No. 112, para. 81.

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52. The Court considers that the documents provided by the representatives in the final brief of pleadings are useful for the ruling of the present case, since they were not contested or objected, nor was their authenticity or veracity put in question. Therefore, they are included in the body of evidence pursuant to Article 45(1) of the Rules of Procedure. [FN9]

[FN9] Cfr. Case of Lori Berenson Mejía, supra note 3, para. 81; Case of Tibi. Judgment of September 7, 2004. Series C No. 114, paras. 78 and 85; and Case of "Juvenile Reeducation Institute", supra note 8, para. 90.

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53. Regarding the documents requested and presented as evidence to facilitate adjudication of the case (supra paras. 23, 25, and 30), the Court includes them in the body of evidence of the present case pursuant to that stated in the second subparagraph of Article 45 of the Rules of Procedure.

VII. PROVEN FACTS

54(1) On May 10, 1997 Mr. Fermín Ramírez was arrested by a group of neighbors of the Las Morenas village, who turned him in to the National Police for allegedly having committed a crime against the minor Grindi Jasmín Franco Torres [FN10].

[FN10] Cfr. Judgment of March 6, 1998 issued by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 7, folios 88 and 89).

54(2) On May 15, 1997 the Second Lower Court of Criminal Matters, Drug Trafficking, and Environmental Crimes of Escuintla ordered the preventive detention of Mr. Fermín Ramírez for the crimes of murder and aggravated rape [FN11] against the minor Grindi Jasmín Franco Torres, of 12 years old, which allegedly occurred on May 10, 1997 in the farm Las Delicias,

close to Las Morenas village, municipality of Puerto Iztapa, Department of Escuintla, Guatemala. [FN12]

[FN11] Cfr. Ruling of May 15, 1997 issued by the Second Lower Court of Criminal Matters, Drug Trafficking, and Environmental Crimes of Escuintla (dossier of appendixes to the petition, appendix 3, folio 43).
[FN12] Cfr. Ruling of May 15, 1997 issued by the Second Lower Court of Criminal Matters, Drug Trafficking, and Environmental Crimes of Escuintla (dossier of appendixes to the petition, appendix 3, folio 44); Indictment presented on August 1, 1997 by the Office of the Public Prosecutor before the Second Lower Court of Criminal Matters, Drug Trafficking, and Environmental Crimes of Escuintla (dossier of appendixes to the petition, appendix 4, folios 46 and 47).

54(3) On August 1, 1997 the Office of the Public Prosecutor presented a request for the commencement of the trial and presented the accusation against Mr. Fermín Ramírez for the crime of aggravated rape established in Article 175 of the Criminal Code, [FN13] which states:

(Aggravated rape). If, based on or as a consequence of the rape, the aggrieved party were to die, a sentence of 30 to 50 years will be imposed. [FN14]

[FN13] Cfr. Indictment presented on August 1, 1997 by the Office of the Public Prosecutor before the Second Lower Court of Criminal Matters, Drug Trafficking, and Environmental Crimes of Escuintla (dossier of appendixes to the petition, appendix 4, folios 45 and 50).
[FN14] Cfr. Criminal Code of Guatemala (Decree Number 17-73) (dossier on statements offered before notary public and evidence to facilitate adjudication of the case).

54(4) The presentation of the indictment in Guatemala is based on Article 332 bis, subparagraph 4 of the Code of Criminal Procedures, which states that it must include:

[…] The legal classification of the illicit act, offering the foundations for the crime that each of the individuals has committed, their form of participation, the degree of execution, and the aggravating or extenuating circumstances.

54(5) The Office of the Public Prosecutor made the accusation in the following terms:

That on May 10, 1997, at approximately eleven hours with thirty minutes, the defendant Fermín Ramírez, with only one surname, or Fermín Ramírez Ordóñez, stood in front of the store called La Esperanza located in the Las Morenas village of the Municipality Puerto Iztapa of the Escuintla Department, place where the girl Grindi Jasmin Franco Torres was, to whom said defendant asked to run an errand for him and that in exchange he would give her twenty Quetzales, going said minor to run the alleged errand the defendant had requested […]. Later [Mr. Ramírez] caught up with her […] and took her on the bicycle he was driving, riding from

South to North on the dirt road that goes from the Las Morenas village to the Obrero village, of that same jurisdiction, and around the Las Delicias farm he took the minor off the bicycle and with great strength sexually abused her, using such violence that he killed her by strangulation, all this occurring along said dirt road, on the grass, next to a quenelle found in said location. After committing the act […], he took off the pants he was wearing, put on a pair of shorts and proceeded to pull the […] minor, whom he buried in the mentioned quenelle, putting mud over her as well as a log that was at the location, with the objective of hiding the victim's body, he later bathed in said quenelle, and proceeded to leave the location, returning to Las Morenas village, his place of residence. [FN15]

[FN15] Cfr. Indictment presented on August 1, 1997 by the Office of the Public Prosecutor before the Second Lower Court of Criminal Matters, Drug Trafficking, and Environmental Crimes of Escuintla (dossier of appendixes to the petition, appendix 4, folios 46 and 47).

54(6) On December 18, 1997 the Second Lower Court of Criminal Matters, Drug Trafficking, and Environmental Crimes of Escuintla issued the order for trial to commence and admitted the indictment made by the Office of the Public Prosecutor against Mr. Fermín Ramírez for the crime of aggravated rape. [FN16]

[FN16] Cfr. Order for trial to commence of December 18, 1997 issued by the Second Lower Court of Criminal Matters, Drug Trafficking, and Environmental Crimes (dossier of appendixes to the petition, appendix 5, folio 55).

54(7) On March 5 and 6 of 1998 the oral and public hearing against Mr. Fermín Ramírez took place before the Criminal, Drug Trafficking and Environmental Crimes Trial Court. [FN17]

[FN17] Cfr. Record of the oral trial moved forward to March 5 and 6, 1998 by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 6, folio 57).

54(8) On the morning of March 5, 1998, during the first part of the oral and public hearing, the Trial Court admitted the legal medical report of May 29, 1997 on the necropsy practiced on the dead minor by the Department's Forensic Examiner, Luis Erick Douglas de León Barrera, who ratified the content of said report by testifying in the mentioned debate. To the questions of the Office of the Public Prosecutor and the Court, Mr. de León Barrera replied that:

The lungs [of the dead minor] were expanded in size due to the inhalation performed, they were logically full of oxygen and this increases the size of the lungs, the set of lungs and trachea is probably due to the inhalation at some time by the victim and that immediately after the inhalation or during the inhalation the trachea and the large vessels were obstructed[. D]ue to the

injuries described, the violence used when treating the minor was definitely excessive. […] From the characteristics of the body, the injuries to the neck and the injuries found on the trachea it could have been a sexual necroph[ilia]; I do think that asphyxia was the cause of death; it could have been that the person raped the girl first and then killed her, so she wouldn't say anything […]. [FN18]

[FN18] Cfr. Record of the oral trial moved forward to March 5 and 6, 1998 by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 6, folios 62 and 63).

54(9) On the afternoon of March 5, 1998, upon the reopening of the oral hearing and after having heard the statements of Mr. Fermín Ramírez and five expert witnesses, including the one given by Doctor de León Barrera (supra para. 54(8)), the Court warned the parties of the possibility of a modification in the legal classification of the crime, without specifying the new classification, in the following terms:

According [to] that established in Article three hundred and seventy four and three hundred and eighty eight of the code of criminal procedures, the Court warns the parties that at the right time a legal classification different to the one contemplated in the indictment and the order for trial to commence may be given. [FN19]

[FN19] Cfr. Record of the oral trial moved forward to March 5 and 6, 1998 by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 6, folio 68).

54(10) Article 333 of the Code of Criminal Procedures states:

Alternative accusation. The Office of the Public Prosecutor, in the event that in the debate all or any of the facts on which the main legal classification are based are not proven, may alternatively indicate the circumstances of fact that allow the placement of the defendant's actions in a different crime. [FN20]

[FN20] Cfr. Code of Criminal Procedures of Guatemala (Decree Number 51-92) (dossier on statements offered before notary public and evidence to facilitate adjudication of the case).

54(11) Article 373 of the Code of Criminal Procedures states:

Extension of charges, during the debate the Office of the Public Prosecutor may expand the charges, through the inclusion of a new fact or a new circumstance that was not mentioned in the

indictment or the order for trial to commence and that may modify the legal classification or the sentence of the same act object of the debate, or constituted the criminal continuation.
In such case, with regard to the facts or circumstances attributed in the extension, the President [of the Court] will proceed to receive a new statement from the defendant and will inform the parties that they have the right to request the suspension of the debate in order to offer new evidence or prepare their intervention. Once this right has been exercised, the court will suspend the debate for a term that will be prudently determined, according to the nature of the facts and the needs of the defense.The facts or circumstances to which the expansion refers will be included in the indictment. [FN21]

[FN21] Cfr. Code of Criminal Procedures of Guatemala (Decree Number 51-92) (dossier on statements offered before notary public and evidence to facilitate adjudication of the case).

54(12) Article 374 of the Code of Criminal Procedures establishes that:

Warning ex officio and suspension of the debate. The President of the Court will warn the parties of the possible modification of the legal classification, and they may exercise the right established in the previous article. [FN22]

[FN22] Cfr. Code of Criminal Procedures of Guatemala (Decree Number 51-92) (dossier on statements offered before notary public and evidence to facilitate adjudication of the case).

54(13) After having made said warning (supra para. 54(9)) the President of the Court did not establish ex officio "that it would receive a new statement" from Mr. Fermín Ramírez nor did it inform the parties that they had the "right to request the suspension of the debate", pursuant to that established in Article 373 of the Code of Criminal Procedures. Nor did the defense request the suspension of the debate. Therefore, it continued. [FN23]

[FN23] Cfr. Record of the oral trial moved forward to March 5 and 6, 1998 by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 6, folio 68).

54(14) In its closing arguments of the oral hearing, the Office of the Public Prosecutor concluded that Mr. Fermín Ramírez was responsible of the crime of murder and that the crime was committed with "cruelty" and "brutal impulse" and it requested that the death penalty be imposed. [FN24] In this sense, it stated that:

[w]e always held the thesis that the defendant is responsible for the crime of aggravated rape, during the debate as the Court suggested that a different legal classification to the crime for which he was accused […], to make an analysis regarding what occurred in the court room, the

thesis presented by the Office of the Public Prosecutor is that Mr. Fermín Ramírez […] is the responsible author of the crime of murder.
[…T]hat thesis [is] proven by the Office of the Public Prosecutor through the different evidence and statements received during this hearing [based on which] the participation in the mentioned crime is confirmed, beginning with the defendant's statement in the Second Lower Court […]; [as well as] in the statement of the Forensic Expert, Doctor Erick de León, [who] stated when ratifying his report that the death of the minor had been executed with brutality, also stating that the necrophilia, or physical access after a person's death, occurred in that situation [… To] this we can also add […] the way he found that there was violence in the hymen, which presented damage and violence [; among other statements.].
[…] It was established that it wasn't rape but instead murder; the act was executed with cruelty and brutal impulse, therefore the Office of the Public Prosecutor, attending to that established in Articles: twenty-seven, thirty-two, and one hundred and thirty two (27, 32, and 132) of the Criminal Code, requests that the DEATH PENALTY be imposed on the defendant FERMIN RAMIREZ, only surname. [FN25]

[FN24] Cfr. Record of the oral trial moved forward to March 5 and 6, 1998 by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 6, folio 84).
[FN25] Cfr. Record of the oral trial moved forward to March 5 and 6, 1998 by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 6, folios 81 and 82).

54(15) Article 132 of the Criminal Code states:

(Murder). Murder will be committed by whoever kills a person:
1) With premeditation; 2) For a price, reward, promise, with a profit motive; 3) Through or on the occasion of a flood, fire, poison, explosion, collapsing of a building or any other affectation that may cause great damage; 4) With known premeditation; 5) With cruelty; 6) With the impulse of brutal perversity; 7) To prepare, facilitate, commit and hide another crime or to guarantee its results or immunity for themselves or their co-participants or for not having obtained the result proposed when attempting the other punishable act; 8) With terrorist purposes or in the development of terrorist activities.
A prison sentence of 25 to 50 years will be imposed on the offender convicted of murder, however, the death penalty will be imposed instead of the maximum prison time, if due to the circumstance of the acts and of the occasion, the way it was carried out and the determining motives, a greater dangerousness of the agent is revealed.
On those who the death penalty is not imposed for this crime may not be granted a sentence reduction for any reason. [FN26]

[FN26] Cfr. Criminal Code of Guatemala (Decree Number 17-73) (dossier on statements offered before notary public and evidence to facilitate adjudication of the case).

54(16) In their closing arguments of the oral hearing, the defense did not refer expressly to the request presented by the Office of the Public Prosecutor regarding the change of the legal classification of the crime. In this sense, it stated: "how is it possible [that Mr. Fermín Ramírez] is being accused of such a serious act." Likewise, it stated that the arrest of Mr. Fermín Ramírez was illegal, that no witness declared that they had evidence that he had committed the crime and that, with the existence of more than one reasonable doubt, it requested an acquittal. [FN27]

[FN27] Cfr. Record of the oral trial moved forward to March 5 and 6, 1998 by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 6, folio 84).

54(17) Article 388 of the Code of Criminal Procedures states:

Verdict and Indictment. The verdict may not consider other facts or circumstances, different to those described in the indictment and in the order for trial to commence or, in its case, in the extension of the indictment, except when this favours the defendant.
In the verdict the court may give the act a legal classification different to that of the indictment or the order for trial to commence, or impose greater or lower sentences than those requested by the Office of the Public Prosecutor. [FN28]

[FN28] Cfr. Code of Criminal Procedures of Guatemala (Decree Number 51-92) (dossier on statements offered before notary public and evidence to facilitate adjudication of the case).

54(18) In the judgment of March 6, 1998 the Criminal, Drug Trafficking and Environmental Crimes Trial Court considered as credited

[the acts] of which the aggrieved minor was object; III) The presence of the defendant FERMÍN RAMÍREZ AND/OR FERMÍN RAMÍREZ ORDOÑEZ, where the acts occurred; IV) The arrest of the accused party FERMÍN RAMÍREZ AND/OR FERMÍN RAMÍREZ ORDOÑEZ; V) The presence of AB type blood in the right extremity of the dead minor's body belonging to the same blood type as the defendants, and presence of SEMEN in the vaginal sample taken from the minor [in] her underwear and [in the] defendant's underpants. [FN29]

In its considerations the Tribunal reasoned, inter alia, that

[it is the judge's obligation to] vote in each of the matters to be decided in the present judgment, as per the rules of reasoned competent analysis […] Likewise, pursuant with the Law, the judgment may not consider other facts or circumstances different to those described in the indictment or the order for trial to commence as demonstrated, reason for which after the corresponding deliberation and vote the following conclusions are reached:

[…] E) In virtue of the evidence previously analyzed and assessed, the truth of how the facts occurred is completely established, facts that were proven through the scientific means established for that effect during the debate, such as the reports and statements of the expert witnesses […] received during the debate, which verify the defendant's participation in the acts under investigation, since the medical, chemical, and photographic analysis are conclusive and corroborate that stated by the eyewitnesses in each of the moments that lead to the violent death of the minor GRINDI YASMIN FRANCO TORRES, as well as the moments following it […].
[…] F) [Mr. Fermín Ramírez's version] results unlikely and is taken as a means of defense, pursuant with Article sixteen of the Political Constitution of the Republic of Guatemala, which states that in the criminal process nobody may be forced to incriminate him or herself. […]
[…] H) OF THE CLASSIFICATION OF THE CRIME. Article 388 of the Code of Criminal Procedures states that in the judgment the Court may give the act a legal classification different to the one in the indictment or the order for trial to commence or impose greater or lower sentences than the one requested by the Office of the Public Prosecutor. In the present case, the analysis of the evidence presented in the debate, especially in what refers to the legal report from the necropsy performed on the minor's body […], the same one that determines that the cause of death of said minor was due to ASPHYXIA BY STRANGULATION, the Court considers that the criminal act attributable to the defendant fits in the figure contemplated in Article 132 of the Criminal Code, reformed by Decree [Number] 20-96 of the Congress of the Republic, that is the CRIME OF MURDER. Therefore, through a legal overriding the legal classification presented in the indictment and order for trial to commence must be changed from AGGRAVATED RAPE TO THE CRIME OF MURDER. [FN30]

Similarly, with regard to the aggravating circumstances of the crime referring to the social dangerousness of the defendant, the mentioned judgment stated that

said murder was committed with the majority of the elements of this crime, such as MALICE, KNOWN PREMEDITATION, CRUELTY, WITH AN IMPULSE OF BRUTAL PERVERSITY AND ITS HIDING, since the minor Grindi Jasmín Franco Torres was murdered with CRUELTY AND BRUTAL PERVERSITY, THAT UPON RAPING HER HE TORE HER GENITAL ORGANS AND RECTUM, THUS ACTING AGAINST HER QUALITY OF A MINOR AND A GIRL, LATER HIDING HER BODY. As well as the aggravating characteristics included in Article twenty-seven of the Criminal Code, such as: [the] ABUSE OF SUPERIORITY, [the] DESERTED AREA, THE CONTEMPT TOWARD THE VICTIM, AND THE TRICK OF HAVING OFFERED HER TWENTY QUETZALES SO SHE WOULD RUN AN ERRAND FOR HIM TO COMMIT THE CRIME. Therefore, the social dangerousness of the defendant is determined […]. [FN31]

The Court unanimously and "with legal certainty" concluded that:

I) […] the defendant FERMIN RAMÍREZ WITHOUT ANOTHER SURNAME AND/OR FERMÍN RAMÍREZ ORDÓÑEZ is the responsible author of the crime of MURDER AND NOT AGGRAVATED RAPE, as initially presented in the indictment by the Office of the Public Prosecutor, since the evidence produced during the debate, especially the legal medical report regarding the necropsy carried out on the body of the minor GRINDI YASMIN FRANCO TORRES establishes that the cause of death of said minor was asphyxia by strangulation, report

that was ratified by Doctor DOUGLAS ERICK DE LEON BARRERA, Forensic Doctor of the Department in the hearing itself of the debate, and not a consequence of the minor's rape, and that it could have been the case that after the victim had died [Mr. Fermín Ramírez] had carnal access with the body, thus becoming a NECROPHILIA. [FN32].

Finally, with regard to the determination of the sentence, it decided that for the "illicit act [of murder], it sentenced [Mr. Fermín Ramírez] to the DEATH PENALTY." [FN33]

[FN29] Cfr. Judgment of March 6, 1998 issued by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 7, folio 89).
[FN30] Cfr. Judgment of March 6, 1998 issued by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 7, folios 91, 95, and 96).
[FN31] Cfr. Judgment of March 6, 1998 issued by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 7, folio 98).
[FN32] Cfr. Judgment of March 6, 1998 issued by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 7, folio 97).
[FN33] Cfr. Judgment of March 6, 1998 issued by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 7, folio 100).

54(19) Mr. Fermín Ramírez's defense counsel presented a special motion of appeal before the Twelfth Chamber of the Appeals Court of Criminal Matters, Drug Trafficking and Environmental Crimes for merit and procedural reasons against the judgment of March 6, 1998 of the Criminal Trial Court, within the term established by law. Likewise, the defense counsel stated that the change in name of the legal classification –rape- to murder, requested by the Office of the Public Prosecutor, constituted an expansion, reason for which a new statement had to be received from Mr. Fermín Ramírez. [FN34] In this regard, the defense counsel stated as

[…] Reasons of Merit and as sub-reasons: non-observance, wrongful interpretation, and erroneous application of Articles 14 of the Political Constitution of the Republic of Guatemala; 8 second numeral of the American Convention of Human Rights and 132 of the Criminal Code; and Procedural Reasons, invoking as sub-reasons the nonobservance and erroneous application of the law, especially Article 373 of the Code of Criminal Procedures. [FN35]

[FN34] Cfr. Judgment of first appeal of May 27, 1998 issued by the Twelfth Chamber of the Appeals Court of Criminal Matters, Drug Trafficking, and Environmental Crimes of Guatemala (dossier of appendixes to the petition, appendix 8, folios 102 and 103); and judgment of February 18, 1999 issued by the Constitutional Court, in its quality of extraordinary Court of Amparo (dossier of appendixes to the petition, appendix 10, folio 121).
[FN35] Cfr. Judgment of first appeal of May 27, 1998 issued by the Twelfth Chamber of the Appeals Court of Criminal Matters, Drug Trafficking, and Environmental Crimes of Guatemala (dossier of appendixes to the petition, appendix 8, folio 103).

54(20) On May 27, 1998, the Twelfth Chamber of the Appeals Court of Criminal Matters, Drug Trafficking and Environmental Crimes declared the special motion of appeal inadmissible based on the following considerations:

[…] for reasons of Merit[:] in no way was the presumption of innocence of Mr. [Fermín Ramírez] violated; since the due process was respected; nor was the right to a fair trial to which the defendants are entitled pursuant to the American Convention on Human Rights and, besides, all the elements necessary to classify the crime as Murder according to that established in Article 132 of the Criminal Code are present, since all the facts attributed to the process were the consequence of a normally suitable action for their production, according to the nature of the crime and the circumstances under which it was committed, concluding from this that he was arrested moments after the act is said to have been committed; that accepted by him in his preliminary examination statement and from the statements of the witnesses […] and the report offered by the [expert witness] of the Chemical Biological Criminal Lab of the Office of identification of the National Police and the Forensic Medical report of the necropsy practiced on the body of the dead minor; details that served as grounds for the Trial Court to achieve legal certainty that Fermín Ramírez only surname was the author of the violent death of GRINDI YASMIN FRANCO TORRES, criterion shared by this Chamber and, therefore, it must declare the Special Motion of Appeal due to reasons of Merit inadmissible.
With regard to the procedural motives[:] Article 373 of the Code of Criminal Procedures was not unobserved nor erroneously applied by the Trial Court, since at no time was the indictment expanded through the inclusion of a new fact or a new circumstance that was not mentioned in the indictment or in the order for trial to commence, on the contrary, they correctly applied Article 388 of the same Code, quoted in its second paragraph, where the law enables the Trial Court to give the act a different legal classification to that of the indictment or the order for trial to commence or to impose sentences greater or below the ones requested by the Office of the Public Prosecutor. In what refers to the violation of Articles 211, 219, 281, and 305 of the Code of Criminal Procedures, invoked by the defense counsel […] when analyzed, despite having been stated as violated in the initial writ of the presentation of the Special Motion of Appeal and not having been invoked as a Procedural Reason, this Chamber does not consider they were not observed. Regarding Articles 65 and 66 of the Criminal Code, these were not violated either, since the Trial Court justified their motive for imposing the death penalty on the defendant. On the other hand, this Chamber considers that no notorious injustice was committed against the defendant FERMIN RAMIREZ only surname or FERMIN RAMIREZ ORDOÑEZ that violated his constitutional rights granted by law to every person, but instead they were respected; and the death penalty imposed on the defendant was based on the conclusive evidence produced in the debate and assessed by the Trial Court pursuant [to] the Rules of Competent Analysis. Therefore, the Special Motion of Appeal based on Procedural Motives must also be declared inadmissible. [FN36]

[FN36] Cfr. Judgment of first appeal of May 27, 1998 issued by the Twelfth Chamber of the Appeals Court of Criminal Matters, Drug Trafficking, and Environmental Crimes of Guatemala (dossier of appendixes to the petition, appendix 8, folios 103-106).

54(21) On June 6, 1998 the defense counsel of Mr. Fermín Ramírez presented before the Twelfth Court of Appeals an appeal for review by a higher court without formalities. On June 7, 1998, the defense counsel of Mr. Fermín Ramírez presented before the Criminal Chamber of the Supreme Court of Justice an appeal for review by a higher court due to merit against the judgment of May 27, 1998 issued by the Twelfth Chamber of the Appeals Court of Criminal Matters, Drug Trafficking and Environmental Crimes, and claimed an erroneous interpretation of Articles 430, 373, and 388 of the Code of Criminal Procedures and of Articles 65 of the Criminal Code. In this sense, the defense counsel stated that:

[Article 430 of the Code of Criminal Procedures was erroneously interpreted because] the first appeals Court gave merit to the evidence provided in the debate […] and therefore also gave merit to the facts proven […] without having the power to do so. [Article 373 of the mentioned legal document was erroneously interpreted because] even though it is true that there wasn't an expansion of the indictment this is a violation of the procedure that had an adverse effect on the defendant [due to] the inclusion of new facts within the process […] and therefore the right the defendant or his counsel had to request a suspension was omitted. Also, if the possibilities of a variation in the legal classification tended to a more serious crime, the warning included in Article 374 of the same legal document must have been made. [Article 388 of the Code of Criminal Procedures was erroneously interpreted because] the Appeals court considered the article correctly applied […] with regard to the power of the Criminal trial Court […] to give the act a different legal classification of that included in the indictment or in the order for trial to commence o to impose sentences greater or lesser than the one requested by the Office of the Public Prosecutor without taking into account that the facts on which there sentence was based were not the same that originated the process […]; therefore the lower degree Court was not empowered to modify the legal classification of the facts because the requirements that guarantee the inviolability of the defense through Article 12 of the Political Constitution of the Republic had not been complied with. [Article 65 of the Criminal Code was erroneously interpreted because] the Court of Appeals […] omit[ted] […] to point out that at no time the trial court gave merit to his personal background or that of the victim [nor] of the greater or lesser dangerousness of the defendant, circumstance that must be a precedent and not a consequence of the sentence, likewise it omitted from its reasoning the elements and circumstances of the fact on which it was based by simply applying the aggravating circumstances included in the lower court sentence, since it only limited its action to their numeric description. [FN37]

[FN37] Cfr. Appeal for annulment without formalities presented before the Twelfth chamber of Appeals and appeal for annulment due to merit of July 7, 1998 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 847-858).

54(22) On August 17, 1998, the Criminal Chamber of the Supreme Court of Justice considered that the Appeal for Review by a Higher Court presented by the defense counsel of Mr. Fermín Ramírez had been erroneously presented since they only indicated that it was being presented due to reasons of merit but it did not indicate, as per the applicable law, which was the case of

legality it invoked. However, since it was a case that involved the death penalty it revised the judgment ex officio, in order to establish, inter alia, if the constitutional and legal guarantees were observed during the process. Said Criminal Chamber declared the Appeal inadmissible and mentioned that:

[…] the legal norms stated as violated must be of a substantive nature and not a procedural one. In the case in question […] the appellant claims there was a violation of […] norms of an eminent adjective nature, an argumentative defect that makes it impossible to examine the appeal.
[…] the appellant limited itself to expressing its non-conformity with that decided in this regard; but it did not formulate a position that would act as the foundation for its claim, which makes the examination of the case impossible.
[…] that none of the procedural motives or motives of merit for annulment regulated in the Code of Criminal Procedures is present.
[…] that the process was substantiated pursuant to the right to a fair trial satisfying the defendant's right to a defense, not finding any circumstance to justify its annulment, since the courts that have taken up the case have observed all the norms regarding the procedure of the trial, without violating the defendant's right to take action before the competent, predetermined judges, to defend himself, to offer and present evidence, to present arguments and use means of appeal, that is, the constitutional right to a due process was completely attended to. [FN38]

[FN38] Cfr. Judgment of August 17, 1998 issued by the Supreme Court of Justice (dossier of appendixes to the petition, appendix 9, folios 113 and 114).

54(23) On September 30, 1998 Mr. Fermín Ramírez's defense counsel presented before the Constitutional Court an appeal of relief against the decision of the Criminal Chamber of the Supreme Court of Justice of August 17, 1998. In said appeal it requested a provisional Amparo and stated, inter alia, the violations to the right to life, to a defense, to a due process, and to the presumption of innocence. In this sense, the defense counsel stated that:

[the fact that the appeal for review by a higher court presented for reasons of merit was declared inadmissible violates Mr. Fermín Ramírez's constitutional rights [set forth in Articles 6, 12, 14, and 18(a) of the Constitution because:]
[…] the court […] issued [against Mr. Fermín Ramírez] a conviction and imposed [upon him] the death penalty, which is not legally permitted, since it was based on presumptions and, by being carried out this way, the internal legislation was violated, specifically Article 18 of the Political Constitution of the Republic of Guatemala, as well as international treaties and the right to life that every person has.
The Criminal Trial Court, when issuing its verdict, issued a conviction, despite the fact that nobody at any time pointed [him] out as the responsible party […]
[…] the convicting court when issuing the corresponding verdict in the judgment dated March sixth nineteen ninety eight, does not at any time consider as proven the fact that [Mr. Fermín Ramírez] had participated in the illicit act of murder he has been charged with.

[…] the court gave evidentiary value to illegitimate evidence, since it was obtained, first of all illegally, and on the other hand they were obtained without the presence of a defense counsel[. Similarly,] it is evident that the arrest of [Mr. Fermín Ramírez] was completely illegal.
[T]he convicting court issued a death sentence based on presumptions, misapplying the rules of a reasoned and competent analysis not following the principle of in dubio pro reo or favor rei, since without the existence of evidence to induce the court in veracity when applying the rules of competent analysis it should have declared that there was no certainty and therefore acquit [Mr. Fermín Ramírez] of the crime he was accused of. [FN39]

[FN39] Cfr. Appeal of relief presented on September 30, 1998 before the Constitutional Court (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 864 and 866-868).

54.24 On February 18, 1999 the Constitutional Court in its quality of Extraordinary Court of Amparo, denied the Amparo requested on September 30, 1998, in the following terms:

1. After the occurrence of the violent death of the minor, whom neighbors of the place of the act saw was riding on the bicycle being driven by the applicant toward the river, and moments later they discovered her body covered with mud in shallow waters, with blood stains, he was detained by some of them who noticed he was coming back wet, without a shirt on, and with mud stains, in order to turn him over to the police authorities thus avoiding that the other settlers carry out their intention to burn him alive. The Code of Criminal Procedures (Article 257) authorizes an arrest executed in this manner, reason for which your affirmation of having been illegally arrested lacks foundation, and therefore there is no violation to Article 6 of the Constitution.
2. A writ of indictment was issued against the applicant for the crimes of murder and aggravated rape; the Office of the Public Prosecutor accused him of the latter and a trial was commenced. From it we can point out that: a) he had technical assistance from a defense counsel as of the proceeding of preliminary examination [..s]ince it affirms that the court took into account evidence obtained illegally, without the presence of a defense counsel, it is on the record that neither both, or either of them filed a complaint or protested on that opportunity […]: […] There is no violation to Article 12 of the Constitution because the compliance of the judges with the due process can be observed.
3. [The] allegation [regarding that it was not considered proven that Mr. Fermín Ramírez was the person responsible for the death of the minor] lacks support since it was not until the ruling that the trial court declared him as the author of the crime of murder.
4. […] the appeal for review by a higher court [presented by the defense counsel] that gave place to the judgment being appealed [of August 17, 1998], held a different thesis [than that the conviction imposed violated Article 18(a) of the Constitution for having been based on presumptions], expressing that the conviction should have been issued for aggravated rape instead of murder and the punishment should have been imposed within the limits stated in Article 125 of the Criminal Code. […]
Presumptional evidence is supported by clues or signs that shed light on facts that are hidden, whose related evidence with the invested act allows to infer its existence, however, said evidence

differs, due to its different foundation, from the one used in the sentence, since the evidence produced in the debate and from the documents incorporated through their reading, examined pursuant to the rules of reasoned competent analysis, referred to and assessed […] that were not filled with illegality at the time they were proposed or received, refer without doubt to the defendant and are direct evidence extracted by the judges and assessed applying their logics and rationality when justifying their decision. […]
[I]n accordance with that established in Article 44 and 46 of the Law on Amparo, Personal Exhibition, and Constitutionality it is the court's obligation to decide whether to charge the costs to the applicant, who may be exonerated when he/ she has acted with evident good faith as occurs in this case, as well as on the imposition of a fine for the sponsoring attorney. Being the Amparo notoriously inadmissible, a fine must be imposed in this sense.
Therefore: The Constitutional Court […] decides to:
I) Den[y] the Amparo requested by Fermín Ramírez or Fermín Ramírez Ordóñez against the Supreme Court of Justice, Criminal Chamber. II) Revoke the provisional Amparo granted. III) Exonerate the applicant of the costs. IV) Impose upon the sponsoring attorneys […] a fine of one hundred quetzales each, which must be paid to the Treasury of this Court within the five days following the date on which the present judgment is definitive; in case of non-compliance it will be collected through the corresponding executive proceeding. […] [FN40]

[FN40] Cfr. Judgment of the Constitutional Court of February 18, 1999 (dossier of appendixes to the petition, appendix 10, folios 116, 123, and 124).

54(25) Mr. Fermín Ramírez's defense counsel requested a clarification from the Constitutional Court of the judgment of February 18, 1999, regarding the fine imposed on the defense (supra para. 54(24)), clarification that was declared inadmissible on March 1, 1999. [FN41]

[FN41] Cfr. Clarification of March 1, 1999 issued by the Constitutional Court (dossier of appendixes to the petition, appendix 11, folios 125 and 126).

54(26) On May 14, 1999 the defense counsel presented before the Criminal Chamber of the Supreme Court of Justice an appeal for review against the final judgment of March 6, 1998 issued by the Criminal, Drug Trafficking and Environmental Crimes Trial Court of the Department of Escuintla, in virtue of the fact that all regular and extraordinary appeals were exhausted. It stated that:

[…] the sentence imposed [on Mr. Fermín Ramírez] was based on presumptions because nobody saw him kill [the minor.]
[…] the value assigned to [the] evidence used to impose the death penalty [on Mr. Fermín Ramírez] lacks validity since there is only indirect evidence and therefore Article 18 of the Constitution is violated […]
[…] due to presumption the classification of the crime [was] chang[ed] and on presumption [Mr. Fermín Ramírez] was convicted to death. [FN42]

[FN42] Cfr. Appeal for review presented on May 14, 1999 before the Criminal Chamber of the Supreme Court of Justice (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 881 and 886-889).

54(27) On July 12, 1999 the Criminal Chamber of the Supreme Court of Justice declared the appeal for review inadmissible due to lack of foundation. In this sense, it stated that:

[…] the appellant at no time […] proved that the incriminating evidence consisting of statements […] which served as foundation for his conviction, lack the evidentiary value attributed by the competent jurisdictional body on that occasion; likewise, the interested party did not prove that said evidence was false, invalid, altered, or falsified since he did not present any element to verify these points[, reason for which] the revision requested lacks foundation and must be declared inadmissible. [FN43]

[FN43] Cfr. Judgment of July 12, 1999 issued by the Supreme Court of Justice (dossier of appendixes to the petition, appendix 12, folios 128-130).

54(28) On July 27, 1999 the defense counsel presented a measure of grace before the Secretary of the Interior so that they would send the dossier to the President of the Republic, based on Article 1 of Decree Number 159 of the Legislative Assembly of the Republic of Guatemala, reformed by Article 2(1) of Decree Number 45 of the Government's Revolutionary Junta; Article 12 of Decree Number 159 of the Legislative Assembly of the Republic of Guatemala, reformed by Article 3 of Decree Number 45 of the Government's Revolutionary Junta, and Article 2 of Decree Number 100-96 of the Congress of the Republic, Regulatory Law on the Death Penalty. In said appeal the defense counsel requested, inter alia, that the death penalty [imposed on Mr. Fermín Ramírez] be commuted to the immediately inferior one of fifty years in prison." [FN44]

[FN44] Cfr. Measure of grace presented on July 27, 1999 before the Ministry of Government (dossier of appendixes to the brief of pleadings and motions, appendix 19, folios 619-627).

54(29) On June 1, 2000 Decree Number 32-3000, issued on May 11, 2000, was published in the Diario de Centro América, through which the Congress of the Republic expressly annulled Decree Number 159 of the National Assembly, since "there was no norm supporting the commutation of the death penalty by the Executive Body as established by [said] Decree[, …] due to the annulment of previous Constitutions." It also stated that Decree Number 32-2000 would come into force on the day of its publication in the Official Newspaper. [FN45]

[FN45] Cfr. Decree Number 32-2000 issued on May 11, 2000 by the Congress of the Republic of Guatemala and published on June 1, 2000 in the Diario de Centro América (dossier of appendixes to the brief of pleadings and motions, appendix 24, folio 670).

54(30) On June 2, 2000 Governmental Agreement Number 235-3000, issued on May 31, 2000, was published in the Diario de Centro América, through which the President of the Republic, in exercise of the powers granted to him in Article 183 subparagraph (e) of the Political Constitution of Guatemala and based on Articles 141 and 203 of the mentioned Constitution; in Article 4 subparagraph (6) of the American Convention on Human Rights, and Article 6 subparagraph (4) of the International Pact on Civil and Political Rights, denied the measure of grace presented by Mr. Fermín Ramírez's defense counsel. [FN46]

[FN46] Cfr. Governmental Agreement Number 235-2000 issued on May 31, 2000 by the President of the Republic of Guatemala and published on June 2, 2000 in the Diario de Centro América (dossier of appendixes to the brief of pleadings and motions, appendix 12, folio 530).

54(31) On June 9, 2000 Mr. Fermín Ramírez's defense counsel presented an Amparo before the Constitutional Court against the Criminal Chamber of the Supreme Court of Justice, the Twelfth Chamber of the Appeals Court of Criminal Matters, Drug Trafficking, and Environmental Crimes, and the Criminal, Drug Trafficking, and Environmental Crimes Trial Court of Escuintla, for the violation of the guarantees of the due process and the right to a defense. Likewise, it requested provisional Amparo before the "imminent danger that the death sentence be executed in […] against [Mr. Fermín Ramírez] as a consequence of the violation of the due process, the principle of defense and providing evidence." In this sense, it stated that:

[…] there was not a legal process because [Mr. Fermín Ramírez] is accused of Aggravated Rape, the lower court open[ed] a trial for this same crime, the debate was open[ed] and [they] told him that [it] would be carried out […] for the crime of Murder without having made an alternative indictment or having expanded the indictment, [or] hearing what he had to say over this other infraction to the law […].
[It is not possible for] the court, based [on] Article [388 of the Code of Criminal Procedures] to change a prison sentence for a death sentence without informing the defendant that he will be charged for the crime of Murder which can imply a prison sentence or the death penalty.
[…] if the indictment is not expanded during the debate for the crime of Murder, the defendant's statement regarding this crime is not received, nor is he given the right to request the suspension of the debate in order to offer new evidence or prepare his intervention due to this change in the crime because in accordance with Article 373 of the Code of Criminal Procedures the president of the court should have warned the defendant about the possible modification of the legal classification pursuant to Article 374 of said code, therefore it is obvious that the due process was violated or there was no legal process in complete violation of Article 12 of the Political Constitution of the Republic; and the accused was left defenseless since he was not given the opportunity to prove that he had not committed that crime, nor was he given the opportunity to offer evidence for the defense in order to disprove [the] facts[, which] proves that the error was

made from the lower court, the higher court, and the criminal chamber, since they should have detected that mistake ex officio in accordance with the principle of effective judicial protection. […]
[…] the Court […] did not justify why it fit into Murder[, thus violating Article 11 bis of the Code of Criminal Procedures].
[the Court] did not explain [or justify] in what the malice[, premeditation and cruelty] consisted. [Regarding the impulse of brutal perversity,] if [the Court] says it was necrophilia it is not possible to commit [the previous] aggravating circumstances to a corpse. [Therefore,] the violation to Article 11 bis of the mentioned code continues.
[…] by not justifying [the] aggravating circumstances [included in Article 27 of the Criminal Code, such as the abuse of superiority, a deserted area, contempt for the victim, use of tricks to commit the crime] it did not comply with that regulated by Article 11 bis in question, and [by] declaring the social dangerousness of the defendant based [on] such aggravating circumstances, it violated Article 87 of the Criminal Code, since in order to declare the dangerousness mentioned in Artilce 132 of the Criminal Code, there must be one of the circumstances mentioned in the stated Article 87 present[, which] must be legally supported and justified […].
[Finally, it requested that] the Amparo be granted in a single instance for this specific case, that the related judgments be annulled and that the correction of the error be ordered as of the procedural act appealed and that the first instance debate be repeated without the mentioned violations. [FN47]

[FN47] Cfr. Amparo presented on June 9, 2000 before the Constitutional Court (dossier of appendixes to the petition, appendix 13, folios 132 and 134).

54(32) On November 21, 2000 the Constitutional Court, in its nature of an Extraordinary Court of Amparo, denied the Amparo of June 9, 2000 in order to avoid becoming a third instance prohibited by law." In this regard, it considered that:

[…] In the present case, the appellant […] presented [the Amparo] when the thirty-day term established […] in the Law on Amparo, Personal Exhibition, and Constitutionality had expired. However, since it is a case in which the execution of the death penalty is pending, the principle of preeminence of the Constitution, which imposes the obligation to admit all appeals, must be applied […].
[…] This Court has repeatedly stated in its jurisprudence that the Amparo, due to its subsidiary and extraordinary nature, cannot replace the ordinary legal protection, because that would be a third instance prohibited by the Constitution.
[…] the substantiated criminal process was held and decided upon in observance of the due process and the defendant's right to a defense, in which he had the opportunity to exercise his constitutional rights, having presented and being processed the regular and extraordinary judicial remedies permitted by the Law on Criminal Procedures. […]
[…] to expect that the acts of the judicial bodies that intervened be restudied and that the Court of Amparo issue a judgment with regard to the motives presented before said bodies is a revision of the merits that […] must be solved by the courts […] [FN48].

[FN48] Cfr. Judgment of November 21, 2000 issued by the Constitutional Court (dossier of appendixes to the petition, appendix 14, folios 143-150).

54(33) On November 28, 2000 the defense counsel of Mr. Fermín Ramírez presented before the Second Court of Criminal Execution an "incidental plea of lack of conclusiveness of the sentence" of March 6, 1998 that sentenced him to death, in order to avoid the setting of the date and time for the execution of the sentence, since the declaration of inadmissibility of the "special motions of appeal, appeals for annulments, relief, review, and measure of grace, [presented by Mr. Fermín Ramírez, and] persisting [the] violation to [his] right to a due process, it present[ed] a complaint before the Inter-American Commission on Human Rights so that it may, as jurisdiction of the Guatemalan criminal courts, declare if there in fact was a violation of the due process in [his] case, being said complaint in process." [FN49].

[FN49] Cfr. Incidental plea of lack of conclusiveness of the sentence presented on November 28, 2000 before the Second Court of Criminal Execution (dossier of appendixes to the petition, appendix 15, folios 152-154).

54(34) On December 22, the Second Court of Criminal Execution, declared the incidental plea of lack of conclusiveness of the sentence inadmissible, due, inter alia, to the following

the convicted party or his defense counsel should have presented certifications of the documents offered in the initial memorial in order to analyze them, which was not done, thus the purpose of the hearing was lost and not having any evidence to analyze or assess the present incidental plea must be declared inadmissible. Regarding the request made by the defense counsel to order discovery in the present incidental plea in order to present evidence, the undersigning is of the opinion that such a request is completely out of order since [this]* would imply a variation of the forms of the process. [FN50]

[FN50] Cfr. Judgment of December 22, 2000 issued by the Second Court of Criminal Execution (dossier of appendixes to the petition, appendix 16, folios 155-157).

54(35) On January 2, 2001 the defense counsel presented a special motion of appeal against the decision of December 22, 2000, for procedural reasons, before the Second Court of Criminal Execution and requested that they proceed "to transfer and forward the […] motion to the Jurisdictional Court", and in it they stated that

[Article 16 of the Law of the Judicial Body was not observed, since] the Court did not order discovery in the process with the evidence offered, since it should not have set a hearing to decide on the incidental plea but instead to proceed with regard to the evidence proposed and,

subsequently, if it was its opinion, set the hearing to discuss the incidental plea in a oral and public hearing […]
[Article 12 of the Constitution was not observed, since Mr. Fermín Ramírez was left] totally defenseless [and he was not given] enough opportunity to defend [himself] in order to prove that there [were] still matters to be resolved, and on which the fulfillment of the sentence imposed will depend, and by declaring inadmissible the appeal and violating constitutional rights, the right to a defense was violated […]. [FN51]

[FN51] Cfr. Motion of appeal presented on January 2, 2001 before the Second Court of Criminal Execution (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 894-901).

54(36) On January 31, 2001 the Fourth Chamber of the Court of Appeals declared the motion unappealable and confirmed the judgment of December 22, 2000, stating that

[…] it did not find any violation of the norms mentioned as violated, since Article 139 of the Law of the Judicial Body […] does not include the ordering of discovery, but instead only the receipt of evidence, when the incidental plea refers to merit matters, in no more than two hearings […]; and, in this specific case, the Judge set a hearing for the reception of evidence, without it being provided by the one who proposed it, reason for which he proceeded to decide on the incidental plea. [FN52]

[FN52] Cfr. Ruling of January 31, 2001 issued by the Fourth Chamber of the Court of Appeals (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 902-906).

54(37) On February 13, 2001 the defense counsel presented an appeal of relief before the Chamber of Amparo and Pretrial of the Supreme Court of Justice against the decision of January 31, 2001. It stated that

[said decision] was not issued pursuant [to the] legal process [and they were] applying, as did the court, a law different to the one that corresponds to the case [of Mr. Fermín Ramírez.]
[the] right [of Mr. Fermín Ramírez] to know who the Prosecuting Attorney that would follow [his] case and to be able to establish a compatibility was violated […]
[…] the Fourth Chamber of the Court of Appeals […] violate[d] the due process [of Mr. Fermín Ramírez] and [his] right to a defense. [FN53]

[FN53] Cfr. Appeal of relief presented on February 13, 2001 before the Chamber of Amparo and Pretrial of the Supreme Court of Justice (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 907-916).

54(38) On May 18, 2001 the Chamber of Amparo and Pretrial of the Supreme Court of Justice declared the appeal of relief presented on February 13, 2001 "notoriously inadmissible". Said decision was notified to the defense of June 4, 2001. In this regard, it considered that

[…] the incidental plea was processed and decided upon pursuant to the due process and the right to defense of the petitioner, in which he had the opportunity to exercise his constitutional rights, providing the evidence in the hearing that was set for this effect, which was not done […]
[…] to intend to get the acts of the judicial bodies that intervened restudied and to obtain a decision from the Amparo court with regard to the motives presented before said bodies, is a revision of the merit and this decision, pursuant to Article 203 of the Constitution, corresponds to the courts, given their function of judging and promoting the execution of that decided, reason for which it would constitute a third instance prohibited by law, due to the subsidiary and extraordinary nature of the Amparo, since it is not a way to revise that decided or to decide matters of fact contested in a legal process that was solved pursuant to the procedural norms that govern it, guaranteeing the rights established in the Constitution and the law. [FN54]

[FN54] Cfr. Judgment of May 18, 2001 issued by the Chamber of Amparo and Pretrial of the Supreme Court of Justice (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 917-923); and appeal for extension presented on June 4, 2001 before the Chamber of Amparo and Pretrial of the Supreme Court of Justice (dossier of appendixes to the petition, appendix 17, folio 161).

54(39) On June 4, 2001, date on which Mr. Fermín Ramírez's defense counsel was notified of the judgment of May 18, 2001, it presented before the Chamber of Amparo and Pretrial of the Supreme Court of Justice an appeal of extension against said judgment, for having "omitted to decide on some of the matters included in the Amparo," in this case, for not referring to the request for the ordering of discovery of the incidental plea regarding the execution of the sentence, or the alleged violation of Mr. Fermín Ramírez's right to know of the change of the Prosecutor in charge of his case. [FN55]

[FN55] Cfr. Appeal of extension presented on June 4, 2001 before the Chamber of Amparo and Pretrial of the Supreme Court of Justice (dossier of appendixes to the petition, appendix 17, folios 161 - 163).

54(40) On June 21, 2001, the Chamber of Amparo and Pretrial of the Supreme Court of Justice declared the appeal for expansion presented on June 4, 2001 inadmissible. In this regard, it considered that

[in] the judgment issued there is no matter to be expanded on, since even though the substantive reasons of why that decided by the Fourth Chamber of the Court of Appeals were not explained in the detail requested, that was because it was the logical and necessary consequence of the fact

that, as stated in the judgment, the Amparo wanted to be turned into a third instance of review, and in order to avoid this is precisely why the Amparo presented was resolved as it was, stating that due to its subsidiary and extraordinary nature it could not substitute the ordinary judicial function, which was reason enough to declare it inadmissible. [FN56]

[FN56] Cfr. Judgment of June 21, 2001 issued by the Chamber of Amapro and Pretrial of the Supreme Court of Justice (dossier of appendixes to the petition, appendix 18, folios 164 and 165).

54(41) On July 11, 2001 the defense counsel presented a motion of appeal against the Amparo judgment of May 18, 2001 before the Constitutional Court. It stated that

[…] the Chamber of Amparo and Pretrial violated [the] right [of Mr. Fermín Ramírez] to have a due process regulated in Article 12 of the Constitution, since by denying [him] the Amparo it supported the decisions of the Fourth Chamber of the Court of Appeals and the ruling issued by the Second Trial Court, because all three of them applied a law that does not regulate the specific case, but instead it is a general provision[. Therefore,] there is a violation of the mentioned due process and, that is why, that decided by the lower court must be revoked and the legally proceeding ruling must be made. [FN57]

[FN57] Cfr. Motion of appeal presented on July 11, 2001 before the Constitutional Court (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 924-928).

54(42) On December 19, 2001 the Constitutional Court confirmed the appealed judgment. In this regard, it considered that

[…] the Amparo must not become a means of revision of the judicial decisions just because they do not favour the expectations of the one who presents it […]. [FN58]

[FN58] Cfr. Judgment of December 19, 2001 issued by the Constitutional Court (dossier of appendixes to the brief of pleadings and motions, appendix 11, folios 525-527).

54(43) On March 8, 2002 Mr. Fermín Ramírez's defense counsel presented a new appeal for review before the Criminal Chamber of the Supreme Court of Justice against the criminal judgment executed on March 6, 1998, since the death penalty had been imposed based on the dangerousness of the defendant, without having performed a psychiatric medical exam that determined this circumstance. It added that

[…] the judge can not conclude [t]he dangerousness from circumstantial evidence and, since that is what he did, there is an unconstitutionality. If the trial court wanted to impose the death penalty [upon Mr. Fermín Ramírez] it should have ordered a psychiatric medical exam, if it was not provided by the prosecutor, in order to determine if he [is] or not dangerous [and, if so,] it also could not impose that sentence [upon him.]
[…] the [motion of] appeal must be declared admissible directly issuing a definitive sentence imposing the new prison punishment of fifty years deducting the time [Mr. Fermín Ramírez has] been in prison. [FN59]

[FN59] Cfr. Appeal for review presented on March 8, 2002 before the Criminal Chamber of the Supreme Court of Justice ((dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 929-939).

54(44) On April 2, 2002 the Criminal Chamber of the Supreme Court of Justice flatly rejected the appeal for revision. It considered that

[…] in order to accept an appeal for revision for its proceeding it must comply with the formal and procedural requirements established by law. [In the present case, the defense counsel] did not specify which facts or elements of evidence that appeared after the conviction that along with those already examined in the process, make it evident that the fact or a circumstance that aggravated the sentence did not exist, or that the defendant did not commit it; because it is not enough for the applicant to invoke as documentary evidence the sentences of the first and second courts, as well as those of the Court of Appeals and Amparo without specifying the reasons of the suitability to justify a less serious sentence or an acquittal. [FN60]

[FN60] Cfr. Judgment of April 2, 2002 issued by the Criminal Chamber of the Supreme Court of Justice (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 940-941).

54(45) On April 25, 2002 the defense counsel presented an appeal of relief against the judgment of April 2, 2002 before the Constitutional Court and requested a provisional Amparo "in virtue of the imminent existence of danger that the death penalty be executed against [Mr. Fermín Ramírez] without being given the possibility to exhaust all the remedies necessary to defend [himself]." With regard to the judgment of April 2, 2002, the defense counsel stated that

[…] the Supreme Court of Justice, Criminal Chamber, violated Article 18 of the Political constitution of the Republic, because it was obliged to process the appeal for review, and if any requirement was missing it had to give the corresponding term for its correction, but never reject it because it goes against its obligations. It also violated Article 14 subparagraph (5) of the International Pact of Civil and Political Rights, because it restrict[ed Mr. Fermín Ramírez's] right to submit the conviction and the sentence imposed to a Higher Court. In this same way Article 8 subparagraph 2 point h of the American Convention on Human Rights is violated,

because [they] restrict [his] right to appeal the sentence before a higher court. Article 398 of the Code of Criminal Procedures was also violated because it limits [his] ability to appeal his conviction of the death penalty, which was arbitrarily imposed [upon him]; and Defense 4 of the Defenses for the guarantee of the protection of the rights of those convicted to the death penalty since if there was a psychiatric medical report it would state that […] he [is] not socially dangerous and therefore, the imposition of the death penalty did not correspond; but since it was done like this, it was imposed arbitrarily. Therefore, the Amparo action must be granted reestablishing [his] right to appeal and for the same reason the Supreme Court of Justice, Criminal Chamber must proceed with the Appeal for Review presented. [FN61]

[FN61] Cfr. Appeal of relief in a single instance presented on April 25, 2002 before the Constitutional Court (dossier of appendixes to the petition, appendix 19, folios 166-175).

54(46) On December 30, 2002 the Constitutional Court, acting as an extraordinary court of Amparo, granted Mr. Fermín Ramírez an Amparo and ordered the Supreme Court of Justice to issue a new decision regarding the admissibility of the appeal for review. In this regard, it considered that:

Having analyzed the background of the Amparo we have determined that the Criminal Chamber of the Supreme Court of Justice, by rejecting the appeal for review presented by the party protected by the Amparo, prohibited [him] his constitutional right to access all means of appeal established by law, since we can appreciate that the content of said ruling, more than a declaration on the admissibility of the review, is a decision regarding the merit of the matter, however said decision must be made by the mentioned judicial body after having exhausted the procedure that, pursuant to the code of criminal procedures, must be given to the appeal for revision –Articles 458 and 459 of the Code of Criminal Procedures. [FN62]

[FN62] Cfr. Judgment of December 30, 2002 issued by the Constitutional Court (dossier of appendixes to the petition, appendix 20, folio 179).

54(47) On November 25, 2003 the Criminal Chamber of the Supreme Court of Justice issued a judgment and declared the appeal for revision presented by the defense counsel against the judgment of March 6, 1998 inadmissible. It considered that:

[…] the appellant did not express why he consider[ed] that the judgments presented are evidentiary elements that occurred after the judgment […] Despite [that] deficiency, [t]he Chamber analyze[d] the evidentiary elements presented, determining that the judgments received as evidence […] do not comply with the requirement of Article 455 subparagraph (5) of the Code of Criminal Procedures, since they are not facts or evidentiary elements that occurred after the conviction […]. [FN63]

[FN63] Cfr. Judgment of November 25, 2003 issued by the Criminal Chamber of the Supreme Court of Justice (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 943-945).

54(48) On December 22, 2003 the defense counsel of Mr. Fermín Ramírez presented before the Constitutional Court a "partial constitutional motion of general nature" against the second to last paragraph of Article 132 of the Criminal Code and its reform, of both Decree Number 17-73 and Decree Number 20-96, both of the Congress of the Republic. It stated that

[…] the circumstances of the act, the occasion, the way it was carried out and the motives [established in the second to last paragraph of Article 132 of the Criminal Code] allow the determination of that dangerousness and the imposition of the death penalty[, which is] precisely what is unconstitutional, because those elements […] are to prove the same, and not to prove the dangerousness and that is why it is derived from known facts to get to know other unknown ones as is the case of that dangerousness obtained from a logical process and not from direct evidence. [FN64]

[FN64] Cfr. Partial unconstitutionality of a law presented on December 22, 2002 before the Constitutional Court (dossier of appendixes to the petition, appendix 22, folios 183-191; and dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 950-958).

54(49) On December 30, 2003 the Constitutional Court decided to not declare the provisional suspension of the norm appealed. In this regard, it considered that

[…] in the present case we can not observe the necessary elements established in Article 138 of the Law on Amparo, Personal Exhibition and Constitutionality [notorious unconstitutionality susceptible of causing irreparable damages) to declare the provisional suspension of the second to last paragraph of Article 132 of the Criminal Code (Decree [Number] 17-73) and its reform included in Article 5 of Decree 20-96 both of the Congress of the Republic of Guatemala. [FN65]

[FN65] Cfr. Ruling of December 30, 2003 issued by the Constitutional Court (dossier of appendixes to the petition, appendix 24, folios 194 and 195).

54(50) On July 20, 2004 the Constitutional Court declared the partial constitutional motion of general nature presented with regard to Article 132 of the Criminal Code of Decree Number 17-73 and Article 5 of Decree Number 20-96, both of the Congress of the Republic of Guatemala inadmissible. It stated that:

[…] the Constitution offers the possibility to denounce the unconstitutionality of laws in specific cases, with the objective of declaring their non-application, situation that occurs if the basic requirements are fulfilled, consistent in pointing out the law in question with an adequate reasoning that will permit the confrontation of the norms mentioned with the constitutional ones specified by the appellant, which will be examined in order to determine the one that must not be applied.
[…] the appellant did not carry out the comparative analysis necessary to determine if the ordinary norm appealed is contrary to constitutional dispositions that he states are violated. The appellant limited his exposition to related facts, without producing the confrontation of norms that would put in evidence the errors claimed. Said defect allows us to reach the conclusion that the incidental plea, as presented lacks all foundation and, therefore, is notoriously irrelevant, which leads to its declaration of inadmissible […]. [FN66]

[FN66] Cfr. Judgment of July 20, 2004 issued by the Constitutional Court (dossier of appendixes to the petition, appendix 25, folios 196 through 203).

54(51) On May 6, 2004 the defense counsel of Mr. Fermín Ramírez presented a second appeal for pardon, [FN67] which had not been decided upon when the present judgment was issued.

[FN67] Cfr. Appeal for pardon presented on May 6, 2004 before the Ministry of Government (dossier of appendixes to the brief of pleadings and motions, appendix 7, folios 490-511).

54(52) On April 11, 2005 the First Lower Criminal, Drug Trafficking, and Environmental Crimes Court of Escuintla declared admissible a constitutional appeal of personal exhibition presented by the Attorney for Human Rights in favor of prisoners, indictees, and convicted individuals located in the areas of the High Security facility called “el Infiernito”, located in the perimeter of the Granja Modelo de Rehabilitación Canadá, Escuintla and of the prisoners who are presenting gastrointestinal and skin alterations, reason for which the initiation of the corresponding investigation was ordered. [FN68]

[FN68] Cfr. Ruling of April 11, 2005 issued by the Lower Criminal, Drug Trafficking, and Environmental Crimes Court of the Department of Escuintla (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 973-975).

54(53) Currently, the execution of Mr. Fermín Ramírez’s death sentence is under the jurisdiction of the Second Court of Criminal Execution and it is suspended due to the validity of the provisional measures ordered by the Court in the present case (supra paras. 32-41).

Detention conditions Mr. Fermín Ramírez has been submitted to

54(54) Mr. Fermín Ramírez has been detained since May 10, 1997 [FN69] and up to this date.

[FN69] Cfr. Judgment of March 6, 1998 issued by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court (dossier of appendixes to the petition, appendix 7, folios 87 and 88); and expert statement offered before notary public (affidavit) by Mr. Rodolfo Kepfer Rodríguez on May 5, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folio 828).

54(55) Mr. Fermín Ramírez has been detained in the following prisons: first in the Granja Modelo de Rehabilitación Canadá Escuintla; on September 28, 1999 he was transferred to the High Security Center Canadá de Escuintla; and on December 5, 2000 he was taken to Sector 11 of the Center of Preventive Detention for Men on Zone 18. On November 19, 2003 he was admitted again in to the High Security Prison Canadá de Escuintla, also known as "Infiernito", where he is currently detained in sector B-4 [FN70].

[FN70] Cfr. Legal certification issued by the Mayor on duty pf the High Security Center Canadá Escuintla (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case).

54(56) While Mr. Fermín Ramírez was detained in sector 11 of the Center of Preventive Detention of Zone 18, this prison permanently lacked water, there were serious problems in the sanitary installations and id did not have an adequate medical service. [FN71] Mr. Fermín Ramírez remained detained with two other people in a small room, he had his own cement sheet to sleep on and the cell had a bathroom. He was not allowed out of the cell not even to carry out outdoor activities and his possibilities to develop educational or labor activities were very limited. The visits were limited to one hour per week. It did not offer medical or psychological services. [FN72]

[FN71] Cfr. Svendsen, Kristin and Cetina, Gustavo: "Death Row. Prison Conditions of those punished with the Death Penalty in Guatemala". ICCPG. Guatemala, August 2004 (dossier of appendixes to the brief of pleadings and motions, appendix 13, page 70). See also Inter-American Commission of Human Rights, Fifth Report on the Situation of Human Rights in Guatemala, April 6, 2001, Chapter VIII; and MINUGUA, Verification Report, The Penitentiary Situation in Guatemala, April 2000.

[FN72] Cfr. Expert statement offered before notary public (affidavit) by Mr. Rodolfo Kepfer Rodríguez on May 5, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folio 829); and testimonial statement offered before notary public (affidavit) by Mr. Fermín Ramírez on May 3, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 825, 963, and 964).

54(57) The High Security Prison in Escuintla presents poor hygiene conditions and lacks water and ventilation, especially during the summer. [FN73] The sector in which Mr. Fermín Ramírez is located is of approximately 20 meters by 6 and 8 meters and has 40 cement beds. In the sector there are close to 40 prisoners, some of them facing the death penalty and others face sentences of 30 to 50 years in prison. There are no adequate educational or sports programs. Medical and psychological assistance is deficient. [FN74]

[FN73] Cfr. Svendsen, Kristin and Cetina, Gustavo: "Death Row. Prison Conditions of those punished with the Death Penalty in Guatemala". ICCPG. Guatemala, August 2004 (dossier of appendixes to the brief of pleadings and motions, appendix 13, pages 71 and 72).
[FN74] Cfr. Expert statement offered before notary public (affidavit) by Mr. Rodolfo Kepfer Rodríguez on May 5, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 829 and 930); and testimonial statement offered before notary public (affidavit) by Mr. Fermín Ramírez on May 3, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 825 and 964). See also Inter-American Commission of Human Rights, Fifth Report on the Situation of Human Rights in Guatemala, April 6, 2001, Chapter VIII; and MINUGUA, Verification Report, The Penitentiary Situation in Guatemala, April 2000.

54(58) In June 2002, when the President of the Republic denied the pardon to Mr. Fermín Ramírez (supra para. 54(30)), he also denied it to Messrs. Tomás Cerrate Hernández and Luis Amilcar Cetin Pérez, who were executed that same month. [FN75] Mr. Fermín Ramírez was located in the same sector of the prison in which the executed prisoners were located and he had a close relationship with them. [FN76]

[FN75] Cfr. Governmental Agreement Number 235-2000 issued on May 31, 2000 by the President of the Republic of Guatemala and published on June 2, 2000 in the Diario de Centro América (dossier of appendixes to the brief of pleadings and motions, appendix 12, folio 530); testimonial statement offered before notary public (affidavit) by Mr. Fermín Ramírez on May 3, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folio 825); and expert statement offered before notary public (affidavit) by Mr. Rodolfo Kepfer Rodríguez on May 5, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folio 828).
[FN76] Cfr. Expert statement offered before notary public (affidavit) by Mr. Rodolfo Kepfer Rodríguez on May 5, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folio 828); and testimonial statement offered before notary public (affidavit) by Mr. Fermín Ramírez on May 3, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 825, 967, and 968).

54(59) Mr. Fermín Ramírez does not currently receive visits from his children. [FN77]

[FN77] Cfr. Testimonial statement offered before notary public (affidavit) by Mr. Fermín Ramírez on May 3, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 825 and 969); and expert statement offered before notary public (affidavit) by Mr. Rodolfo Kepfer Rodríguez on May 5, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folio 832).

Specific facts regarding Mr. Fermín Ramírez

54(60) Mr. Fermín Ramírez has presented health problems such as gastric ulcer, severe gastrointestinal disorders, tachycardia, insomnia, and lack of appetite, and presents states of nervousness and anxiety, as well as feelings of anguish and of being threatened. [FN78]

[FN78] Cfr. Psychological Report of the Area of Psychology of the Institute of Public Criminal Defense Service of November 15, 2004 (dossier of appendixes to the brief of pleadings and motions, appendix 14, folio 537); Expert statement offered before notary public (affidavit) by Mr. Rodolfo Kepfer Rodríguez on May 5, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folio 831); and testimonial statement offered before notary public (affidavit) by Mr. Fermín Ramírez on May 3, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 825 and 970).

54(61) Mr. Fermín Ramírez has been diagnosed as suffering from a chronic situational disorder (chronic stress syndrome) and of a personality disorder of a mixed nature, with impulsive/ aggressive characters. The previous could be a consequence of the extended stay in death row of the centers of maximum security where he has been imprisoned, of the chronic uncertainness of confronting a legal process in which the legal remedies presented by his defense counsel have been denied and of the pressure the means of communication have caused be announcing on several occasions his imminent execution. [FN79]

[FN79] Cfr. Expert statement offered before notary public (affidavit) by Mr. Rodolfo Kepfer Rodríguez on May 5, 2005 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 826, 830, 834, and 835).

Regarding the next of kin of Mr. Fermín Ramírez

54(62) The children of Mr. Fermín Ramírez and Mrs. Ana Lucrecia Sis, former partner of the first, are: Stivent Alexander Ramírez Sis, Fernando Antonio Ramírez Sis, Marvin Geovanni Ramírez Sis, Eliseo Adonias Ramírez Sis, and Ricardo Fermín Ramírez Sis. [FN80]

[FN80] Cfr. Birth certificates of Stivent Alexander Ramírez Sis, Fernando Antonio Ramírez Sis, Marvin Geovanni Ramírez Sis, Eliseo Adonias Ramírez Sis, and Ricardo Fermín Ramírez Sis (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folios 837-841).

54(63) The minor Fermín Ramírez Sis, son of Mr. Fermín Ramírez and Mrs. Ana Lucrecia Sis, passed away on May 20, 2001, at 14 years old, as a consequence of a "Cholangitis emphysematous, neuropathy […], tuberculosis, […] neurmosystitis-carini and […] hidden neoplasm, immunocompromise, septic shock." [FN81]

[FN81] Cfr. Death certificate of Ricardo Fermín Ramírez Sis (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case, volume I, folio 846).

Other facts

54(64) Law initiatives have been presented before the Congress of the Republic of Guatemala seeking to reform the laws that contemplate the application of the death penalty and to abolish it, as well as to regulate the measure of grace. [FN82]

[FN82] Cfr. Proposed law presented by the representative Otto René Cabrera Westerheyde, Legislative Authorities, Control of Proposals, Registration number 3204 (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case); and Agreement projects to sign the Protocol of the American Convention of Human Rights regarding the Abolition of the Death Penalty and the Tentative Plan for the law to revoke all laws that contemplate the death penalty (dossier on merits, volume IV, folios 856 through 870).

54(65) The Institute of Compared Studies in Criminal Sciences has incurred in similar expenses with the proceeding of the present case before the bodies of the Inter-American System Protection of Human Rights. [FN83]

[FN83] Cfr. List and proof of expenses made by the Institute of Compared Studies in Criminal Sciences (dossier of statements offered before a notary public and evidence to facilitate adjudication of the case).

VIII. ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION IN CONNECTION WITH ARTICLE 1(1) OF THE SAME (RIGHT TO A FAIR TRIAL AND JUDICIAL PROTECTION)

55. Arguments of the Commission:

Regarding the violation of Article 8 of the American Convention

a) the right to a due process is fundamental in any Constitutional State, especially when the applicable sanction is the death penalty;
b) the right to be heard is an essential guarantee of the defense and the due process;
c) the exercise of the defense constitutes a fundamental right and an essential guarantee of people against arbitrary acts and the abuse of power and it includes a series of aspects that allow the classification of "due process" on a procedure through which a person's right is affected;

Regarding the criminal process followed against Mr. Fermín Ramírez

d) when the Lower Court issued the order for trial to commence for the crime of aggravated rape against Mr. Fermín Ramírez, the Office of the Public Prosecutor did not request that it be done also for the crime of murder, nor did it present an alternative accusation for the latter crime, even when Article 333 of the Code of Criminal Procedures gave it the opportunity to do so;
e) when the debate for the crime of aggravated rape started, the Office of the Public Prosecutor did not extend the indictment to murder, despite the fact that Article 373 of the Code of Criminal Procedures gave it the power to do so;
f) the Office of the Public Prosecutor asked for the death penalty for the crime of murder when it presented its closing arguments, that is, when the opportunity to request that the defendant be processed for said crime had already precluded;
g) the Criminal, Drug Trafficking, and Environmental Crimes Trial Court of the department of Escuintla, when considering ex officio if there was a possibility to change the legal classification of the crime did not inform Mr. Fermín Ramírez that said change could refer to the crime of murder, which could be punished with the death penalty;
h) in the judgment of March 6, 1998 the Court changed the legal classification of the crime and considered as established new facts that had not been charged on Mr. Ramírez up to that procedural moment: that the cause of death of the minor was "asphyxia by strangulation", and that after the victim had passed away the defendant had carnal access with the corpse, facts that were not considered in the indictment or in the order for trial to commence. The same occurred with a new circumstance that had not been contemplated in the prosecution's case or in the order for trial to commence, and that was definitive in the imposition of the sentence, that is: the greater and specific dangerousness of Mr. Fermín Ramírez. The Trial Court considered this circumstance as established without any evidentiary foundation or reasoning. Based on a relationship of the same circumstances used as aggravating circumstances of the crime, it concluded that Fermín Ramírez presented a greater dangerousness;
i) Article 132 of the Code of Criminal Procedures considers a subjective element that implies the possibility that a person can commit similar acts in the future. The determination of this circumstance requires a scientific evaluation, through adequate means of proof. Criminal dangerousness, as well as any other aggravating or extenuating circumstance, generic or specific,

may not be presumed; instead it must be proven during the trial. By omitting all reference to the defendant's dangerousness in the indictment, the authorities impaired Mr. Fermín Ramírez's defense counsel from presenting evidence for the defense, thus violating the principle of rebuttal. The Office of the Public Prosecutor must have included in the indictment all the elements of the crime;

j) the judicial authorities ignored the principle of consistency or correlation between the indictment and the verdict, and therefore incurred in a violation of the right to a defense, which Mr. Fermín Ramírez could not exercise correctly;

k) the Trial Court issued a conviction without the existence of an act in which the fact attributed to the defendant was determined with absolute clarity, despite that established in Article 332 Bis of the Code of Criminal Procedures, that includes as a substantive requirement of the indictment a clear, precise, and circumstantiated relationship of the illicit act with which the defendant is being charged and its legal classification; and of that stated in Article 388 of the same Code that restricts the verdict to the facts included in the indictment, which did not happen in this case;

l) the criminal legislation contemplates mechanisms designed to guarantee the right to a defense of the accused when from the evidence produced or from the oral debate new facts or circumstances that were not mentioned in the indictment are derived, in order to avoid "surprising" the defendant;

m) a formal expansion of the indictment, based on Article 373 of the Code of Criminal Procedures, including a detailed description of the new facts and circumstances based on which the change of classification and the death penalty were requested was omitted; the president of the Trial Court abstained from receiving a new statement from Mr. Fermín Ramírez regarding the facts that he established as proven in the verdict, and did not expressly warn the parties of their right to request the suspension of the debate, in order to have the necessary time and means to prepare their defense;

n) based on the evidence found in the dossier, the Commission concludes that the judicial authorities abstained from informing Mr. Fermín Ramírez, previously and in detail, of the facts and circumstances on which the conviction was based, thus violating Article 8(2)(b) of the American Convention. As a consequence of the above, the Commission concludes that the Trial Court prevented Mr. Fermín Ramírez from exercising his right to be heard regarding the facts and circumstances established in the conviction, violating Article 8(1) of the mentioned instrument, and did not allow the technical defense to orient its activity in a reasonable manner, with the adequate time and means to prepare it, thus violating Article 8(2)(c) of the Convention;

Regarding the violation of Article 25 of the American Convention

o) the right to an effective remedy, in the terms of Article 25 of the Convention, must be exercised in accordance with the guarantees included in Article 8 of the same;

p) by not acknowledging the correlation that must exist between the indictment and the conviction, Mr. Fermín Ramírez's right to be heard and have the necessary time and means to exercise his defense was violated, therefore the State violated his right to an effective judicial protection;

q) it is evident that none of the remedies tried was effective to ensure the defendant's protection of the right to a due process established in the American Convention, even when the defense counsel argued and proved the absence of a prior and detailed communication to the

defendant of the accusation that determined the application of the death penalty, as well as the adequate means to exercise his defense;

r) the lack of substantiating evidence on the facts that made up the majority of the aggravating circumstances of the crime established by the Lower Court, that were not duly mentioned in the judgment, constituted an obstacle that objectively restricted the possibilities of the defense to contest relevant legal matters in the remedies of appeal and annulment;

s) the systemic confirmation of the ruling of the lower court, despite the serious violations to the due process, is symptomatic of serious deficiencies in the Guatemalan administration of justice; and

t) even though Mr. Fermín Ramírez made formal use of the different remedies included in the procedural legislation to appeal the death penalty issued against him, the Commission considered that these remedies were not efficient, which implies a violation of Article 25 of the Convention.

56. Arguments of the representatives:

Regarding the violation of Article 8 of the American Convention

a) the basis of the right to a defense lies in the possibility of free expression regarding each of the counts of the accusation, considering all the relevant circumstances in order to avoid or reduce the legal consequence (conviction or security and correction measure) or inhibit the criminal prosecution;

b) a prior and detailed summons or knowledge of the accusation is required;

c) the right to be heard makes no sense if the verdict can exceed the fact and circumstances included in the indictment;

Regarding the criminal process followed against Mr. Fermín Ramírez

d) in the terms of Article 374 of the Code of Criminal Procedures, if the trial court warns ex officio that it may vary the legal classification of the acts charged, it must inform the defendant of this possibility and receive a new statement from him on the new facts, so that he may request the suspension of the debate and exercise the right to present new evidence or legal arguments;

Regarding the violation of Article 8(2) of the Convention

e) the victim of the crime was 12 years old at the moment of the act, reason for which the death penalty could not be applied, but instead it should have been punished with 30 to 50 years in prison. The indictment made by the Office of the Public Prosecutor did not contemplate the death penalty;

f) in order to protect the right to a defense and the prior and detailed communication of the indictment, Article 333 of the Code of Criminal Procedures guarantees the possibility of presenting an alternative indictment, in which case the Office of the Public Prosecutor may seek the application of a different legal norm, since it considers there are concurring circumstances. This avoids surprising alterations of the factual framework or of the legal classification of the acts and guarantees the defendant’s right to a defense;

g) in the Guatemalan procedural law the right to a summons is of great importance. A hearing is set to discuss the indictment and exercise a control of all its factual and legal matters. In said hearing the defendant can exercise his right to a defense;h) when preparing the indictment, the Office of the Public Prosecutor only mentioned the sentence of 30 to 50 years in prison. When it presented it final arguments, it mentioned the possibility of requesting the death penalty. The change of legal classification was made in the conviction, without previously informing Mr. Fermín Ramírez. That change varied the nature of the indictment in the trial, since the Court changed the facts that it later considered as proven in the judgment;

i) the aggravating circumstance of dangerousness has not been expressly defined within Guatemalan jurisprudence. Some courts mention social dangerousness and other criminal dangerousness. The doctrine mentions that social dangerousness cannot be invoked in a democratic state, since it corresponds to a criminal system based on the situation of the perpetrator. Criminal dangerousness implies the opinion of the court regarding the possibility that the defendant will commit new crimes in the future, when it is immune from prosecution and the need to apply a security measure is discussed. Therefore, criminal dangerousness may not be presumed, but instead it must be proven;

j) the Office of the Public Prosecutor did not request an extension of the indictment in the terms of Articles 373 and 374 of the Code of Criminal Procedures, regarding the aggravating circumstance of dangerousness, so that the court could have that circumstance as proven in the judgment;

k) no legal decision can be based on the private convincing of the judge or in judgments that the defense has not had the chance to contradict, as occurred in the present case: the conviction of Mr. Fermín Ramírez does not include any objective data legally introduced into the process that can be considered suitable to produce a true or probable knowledge regarding the criminal dangerousness of the convicted party;

l) the State's judicial bodies acted in a discriminatory manner. In other cases judgments have been annulled due to lack of an accusation and summons of criminal dangerousness in the indictment. Likewise, the Court of Appeals has annulled, in a similar case, the imposition of the death penalty because there was not a prior and detailed communication regarding the aggravating circumstance of dangerousness;

Regarding the violation to Article 8(2)(c) of the Convention

m) the prior and detailed knowledge of the indictment against Mr. Fermín Ramírez, regarding the possible legal classification of murder and the aggravating circumstance of dangerousness, would have allowed the defense counsel to request the suspension of the debate and the preparation of evidence for the defense;

n) the fact that Mr. Fermín Ramírez was never warned that the crime for which he was being tried implied the possibility of imposing the death penalty, made the defense counsel consider that it was unnecessary to request the suspension of the debate and offer specific evidence regarding the determination of the sentence;

Regarding the violation of Article 8(2)(f) of the American Convention

o) the Courts of Justice violated the right to the presumption of innocence, since they considered the defendant's dangerousness proven without the existence of specific evidence of it, based simply on the "subjective and irrational" appreciation of the Trial Court;
p) according to the principle of presumption: 1) the guilt of the defendant must be established beyond reasonable doubt; 2) the defendant must enjoy the benefit of doubt; and 3) the burden of evidence lies on the prosecution, who must destroy the presumption that exists in favour of the defendant;

Regarding the violations of Articles 25 and 8(2)(h) of the American Convention

q) the right to appeal the judgment before the judge or higher courts is an essential element of the due process and has a non-revocable nature;
r) the existence of a legal framework that ensures the right to appeal and revise a judgment is not enough to comply with the due process of law and guarantee the defendant's right to appeal the conviction;
s) the courts that took up the motions of appeal and other appeals did not repair the violation to the right to life and the other minimum legal guarantees;
t) the lack of precision of the term "dangerousness" makes the right to a review of the conviction "false", since due to the ambiguity of said term it is impossible to go over the factual and legal elements that lead to the imposition of the death penalty;
u) there was a lack of effective judicial protection from the higher bodies that took up the case; and
v) the internal legislation regulates remedies that do not reunite the requirements necessary to ensure the revision of the judgment in a complete manner. The special motion of appeal has become a formalistic and technical remedy, which does not allow the defendants to access an integrated revision of the verdict. The appeal for dismissal is a remedy limited to matters of law. The Amparo in criminal matters does not refer to the facts considered proven by the court or regarding the evidence and assessment of the evidence made by the trial court.

57. Arguments of the State:

Regarding the violation of Article 8 of the American Convention

a) in the development of the debate of March 5, 1997 the trial court warned the parties, based on Article 374 of the Code of Criminal Procedures, that at the opportune time a legal classification different to the one included in the indictment and the order for trial to commence could be given;
b) Article 373 of the Code of Criminal Procedures establishes the right of the parties to request the suspension of the debate, in order to offer new evidence or prepare their intervention. When the trial court warned the parties of the possible change of the legal classification of the act, it guaranteed the defendant's right to a defense; however, it was not exercised at the correct procedural moment;
c) there was no violation to Article 8 of the Convention, since at the beginning of the debate the entire indictment and order for trial to commence were read;
d) if Mr. Fermín Ramírez was not heard regarding other facts, it was due to the fact that the defense counsel did not exercise the procedural right to request the suspension of the debate;

e) new facts or evidentiary means were not included. The warning made by the Court was not due to their incorporation, instead it was made after the expert witness stated that the cause of death of the minor had been asphyxia by strangulation;
f) in the judgment, the court did not consider proven the fact that after the death of the minor Mr. Fermín Ramírez had intercourse with the corpse, and therefore the incorporation of new facts in the criminal procedure did not exist;
g) regarding the change of the legal classification of the act, the Trial Court acted in accordance with Article 388 of the Code of Criminal Procedures, which grants it the power to give the act a classification different to the one included in the indictment or the order for trial to commence. To adopt its decision, the Court must assess all the evidence produced in the debate pursuant to the rules of competent analysis;
h) the court established, pursuant to the evidence produced, that the cause of death of the minor fit the crime of murder. It is irrelevant if the sexual rape was committed before, during, or after the minor was murdered. The important thing for the classification of the crime is the determination of the causes of the death;
i) based on the facts presented in the indictment and established through the evidence produced in the debate the dangerousness revealed by Mr. Fermín Ramírez in committing this crime is assumed. The trial court considered that Mr. Fermín Ramírez incurred in six of the eight aggravating circumstances that allow the classification of the crime as murder; and

Regarding the violation of Article 25 of the American Convention

j) during the process the right to legal protection was respected. Mr. Fermín Ramírez had access to the remedies included in the internal legislation. The right to exercise them was not breached.

Considerations of the Court

58. Article 8(1) of the American Convention states:

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.

59. Likewise, Article 8(2) of the Conventions states that:

2. 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. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
b) prior notification in detail to the accused of the charges against him;
c) adequate time and means for the preparation of his defense;

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;
f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
g) the right not to be compelled to be a witness against himself or to plead guilty; and
h) the right to appeal the judgment to a higher court.

60. Article 25(1) of the American Convention establishes:

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.

61. In this case, the Court has been called to determine if the criminal process followed against Mr. Fermín Ramírez, which resulted in a conviction to the death penalty, observed the guarantees of the due process as required, specifically, by Article 8 of the Convention, and if said person had access to an effective recourse in the terms of Article 25 of the same, both in relation with Article 1(1) of that instrument.

62. It is important to reiterate in this case, in which the actions within the framework of a criminal process are being questioned, that the bodies of the Inter-American System of Human Rights do not act as an instance of appeal or revision of judgments issued in internal procedures. Its role is to determine the compatibility of the actions carried out in said processes with the American Convention. [FN84] This is what the Tribunal will limit to in the present Ruling.

[FN84] Cfr. Case of Juan Humberto Sánchez. Judgment of June 7, 2003. Series C No. 99, para. 120; Case of Bámaca Velásquez. Judgment of November 25, 2000. Series C No. 70, para. 189; and Case of the “Street Children” (Villagrán Morales et al.). Judgment of November 19, 1999. Series C No. 63, para. 222.
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63. The process followed against Mr. Fermín Ramírez originated in the violent death of a minor. When deciding other cases, the Court has pointed out that this is not a criminal court where the criminal responsibility of the individuals can be analyzed. [FN85] The application of the criminal law to those who commit crimes corresponds to the national courts. This applies to the present case, which does not refer to the innocence or guilt of Mr. Fermín Ramírez with regard to the acts attributed to him, but instead to the conformity of the acts of his process with the American Convention. The Court mentions the duty the States have to protect everybody, avoiding crimes, punishing the parties responsible for them, and maintaining public order, especially when dealing with acts like the ones that originated the criminal procedure followed against Mr. Fermín Ramírez, which not only constitute a damage to the individuals but to society

as a whole, and they deserve the most energetic rejection, even more so when they involve boys and girls. However, the States' fight against crime must take place within the limits and pursuant to the procedures that permit the preservation of both public security and a complete respect of the human rights of those submitted to their jurisdiction. [FN86]

[FN85] Cfr. Case of Castillo Petruzzi and others. Judgment of May 30, 1999. Series C No. 52, para. 90; Case of the "Panel Blanca" (Paniagua Morales et al.). Judgment of March 8, 1998. Series C No. 37, para. 71; and Case of Suárez Rosero. Judgment of November 12, 1997. Series C No. 35, para. 37.

[FN86] Cfr. Case of Hilaire, Constantine and Benjamin et al.. Judgment of June 21, 2002. Series C No. 94, para. 101; Case of Bámaca Velásquez, supra note 84, para. 174; and Case of Durand and Ugarte. Judgment of August 16, 2000. Series C No. 68, para. 69.

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64. In order to establish if the State violated provisions of the Convention, the Court must determine:

a) the nature and content of the so called "principle of coherence or correlation between the indictment and the verdict" in matters of criminal procedures in the light of the judicial guarantees included in Article 8 of the Convention; specifically, the possibility that the criminal judge give the illicit act a legal classification different to the one established in the indictment, or to include facts not included in the latter, all in relation with the defendant's right to a defense;

b) the need to contemplate in the criminal indictment the circumstances that prove the dangerousness of the agent and the relevance, from the perspective of criminal legality, that the legal description of the crime or the determination that its consequences include references to the dangerousness of the agent, which influence the legal determination of the sentence; and

c) Mr. Fermín Ramírez's access to an effective remedy to protect his rights in the criminal process developed against him, pursuant to Article 25 of the Convention.

a) Principle of coherence or correlation between the indictment and the verdict.

65. One of the main arguments presented by the Commission and the representative in holding that the State violated Article 8 of the Convention is the non-observance of the mentioned correlation between the indictment and the judgment. The inconsistency occurred when the Trial Court changed the legal classification of the crime and considered as proven new facts and circumstances, that were not considered in the indictment or the order for trial to commence, that is: the cause of death of the minor and the circumstances that in the opinion of the Trial Court proved that Mr. Fermín Ramírez represented a greater danger.

66. The Convention does not endorse any specific criminal procedural system. It gives the States the liberty to determine which one they prefer, as long as they respect the guarantees established in the Convention itself, the internal legislation, other applicable international treaties, the unwritten norms, and the imperative stipulations of international law.

67. When determining the scope of the guarantees included in Article 8(2) of the Convention, the Court must consider the role of the "indictment" in the criminal due process vis-à-vis the

right to a defense. The material description of the conduct attributable contains the factual data included in the indictment, which is the indispensable reference for the exercise of the defense of the accused and the consequent consideration of the judge in the verdict. Therefore, the defendant has the right to know, through a clear, detailed, and precise description, the facts he is being charged with. Their legal classification may be varied during the process by the prosecutor or the judge, without this violating the right to a defense, when the facts themselves are maintained invariable and the procedural guarantees included in the law for the change to the new classification are observed. The so-called "principle of coherence or correlation between the indictment and the conviction" implies that the judgment may fall only upon the facts or circumstances included in the indictment.

68. Since the principle of coherence or correlation is an indispensable corollary of the right to a defense, the Court considers that it constitutes a fundamental guarantee of the due process in criminal matters, which the States must observe in compliance of the obligations included in subparagraphs b) and c) of Article 8(2) of the Convention.

69. In the case Pélissier and Sassi v. France, the European Court of Human Rights determined that the applicants were not given the opportunity to prepare their defense with regard to the new charge they were accused of, since it was only through the judgment of the appeals court that they found out of the change in the classification of the facts. Specifically, it considered that the change accepted in the judgment altered the terms of the initial indictment. In this regard it made the following considerations:

[…] The Court observes that the provisions of paragraph 3 (a) of Article 6 point to the need for special attention to be paid to the notification of the "accusation" to the defendant. Particulars of the offence play a crucial role in the criminal process, in that it is from the moment of their service that the suspect is formally put on notice of the factual and legal basis of the charges against him (see the Kamasinski v. Austria judgment of 19 December 1989, Series A no. 168, pp. 36-37, § 79). Article 6 § 3 (a) of the Convention affords the defendant the right to be informed not only of the cause of the accusation, that is to say the acts he is alleged to have committed and on which the accusation is based, but also the legal characterisation given to those acts. That information should, as the Commission rightly stated, be detailed.
[…] The scope of the above provision must in particular be assessed in the light of the more general right to a fair hearing guaranteed by Article 6 § 1 of the Convention (see, mutatis mutandis, the following judgments: Deweer v. Belgium of 27 February 1980, Series A no. 35, pp. 30-31, § 56; Artico v. Italy of 13 May 1980, Series A no. 37, p. 15, § 32; Goddi v. Italy of 9 April 1984, Series A no. 76, p. 11, § 28; and Colozza v. Italy of 12 February 1985, Series A no. 89, p. 14, § 26). The Court considers that in criminal matters the provision of full, detailed information concerning the charges against a defendant, and consequently the legal characterisation that the court might adopt in the matter, is an essential prerequisite for ensuring that the proceedings are fair.
[…] Lastly, as regards the complaint under Article 6 § 3 (b) of the Convention, the Court considers that sub-paragraphs (a) and (b) of Article 6 § 3 are connected and that the right to be informed of the nature and the cause of the accusation must be considered in the light of the accused's right to prepare his defence. [FN87]

[FN87] Cfr. Pelissier and Sassi v. France 25444/94, [1999] ECHR, paras. 51-54.

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70. In the present case, the imposition of the death penalty by the Criminal, Drug Trafficking, and Environmental Crimes Trial Court was based on the application of Article 132 of the Criminal Code of Guatemala, which classifies and punishes murder. The sentence was issued after an oral and public debate, following the indictment made against Mr. Fermín Ramírez for the crime of aggravated rape, stipulated in Article 175 of the Criminal Code and punished with imprisonment of up to 50 years. This accusation was the basis for the start of the oral and public trial before the Criminal, Drug Trafficking, and Environmental Crimes Trial Court. During the first day of the debate, the Court warned the parties of the possibility to change the legal classification of the crime, but it did not specify toward what crime the change could be oriented, which is not in any way irrelevant for the exercise of the defense and the judicial decision regarding the applicable punishment. In the judgment of March 6, 1998, the Criminal Trial Court, invoking Article 388 of the Code of Criminal Procedures, decided that "from the analysis of the evidence produced in the debate […] the Court considers that the illicit act charged on the defendant falls into the figure contemplated in Article 132 of the Criminal Code, [… r]eason for which, by rule of law the legal classification presented in the indictment and the order for trial to commence must be changed from aggravated rape to the crime of murder." Therefore, it convicted Mr. Fermín Ramírez to the death penalty (supra paras. 54(5) through 54(18)).

71. When evacuating evidence during the oral trial it is possible to prove the existence of new facts or circumstances not included in the indictment. In said hypothesis, the Office of the Public Prosecutor may present an "Alternative indictment" or the "Extension of the indictment", previously mentioned (supra para. 54(10) and 54(11)), in order to seek the modification of the object of the process.

72. In the case to which this judgment refers certain mistakes and omissions occurred. After the indictment made by the Office of the Public Prosecutor classified the defendant's act as an aggravated rape, the accusing body ordered the court to change this legal classification and convict the defendant to the death penalty, but it did not exercise the power to present an "Alternative indictment" or an "Extension of the indictment", pursuant to Articles 333 and 373 of the Guatemalan Code of Criminal Procedures, respectively (supra paras. 54(10), 54(11) and 71), instead it limited its action to requesting, in its closing arguments, at the end of the debate, that the defendant be convicted for the crime of murder and that the death penalty be imposed upon him. On its part, the president of the Trial Court did not rule that it wanted to "receive a new statement" from Mr. Fermín Ramírez, nor did it inform the parties that they had the "right to request the suspension of the debate to offer new evidence or to prepare their intervention," which must have been done ex officio pursuant to the terms of Articles 373 and 374 of the Code of Criminal Procedures (supra paras. 54(11) and 54(12)). In any case, the criminal court must have carried out the process in accordance with the guarantees established in the internal legislation and the Convention.

73. The Trial Court based its actions on Article 374 of the Code of Criminal Procedures, which establishes a "warning ex officio" regarding a "possible modification of the legal

classification." However, the president of the Court limited his actions to warning the parties that "at the right moment" a legal classification different to the one included in the indictment and in the order for trial to commence could be given, but it did not specify which would be the new legal classification, and much less did it refer to the possibility that the change in the classification could actually originate from a modification in the factual basis of the process and, when the time came, of the conviction. The president of the Trial Court did not offer the defendant the possibility to give a new statement with regard to the last facts attributed to him. These omissions deprived the defense of a certainty regarding the facts imputed (Article 8(2)(b) of the Convention) and, therefore, represented an obstacle for an adequate preparation of the defense, in the terms of Article 8(2)(c) of the Convention.

74. The second paragraph of Article 388 of the Guatemalan Code of Criminal Procedures states that "in the conviction, the court may give the act a legal classification different to the one established in the indictment or the order for trial to commence or impose punishments greater or below those requested by the Office of the Public Prosecutor." This power, attendant to the principle iura novit curia, must be understood and interpreted in harmony with the principle of consistency and the right to a defense. The necessary consistency between the indictment and the possible conviction justifies the suspension of the debate and the new questioning of the defendant, when the factual basis of the indictment wants to be changed. If this occurs irregularly, the right to a defense is damaged, in the measure that the defendant is not able to exercise it with regard to all the facts that will be considered in the judgment.

75. In this sense, the Court observes that, in the judgment of March 6, 1998, the Trial Court did not limit itself to changing the legal classification of the previously imputed acts, but instead it modified the factual basis of the accusation, not observing the principle of consistency.

76. It went from the classification of Aggravated Rape to the classification of Murder. The direction of malice does not coincide in both conditions: in the first, the animus is to have carnal access, from which the death of the passive subject results; in the second, it is to kill, in any of the forms or through any of the means provided by law as an aggravating cause. The Trial Court considered as proven facts included in the indictment: the intentional murder produced by "asphyxia by strangulation" and the possibility of carnal access after the death. It could not be understood that this means a simple change in the legal classification of the crime; instead it implies different acts than those that represent an Aggravated Rape (Article 175 of the Criminal Code). Thus, the factual basis established in the indictment was varied, without Mr. Fermín Ramírez being able to exercise any defense in this regard. This substantial modification brought with it the possibility to impose, as actually occurred, capital punishment.

77. In the mentioned case of Pélissier and Sassi, the European Court of Human Rights declared that the State was responsible for the violation of the right of the applicants to be informed, in a detailed manner, of the indictment as well as their right to dispose of the time and means necessary to prepare their defense (Articles 6(1) and 6(3) subparagraphs (a) and (b) of the European Convention for the Protection of Human Rights and Fundamental Liberties), considering that:

[…] in using the right which it unquestionably had to recharacterise facts over which it properly had jurisdiction, the Aix-en-Provence Court of Appeal should have afforded the applicants the possibility of exercising their defence rights on that issue in a practical and effective manner and, in particular, in good time. It finds nothing in the instant case capable of explaining why, for example, the hearing was not adjourned for further argument or, alternatively, the applicants were not requested to submit written observations while the Court of Appeal was in deliberation. On the contrary, the material before the Court indicates that the applicants were given no opportunity to prepare their defence to the new charge, as it was only through the Court of Appeal's judgment that they learnt of the recharacterisation of the facts. Plainly, that was too late. [FN88]

[FN88] Cfr. Pelissier and Sassi v France, supra note 87, para. 62. See also, mutatis mutandis, Mattoccia v Italy 23969/94 [2000] ECHR, paras. 60-81; Sipavicius v. Lithuania, 49093/99 [2002] ECHR, paras. 25-30; Dallos v Hungary 29082/95 [2001] ECHR, paras. 47-53; T v. Austria 27783/95 [2000] ECHR, paras. 70-72; and Kyprianou v Cyprus 73797/01 [2004] ECHR, paras. 65-68.

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78. The respect to the set of guarantees that inform of the due process and provide the limits to the regulation of the state's criminal power in a democratic society is especially impassable and rigorous when dealing with the imposition of the death penalty.

79. In the present case, by disregarding the guarantees of the due process, especially the right to a defense, the State violated the procedural rules of strict and necessary observance in cases of imposition of the death penalty. Therefore, the conviction of Mr. Fermín Ramírez to capital punishment was arbitrary for having violated the impassable limitations for the imposition of said punishments in the countries that still have it. [FN89]

[FN89] Cfr. Restrictions to the death penalty (Arts. 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para. 55.

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80. Based on all the above, the Court considers that the procedural offenses in which the judicial authorities incurred violated Article 8(2)(b) and 8(2)(c) of the Convention, in relation to Article 1(1) of the same.

b) Need to contemplate in the criminal indictment the circumstances that prove the agent's dangerousness.

81. The Commission argued that the State incurred in a violation of the right to a defense when the Trial Court, in its judgment of March 6, 1998, did not express any grounds regarding the dangerousness of the agent, but instead it concluded, based on a relationship between the same circumstances used as aggravating causes of the crime, that Mr. Fermín Ramírez represented a greater dangerousness. From a procedural point of view, it is serious that the

indictment did not refer to the circumstances that would prove the dangerousness of Mr. Fermín Ramírez. The Court considers that this matter must be analyzed based on the compatibility of Article 132 of the Criminal Code with Article 9 of the Convention (infra paras. 87 through 98).

c) Access to an effective remedy (Article 25 of the Convention)

82. The Commission and the representatives argued that the State violated Article 25 of the Convention. In this regard, the Court observed that the ruling on the merits of the case issued by the Criminal Trial Court was appealed through several regular and extraordinary remedies existing in Guatemala. The decisions issued with regard to these remedies coincided in stating that the actions of the Trial Court were pursuant to the criminal, criminal procedural, constitutional, and international norms applicable to the case (supra para. 54 points 20, 22, 24, 27, 32, 34, 36, 38, 40, 42, 44, 46, 47, and 50).

83. Even though the higher instances did not notice the irregularities that occurred in the criminal procedure, from which the State's international responsibility derives for the violation of Article 8 of the Convention, it did process and decide with regularity the remedies presented by the defense counsel of Mr. Fermín Ramírez. The fact that the appeals presented were not, in general, decided on a favorable manner to the interests of Mr. Fermín Ramírez, does not imply that the victim did not have access to an effective remedy to protect his rights. After an analysis of the legal and factual arguments included in the rulings of the different remedies presented in the criminal procedure, this Tribunal does not consider proven that the State violated the right to access a court, or restricted the defendant's possibility to have an effective remedy to appeal the judgment issued against him.

IX. ARTICLE 9 OF THE AMERICAN CONVENTION WITH RELATION TO ARTICLE 2 OF THE SAME (FREEDOM FROM EX POSTO FACTO LAWS)

Arguments of the Commission

84. It did not argument the violation of Article 9 of the American Convention.

85. Arguments of the representatives

a) the State violated Article 9 of the American Convention with relation to Articles 2 and 4(1) of the same;
b) subjective assessments, such as dangerousness or the personal characteristics of the author must be excluded, pursuant to the freedom from ex posto facto laws, as grounds for legal consequences against the defendant;
c) Article 132 of the Criminal Code is a manifestation of a criminal system based on the situation of the perpetrator based on the idea of preventing future crimes through the application of the death penalty to allegedly dangerous criminals;
d) the crimes, that are the grounds of the punishment, may not be attitudes or states of mind, nor vague or undefined facts, instead they must be specified in human actions described by the criminal law. If the legislator decides to punish certain behaviors, it must describe them in the provision;

e) the imposition of the death penalty through the application of a law incompatible with the Convention, violates the State's obligation to respect and guarantee Mr. Fermín Ramírez's right to life; and

f) the legal insecurity generated by the dangerousness, due to its legal indetermination, generates a wide margin for punitive discretionary behavior contrary to the demands of the Convention. It is also highly discriminatory and reflects a criminal system based on the situation of the perpetrator that does not sympathize with the dignity inherent to all human beings.

Arguments of the State

86. It did not refer to Article 9 of the American Convention.

Considerations of the Court

87. Article 9 of the Convention states that:

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

88. This Court has established that the applicants may invoke rights different to those included in the Commission's application, abiding to the facts included in the application. [FN90]

[FN90] Cfr. Case of "Juvenile Reeducation Institute", supra note 8, para. 125; Case of the Gómez Paquiyauri Brothers. Judgment of July 8, 2004. Series C No. 110, para. 179; and Case of Herrera Ulloa. Judgment of July 2, 2004. Series C No. 106, para. 142.

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89. In its arguments regarding the violation of Article 8 of the Convention, the Commission stated that Article 132 of the Criminal Code of Guatemala includes a subjective element referring to the possibility that a person will commit illicit acts in the future. This requires a scientific assessment, through adequate evidentiary means. The criminal dangerousness, as any other aggravating or extenuating circumstance, generic or specific, may not be presumed, but instead must be proven in the trial; when it is not mentioned in the indictment, the principle of rebuttal is broken (supra paras. 55(h), 55(i), 55(j), and 81). The representatives argued that the introduction of subjective assessments in criminal definitions, such as the dangerousness of the crime or the personal characteristics of the author, is a violation of the freedom from ex post facto laws (supra para. 85). Since Mr. Fermín Ramírez was convicted to the death penalty based on said Article 132 of the Criminal Code, the Court considers it relevant to analyze the compatibility of said norm with the American Convention.

90. The freedom from ex post facto laws constitutes one of the central elements of the criminal prosecution in a democratic society. By establishing that "no one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed," Article 9 of the Convention obliges the States to define those criminal "actions or omissions" in the most clear and precise manner possible. In this regard, the Court has stated:

[…] Concerning the principle of legality in the penal sphere, […]the elaboration of penal categories presumes a clear definition of the criminalized conduct, which establishes its elements, and allows it to be distinguished from behaviors that are either not punishable or punishable but not with imprisonment.
Under the rule of law, the principles of legality and non-retroactivity govern the actions of all bodies of the State in their respective fields, particularly when the exercise of its punitive power is at issue.
In a democratic system it is necessary to maximize the precautions in order for criminal sanctions to be adopted with strict respect for the basic rights of people and with a prior careful verification of the effective existence of the illicit act.
In this sense, the criminal judge must, when applying the criminal law, strictly abide to that stated in it and observe great thoroughness in the adjustment of the accused person's behavior to the elements of the crime, in such a way that acts not punished by the legal system are not penalized. [FN91]

[FN91] Cfr. Case of Lori Berenson, supra note 3, paras. 79-82; Case of De la Cruz Flores. Judgment of November 18, 2004. Series C No. 115, paras. 79-82; and Case of Ricardo Canese. Judgment of August 31, 2004. Series C No. 111, paras. 174-177.
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91. Article 132 of the Guatemalan Criminal Code defines the crime of murder and establishes as the applicable sanction to its author his imprisonment during 25 to 50 years or the death penalty (supra para. 54(15)).

92. From the second to last paragraph of this provision the possibility that the judge convict the defendant to one or the other punishment based on a judgment of dangerousness of the agent is deduced, since it states that the death penalty will be applied instead of the maximum prison sentence "if a greater dangerousness of the agent is revealed," which will be determined according to "the circumstances of the act and the occasion, the way in which it was carried out and the determining motives." Based on the above, the consideration of dangerousness becomes the element on which the application of the maximum punishment depends.

93. If the dangerousness of the agent implies a criminal consequence of such serious nature, as occurs in the case of Murder, pursuant to the Guatemalan law, the personal circumstances of the agent must be part of the indictment, they must be proven during the trial, and analyzed in the judgment. However, the circumstances that would prove the dangerousness of Mr. Fermín Ramírez were not object of the indictment made by the Office of the Public Prosecutor. This lead the Inter-American Commission to consider that the Trial Court incurred in another

inconsistency when it considered them proven without their inclusion in the indictment, which implies a violation to Article 8 of the Convention (supra paras. 55(h) through 55(n), 81, and 89).

94. In the opinion of this Court, the problem presented by the citing of the dangerousness cannot only be analyzed in light of the guarantees of the due process, within Article 8 of the Convention. This citing has a greater scope and seriousness. In effect, it clearly constitutes an expression of the exercise of the state's ius puniendi over the basis of the personal characteristics of the agent and not the act committed, that is, it substitutes the Criminal System based on the crime committed, proper of the criminal system of a democratic society, for a Criminal System based on the situation of the perpetrator, which opens the door to authoritarianism precisely in a subject in which the juridical rights of greatest hierarchy are at stake.

95. The assessment of the agent's dangerousness implies the judge's appreciation with regard to the possibility that the defendant will commit criminal acts in the future, that is, it adds to the accusation for the acts committed, the prediction of future acts that will probably occur. The State's criminal function is based on this principle. In the end, the individual will be punished – even with the death penalty – not based on what he has done, but on what he is. It is not even necessary to weigh in the implications, which are evident, of this return to the past, absolutely unacceptable from the point of view of human rights. The prediction will be made, in the best of cases, based on the diagnosis offered by a psychological o psychiatric expert assessment of the defendant.

96. Therefore, the introduction in the criminal text of the dangerousness of the agent as a criterion for the criminal classification of the acts and the application of certain sanctions is not compatible with the freedom from ex post facto law and, therefore, contrary to the Convention.

97. Article 2 of the Convention states the duty the States Parties to the Convention have to adjust their internal legislation to the obligations derived from the Convention. In this sense, the Court has stated that:

[i]f the States, pursuant to Article 2 of the American Convention, have a positive obligation to adopt the legislative measures necessary to guarantee the exercise of the rights recognised in the Convention, it follows, then, that they also must refrain both from promulgating laws that disregard or impede the free exercise of these rights, and from suppressing or modifying the existing laws protecting them. These acts would likewise constitute a violation of Article 2 of the Convention. [FN92]

[FN92] Cfr. Case of Caesar, supra note 3, para. 91; and Case of Hilaire, Constantine, and Benjamin et al., supra note 86, para. 113.

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98. Based on all the above, the Court considers that the State has violated Article 9 of the Convention, in relation to Article 2 of the same, for having maintained in force the part of Article 132 of the Criminal Code that refers to the dangerousness of the agent, once the Convention was ratified by Guatemala.

X. ARTICLE 4 OF THE AMERICAN CONVENTION IN RELATION TO ARTICLES 1(1) AND 2 OF THE SAME (RIGHT TO LIFE)

99. Arguments of the Commission:

the State violated the right enshrined in Article 4 of the American Convention in relation with Article 1(1) of the same, with the conviction and possible execution of the death penalty imposed upon Mr. Fermín Ramírez in a criminal process in which the rights to a due process of law and an effective legal protection were violated;

100. Arguments of the representatives:

a) the State violated the right enshrined in Article 4 of the Convention in relation with Article 1(1) of the same with the possible execution of the death penalty imposed upon Mr. Fermín Ramírez;
b) at the time at which the request for the commutation of the sentence of Mr. Fermín Ramírez was decided on there was not in Guatemala regulation of pardon, reason for which both the procedure and the decision were arbitrary. The pardon process of Mr. Fermín Ramírez was carried out without legal formalities, without a hearing or the participation of the alleged victim. The appeal for pardon was denied without the existence of a provision that regulated a specific process;
c) in an Advisory Opinion of September 22, 1993 the Constitutional Court ruled that Decree Number 159 was revoked and therefore "the measure of grace included in [the] Decree […] was not valid, but the measure of grace is, in virtue of international treaties;"
d) by revoking Decree Number 159 of the Legislative Assembly, the State failed to comply with the duty to establish an appeal that allows the convicted party to request pardon, commutation of the sentence, or amnesty; currently no indictee for crimes punished with the death penalty can request pardon, since a process has not been established for this purpose;
e) the new law of the Executive Body of 1997 does not contemplate the power of a Ministry or the President of the Republic to know of and decide upon a measure of grace. The latter did not have legal or specific procedural powers to process the pardon. Despite this legal gap, it admitted into process the request for pardon and issued a definitive ruling, which makes it null and void by law;
f) the new request for pardon presented by Mr. Fermín Ramírez can not be processed or ruled upon due to the existing legal gap with regard to the procedure and authority that must know of the appeal; and
g) the State did not guarantee an effective procedure to grant the accused party amnesty, pardon, or commutation of the sentence, thus failing to comply with the requirements established in Article 4(6) of the Convention, in relation with Article 1(1) of the same.

101. Arguments of the State:

a) there was no violation to Article 4 of the American Convention, since the process was substantiated respecting the judicial guarantees;

b) Mr. Fermín Ramírez made effective his right to request pardon, enshrined in Article 4(6) of the American Convention, which establishes the power and the obligation to grant it;
c) The fact that the pardon presented was decided negatively does not breach the right enshrined in the Convention; and
d) it has guaranteed that the death penalty will not be executed while the case is being processed before the Inter-American System of Human Rights, in compliance of the precautionary and provisional measures issued.

Considerations of the Court

102. Article 4 of the American Convention states:

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years old or over 70 years old; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

103. It has been established that the criminal procedure that culminated in the conviction of Mr. Fermín Ramírez did not respect the guarantees of the due process (supra paras. 66 through 80). However, the conviction has not been executed in virtue of the internal remedies presented and the precautionary measures issued by the Commission as well as the provisional measures ordered by the Court. If Mr. Fermín Ramírez had been executed as a consequence of the process followed against him, there would have been an arbitrary deprivation of the right to life, in the terms of Article 4 of the Convention. [FN93] Since this is not the case, the Court considers that the State has not violated the right enshrined in Article 4(1) of the American Convention, in relation to Article 1(1) of the same.

[FN93] Cfr. 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. 136.

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104. On the other hand, the representatives argued that the State had violated Article 4(6) of the American Convention because Guatemala did not regulate a pardon when the request for grace presented by Mr. Fermín Ramírez was decided upon, reason for which both the procedure and the decision were arbitrary (supra para. 100).

105. The Court acknowledges that the State gave Mr. Ramírez access to the measure of grace and that it processed and issued a ruling on said appeal. Mr. Fermín Ramírez's defense counsel presented the measure of grace on July 27, 1999 and based its request on Decree Number 159 with the purpose that the death penalty to which he had been convicted be commuted (supra para. 54(28)). It is on the record that one day before Agreement Number 235-2000 that decided said appeal was published in the Official Newspaper, the same newspaper published Decree Number 32-2000, which expressly revoked Decree Number 159 (supra para. 54(29)) based on the following considerations:

[…] That the National Legislative Assembly of the Republic of Guatemala approved, on April nineteenth eighteen ninety two Decree Number 159 that regulated the power that Article seventy eight of the Political Constitution in force at that time, granted the President of the Republic to commute the death penalty and grant pardon in the cases established, up to the year nineteen eighty five in which the current Political Constitution, which does not contemplate it, was enacted.
[…] That the Political Constitution of the Republic enacted by the National Constituent Assembly on May thirty-first nineteen eighty five, in force as of January fourteenth nineteen eighty six, expressly revoked all the Constitutions of the Republic of Guatemala and any law that had similar prior effects and, established the independence of powers by declaring that the sovereignty lies in the people, which delegates it for its exercise in the Legislative, Executive, and Judicial Organisms, within which subordination is prohibited, and also, that the power to judge and execute what is tried corresponds exclusively to the Judicial Body and that no other authority may intervene in the administration of justice.
[…] That the Political Constitution of the Republic establishes that it will prevail over any law or treaty, and that since there isn't a provision that gives the Executive Body grounds to commute the death penalty as established in Decree Number 159 of the National Legislative Assembly of the Republic, given the fact that the previous Constitutions were revoked, it becomes necessary to expressly annul the same with the purpose of creating legal certainty and avoiding ambiguity in the interpretation of the law.

106. On June 2, 2000 Governmental Agreement Number 235-2000 of the President of the Republic of Guatemala was published, in it the latter ruled on said appeal (supra para. 54(30)), and in it considered, inter alia, that

[…] the Executive Body must act in respect of the constitutional mandate of non-subordination between the other two Bodies of the State; in what refers to the administration of justice it is a function and power that falls exclusively upon the courts of justice, who have the sole responsibility of promoting the execution of that judged, and its exercise must be respected by the Executive abiding the judicial rulings especially if the constitutional guarantees of the due process have been observed and the right to a defense has been complied with.

[…] That the President of the Republic is the Head of State of Guatemala and he exercises the functions of the Executive Body through mandate of the people and among its functions he must comply with and ensure compliance of the Constitution and the Laws, in the present case and having complied with that determined by the Constitution and the substantive and procedural laws in force to this effect, the sovereign attitude of the President of the Republic is of respect and coordination for the compliance of the rulings issued pursuant to the law by the courts of justice.
THEREFORE
In exercise of the powers granted to it in Article 183 subparagraph (e) of the Political Constitution of the Republic and based on Articles 141 and 203 of the mentioned Constitution; 4° subparagraph 6 of the American Convention on Human Rights and 6° subparagraph 4 of the International Pact of Civil and Political Rights.
IT AGREES:
[…] TO DENY the measure of grace presented by FERMIN RAMIREZ […]

107. The Court considers that with the annulment of Decree Number 159, through Decree Number 32-2000, an organization with the power to know of and decide upon the measure of grace established in Article 4(6) of the Convention was expressly disregarded. The Court also verified that from Governmental Agreement Number 235-2000, issued on a later date, it can conclude that no State body has the power to know of and decide upon the measure of grace.

108. Regarding the annulment of Decree Number 159, the Committee of Human Rights of the Organization of United Nations stated

[…] its concern regarding the elimination of the measure of grace or pardon in the case of the death penalty, through a Law of May 12, 2001, acknowledged by the [International] Pact [of Civil and Political Rights] in paragraph 4 of its Article 6. It took note of the information […] since despite the existence of said law the President of the Republic has made use of said right on the grounds of the supremacy of international treaties over regular laws. The State Party must guarantee that every person convicted to death has the right to request a pardon or the commutation of the sentence, adjusting the legislation to the obligations of the Pact and issuing the corresponding provisions so that right to petition may be exercised. [FN94]

[FN94] Human Rights Committee of the United Nations. Final Observations of the Human Rights Committee: Guatemala. 72º meeting, August 27, 2001, CCPR/CO/72/GTM, para. 18.
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109. The Court considers that the right to grace forms part of the international corpus juris, specifically of the American Convention and the International Pact of Civil and Political Rights. [FN95] For these effects, said international treaties on human rights have preeminence over internal laws, pursuant to that established in Article 46 of the Political Constitution of the Republic of Guatemala. [FN96]

[FN95] Cfr., in the same sense Inter-American Commission on Human Rights, Fifth Report on the Situation of Human Rights in Guatemala, April 6, 2001, Chapter V; and MINUGUA, Eleventh Report on Human Rights, September 2000, para 26.
[FN96] Cfr. Article 46. Preeminence of International Law. It establishes the general principle that in matters of human rights, the treaties and conventions accepted and ratified by Guatemala have preeminence over the internal legislation. Political Constitutional of the Republic of Guatemala (dossier on statements given before a notary public and evidence to facilitate adjudication).
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110. Therefore, since the internal legislation does not establish any attribution so that a State body has the power to know of and decide upon the measures of grace and being this the explanation for the denial of the measure of grace presented by Mr. Fermín Ramírez, the State failed to comply with the obligations derived from Article 4(6) of the Convention in relation to Articles 1(1) and 2 of the same.

XI. ARTICLE 5 AND 17 OF THE AMERICAN CONVENTION IN RELATION WITH ARTICLE 1(1) OF THE SAME (RIGHT TO HUMANE TREATMENT AND RIGHTS OF THE FAMILY)

111. The Commission did not refer to Articles 5 and 17 of the American Convention.

112. Arguments of the representatives

Regarding Article 5(1), 5(2), and 5(6) of the American Convention

a) in his condition of convicted to the death penalty, Mr. Fermín Ramírez has been submitted to imprisonment conditions, especially those experienced in Sector 11, that constitute cruel, inhumane, and degrading treatment and he has had to support a long wait of almost seven years for the execution of the sentence;
b) the State has deprived Mr. Fermín Ramírez of the conditions necessary for his social reinsertion. In this sense:
i. Mr. Ramírez is currently located in an area of the prison where he lives with 80 other inmates; during the hot season he sleeps in the yard, since it is impossible to sleep inside because they do not have a fan. He does not have the possibility to go outside; most of the time they do not have water; the installations have sanitary problems and the food is bad and insufficient;
ii. they do not have adequate and responsible medical, dental, and psychological services. When Mr. Ramírez had appointments at the public hospital, the authorities did not take him. During his imprisonment he developed gastritis, but he never received special foods, which caused him an ulcer;
iii. Mr. Ramírez suffers from ill treatments and threats from other inmates and the guards. In Sector 11 another inmate attacked him with a knife, reason for which he currently suffers from pain on the left side;

iv. Mr. Ramírez has visitation rights of one hour per week; however, the registration process of visitors reduces it to 35 or 45 minutes. He has not seen his children in 7 months and he has not had a marital visit in more than a year; and

v. there are not adequate physical spaces for an effective communication with his defense counsel.

c) the special security regime, the treatment, and the conditions of imprisonment constitute a method for the destruction of Mr. Ramírez's physical and mental capacity. These conditions cause suffering and anguish, which has resulted in pshychomatic illnesses for which he does not receive any treatment;

d) in the present case the essential elements of the phenomena of death row have come together: the extended delay while awaiting the execution, the imprisonment conditions, and the anguish; and

e) the next of kin of Mr. Fermín Ramírez have also suffered due to the anguish of knowing that he is on death row: the former couple of Mr. Ramírez, Ana Lucrecia Sis, was fired from her job when they found out that she was the wife of Mr. Ramírez; Ricardo Fermín Ramírez, the smallest of the children of the alleged victim and Ana Lucrecia Sis suffered a depression due to his father's conviction to death, the child passed away due to the state of anguish and depression he was in; the other children suffer severe depression, have learning problems, and are under psychological treatment.

Regarding Article 17 of the American Convention, in relation with Article 1(1) of the same

a) the severe restrictions imposed by the State on Mr. Fermín Ramírez have deprived him of the possibility to have a relationship with his children, which affects their comprehensive development and the right to a family life. The restriction on personal liberty should not damage the relationship between Mr. Ramírez and his children, which are not subject to the conviction; and

b) pursuant to Article 9(3) of the Convention on Children's Rights, both parents can maintain personal relationships with their children in a regular manner.

Arguments of the State

113. It did not refer to Articles 5 and 17 of the American Convention.

Considerations of the Court

114. Article 5(1) and 5(2) of the Convention state:

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 with respect for the inherent dignity of the human person.

115. Article 17(1) of the American Convention states:

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

116. This Court has established that the applicants can invoke rights different to those included in the Commission's application, abiding to the facts included in the application. [FN97]

[FN97] Cfr. Case of "Juvenile Reeducation Institute", supra note 8, para. 125; Case of the Gómez Paquiyauri Brothers, supra note 90, para. 179; and Case of Herrera Ulloa, supra note 90, para. 142.

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117. The jurisprudence of this Tribunal, as well as other international courts and authorities, has emphasized that there is a universal prohibition to submit a person to torture or other cruel, inhumane, or degrading treatment or punishment that violates peremptory norms of international law (ius cogens). [FN98]

[FN98] Cfr. Case of Caesar, supra note 3, para. 70; Case of the Gómez Paquiyauri Brothers, supra note 97, para. 112; and Case of Maritza Urrutia. Judgment of November 27, 2003, Series C No. 103, para. 92.

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118. Regarding the imprisonment conditions, the Court has specified that, pursuant to Article 5(1) and 5(2) of the Convention, everybody who is imprisoned has the right to live in a situation of detention compatible with their personal dignity, which must be guaranteed by the State since it is in a special position of guarantor with regard to said persons, because the penitentiary authorities exercise total control over these. [FN99] Specifically, the Tribunal has considered that the detention in conditions of overcrowding, with lack of ventilation and natural light, without a bed to lie in or adequate conditions of hygiene, in isolation and with lack of communication or with unjustified restrictions to the regime of visits, is a violation of personal integrity. [FN100]

[FN99] Cfr. Case of Caesar, supra note 3, para. 97; Case of Lori Berenson Mejía, supra note 3, para. 102; and Case of Tibi, supra note 9, para. 150.

[FN100] Cfr. Case of Caesar, supra note 3, para. 96; Case of Lori Berenson Mejía, supra note 3, para. 102; and Case of Tibi, supra note 9, para 150. See also Minimum rules for the treatment of inmates, adopted by the First Congress of the United Nations on the Prevention of Crime and Treatment of the Criminal, held in Geneva in 1955 and approved by the E.S.C. res. 663C (XXIV) on July 31, 1957 and amended 2076 (LXII) on May 13, 1977, Rules 10 and 11.

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119. In the circumstances of the present case, the Court considers relevant the fact that Mr. Fermín Ramírez was convicted to the death penalty for committing a crime he was not accused of, at the end of a process in which his judicial guarantees were violated; that the grounds for the

conviction was a provision whose content is contrary to the American Convention; and that he has been submitted to grave conditions in his imprisonment, both in Sector 11 of the Center for Preventive Detention of Zone 18, and in the High Security Center of Escuintla, which can be embodied in a general context of serious prison deficiencies, pointed out by international organizations. [FN101] Based on all the above, the Court considers that the State violated Article 5(1) and 5(2) of the Convention, in relation with Article 1(1) of the same.

[FN101] Cfr. Inter-American Commission of Human Rights, Fifth Report on the Situation of Human Rights in Guatemala, April 6, 2001, Chapter VIII; and MINUGUA, Verification Report, The Penitentiary Situation in Guatemala, April 2000.

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120. Lastly, the representatives argued that the next of kin of Mr. Fermín Ramírez have faced serious psychological suffering from the anguish of knowing that he is on death row, which would imply a violation of Article 5 of the Convention in detriment of said next of kin. Even when the irregular death penalty can bring very painful consequences for the next of kin of the convicted party, who witness the impact of the conviction on the inmate and face social stigmatization, the Court considers that in the present case it has not been proven that the next of kin of Mr. Fermín Ramírez have been the victims of a violation to Article 5 of the Convention.

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121. Finally, this Tribunal considers that the facts argued in the present case do not fall under Article 17 of the Convention, taking into account that the infringement upon family life was not produced as the result of a specific action or omission of the State with that purpose, instead it was a consequence of the process followed for the crime charged, with its characteristics, and the behavior of the accused party himself. Therefore, the Court will not issue a ruling on this matter.

XII. REPARATIONS (APPLICATION OF ARTICLE 63(1)) (OBLIGATION TO REPAIR)

122. This Court has held that it is a principle of International Law that any violation of an obligation of this nature attributable to a State carries with it an obligation to adequately repair the damage caused and to put an end to the consequences of said violation. [FN102] According to Article 63(1) of the American Convention, which constitutes a rule of customary law that enshrines one of the fundamental principles on contemporary international law on state responsibility,

> [i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

[FN102] Cfr. Case of Caesar, supra note 3, para. 120; Case of Huilca Tecse. Judgment of March 3, 2005. Series C No. 121, para 86; and Case of the Serrano Cruz Sisters, supra note 3, para. 133.
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123. The reparation of the damage caused by a violation of an international obligation requires, whenever possible, full restitution (restitutio in integrum), which consists in the restoring the situation that existed before the violation occurred. When this is not possible, as in the majority of the cases, among them the present one, it is the task of the Tribunal to order the adoption of a series of measures that, besides guaranteeing respect for the rights violated, will ensure that the damage resulting from the infractions is repaired, as well as establish payment of an indemnity as compensation for the harm caused. [FN103] It is necessary to add measures of a positive nature that the State must adopt in order to ensure that detrimental acts like those of the present case do not occur again. [FN104] The obligation to repair, which is regulated in all its aspects by international law, cannot be altered or eluded by the State's invocation of its domestic law. [FN105]

[FN103] Cfr. Case of Caesar, supra note 3, para. 122; Case of Huilca Tecse, supra note 102, para. 88; and Case of the Serrano Cruz Sisters, supra note 3, para. 134.
[FN104] Cfr. Case of the Serrano Cruz Sisters, supra note 3, para. 135; Case of the Cruz Flores, supra note 91, para. 140; and Case of "Juvenile Reeducation Institute", supra note 8, para. 260.
[FN105] Cfr. Case of Caesar, supra note 3, para. 122; Case of Huilca Tecse, supra note 102, para. 88; and Case of the Serrano Cruz Sisters, supra note 3, para. 135.
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124. The nature and amount of the reparations depend on the nature of the violations committed and the harm caused at both pecuniary and non-pecuniary levels. They must be coherent with the violations stated. They cannot entail either enrichment or impoverishment of the victim or his or her family. [FN106]

[FN106] Cfr. Case of Caesar, supra note 3, para. 123; Case of Huilca Tecse, supra note 102, para. 89; and Case of the Serrano Cruz Sisters, supra note 3, para. 136.
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125. Arguments of the Commission

In regard to the beneficiaries

a) Mr. Fermín Ramírez is the beneficiary of the reparations.

In regard to the pecuniary damage

b) Mr. Fermín Ramírez must be granted a fair compensation destined to making up, in an adequate and effective manner, for the pecuniary damages caused by the violations committed;

In regard to the non-pecuniary damage

c) the compensation must be granted in the extension and measure sufficient to reimburse the non-pecuniary damages caused;
d) Mr. Fermín Ramírez is awaiting his execution since May 6, 1998, date on which the conviction was issued, and lacks guarantees regarding his rights;
e) a judgment that takes into considerations the claims of the victim is one form of satisfaction. In this case, the suffering and anguish experimented by Mr. Fermín Ramírez for more than six years, under the phenomena of death row must be taken into consideration; and
f) the constant threat in which Mr. Fermín Ramírez finds himself that he may at any time be executed as a consequence of a conviction contrary to the American Convention is enough for the Court to issue a compensation in his favour, in equity, for the moral damage the State has caused him.

With regard to other forms of reparation

g) in this case the restitutio in integrum of the Mr. Fermín Ramírez's rights that were violated is appropriate, since the death penalty has not been executed;
h) the Court must order the State to:
i. guarantee to the injured party the enjoyment of its rights or liberties violated and leave without effect the conviction imposed;
ii. conduct a new trial against Mr. Fermín Ramírez pursuant to the rules of the due process of law;
iii. commute the death penalty imposed upon Mr. Fermín Ramírez; and
iv. adopt the measures necessary in order to guarantee the "non-recidivism" of irregular procedures that may produce irreparable effects.

In relation to the costs and expenses

i) both the Institute of Public Defense and the Institute of Compared Studies may prove before the Court the costs in which they incurred during the processing of the present case before the Inter-American System of Human Rights.

126. Arguments of the representatives

In relation to the beneficiaries

a) the beneficiaries of the reparations are the alleged victim, Fermín Ramírez; his sons Danilo Ramírez Hernández and Erick Ramírez Hernández, procreated with Mrs. Timotea Hernández y Hernández, his first partner; his sons Stiven Alexander Ramírez Sis, Fernando Ramírez Sis, Marvin Geovany Ramírez Sis, Eliseo Ramírez Sis, and Ricardo Fermín Ramírez Sis (deceased), procreated with Mrs. Ana Lucrecia Sis, his second partner; and Mrs. Irma Azucena España, his current partner, as well as her son, Stiven Josué Azucena España, who is not recognized by Mr. Fermín Ramírez, because he had not been born when his father was accused. However, in their final arguments, the representatives stated that the beneficiaries are only Stiven

Alexander Ramírez Sis, Fernando Ramírez Sis, Marvin Geovany Ramírez Sis, Eliseo Ramírez Sis, and Ricardo Fermín Ramírez Sis;

In relation to the pecuniary damage

b) Mrs. Carmen Ramírez, aunt of Mr. Fermín Ramírez, has incurred in medical expenses and survival expenses for him, for which Mr. Fermín Ramírez must receive a compensation of $5,000.00 (five thousand United States dollars) for the medical and survival expenses in which he has incurred during the seven years he has been on death row;
c) regarding lost earnings the income that Mr. Fermín Ramírez's family could have perceived if he was not imprisoned must be taken into consideration. The fact the Mr. Fermín Ramírez was dedicated to traditional fishing, activity that allowed him to fulfill the needs of the mother of his youngest child and his other seven children must be taken into consideration;
d) as of the day on which Mr. Fermín Ramírez was convicted to the death penalty, his partner and children made different approaches to governmental institutions. With this motive and as a consequence of the visits to the prison, the partner has stopped performing economic activities to offer support to Mr. Fermín Ramírez. Said distraction produced a decrease in their income, which must be compensated; and
e) the regimen of maximum security imposed upon Mr. Ramírez wrongfully deprived him of the right to work, for which he must receive a compensation for loss of earnings of $18,525.81 (eighteen thousand five hundred and twenty five United States dollars with eight one cents).

In relation with the non-pecuniary damage

f) both Mr. Fermín Ramírez and his next of kin experienced moral suffering as a consequence of the possibility that the date and time of the execution would be set at any time;
g) the moral suffering that the situation of the present case has caused to the children of Mr. Ramírez, Stivent Alexander Ramírez Sis, Fernando Antonio Ramírez Sis, Marvin Geovanni Ramírez Sis, Eliseo Adonias Ramírez Sis, and Ricardo Fermín Ramírez Sis, and Mrs. Ana Lucrecia Sis, their mother is evident;
h) the suffering has been made worse by virtue of the fact that the courts declare inadmissible all the remedies presented by the defense counsel, which increases the tension of the alleged victim and his next of kin. Therefore, a fair compensation must be granted to him and them; and
i) when this petition was presented, Mr. Fermín Ramírez and his next of kin continue to suffer the experience of being in death row and the psychological, mental, and emotional effects this may have on them, reason for which we request future expenses for medical and psychological treatments.

In relation to the other forms of reparation, they request that the State:

j) publicly acknowledge, with the presence of state authorities, the judicial errors committed in the process in which Mr. Fermín Ramírez was sentenced to death;
k) commit to not imposing the death penalty in violation of national or international guarantees;

l) commit to guaranteeing the compliance and correct application of national and international laws in matters of human rights in all criminal spheres;

m) publish the judgment of the Inter-American Court in the Official Newspaper of Guatemala;

n) publicly acknowledge that Mr. Fermín Ramírez has been submitted to a cruel, inhumane, and degrading treatment during a prolonged period of time, which has caused constant and growing anguish to the accused and his next of kin, due to the application of conditions that violate the rights inherent to all inmates, such as those related to the preservation of human dignity, health, family, work, and education, among others. In this act the high authorities of the State – including at least the General Authorities of the Penitentiary System, the Minister of Government and the President of the Judicial Organization- must be present and it must be broadcast through the main means of national communication;

o) adjust its legal framework and penitentiary practices to the commitments assumed by the State in the American Convention on Human Rights. Specifically, the State must be required to:

i) modify Article 132 of the Criminal Code;

ii) enact a law that will regulate the penitentiary system and the rights and obligations of inmates and guarantees their right to a penitentiary execution compatible with human dignity and based on the Minimum Rules for the treatment of inmates of the United Nations; and

iii) cease the special regimen of maximum security to which those sentenced to the death penalty are submitted;

p) guarantee that inmates receive: adequate medical-sanitary attention; a visitation regimen compatible with the obligations assumed pursuant to the Convention; an adequate physical space for the inmates equipped with bathrooms and showers in good operating conditions, as well as access to sunlight and fresh air. It must also improve the heath conditions in the prisons;

q) guarantee that Mr. Fermín Ramírez and all the persons submitted to the regimen of high or maximum security have the possibility to participate in educational, work, and recreational programs that allow their complete social reinsertion;

r) guarantee special programs of adequate psychological attention to offer care for the mental suffering that Mr. Fermín Ramírez has been submitted to during his imprisonment;

s) abstain from executing Mr. Fermín Ramírez and the rest of the people that have been sentenced to death based on Article 132 of the Criminal Code;

t) submit Mr. Fermín Ramírez to a new trial in order to determine his guilt observing the minimum judicial guarantees of the American Convention. Upon the realization of a new trial, Mr. Fermín Ramírez could be tried for the crime of murder and receive a conviction of twenty-five to fifty years in prison, which, due to its duration, is contrary to the American Convention since it annihilates the personality and causes irreversible psychological damage;

u) adjust its legislation so that the sentence contemplated for the crime of murder is compatible with the Convention and does not violate the prohibition of cruel, inhumane, or degrading punishments;

v) revoke the prohibition included in Article 2 subparagraph f) of the Law on Redemption of Sentences, which does not allow the redemption of punishments through preliminary stages and paid labor of the persons sentenced for crimes of intentional homicide, murder, parricide, aggravated rape, kidnapping in all its forms, sabotage, aggravated robbery and aggravated theft. It must also establish substantive norms so that the people sentenced to imprisonment may redeem time through the realization of educational and work activities;

w) before the non-existence of a legal procedure that guarantees the right to request pardon, the commutation of the sentence, or amnesty, it must decree the commutation of the punishment imposed upon all those sentenced to murder that are not able to exercise their right to pardon;
x) while it does not implement a procedure for the exercise of the right to pardon, amnesty, or commutation of the sentence, and while it does not guarantee that those sentenced to death are not submitted to cruel, inhumane, and degrading conditions under the phenomena of death row, it must issue a legal stipulation ordering a moratorium of the death penalty and the cease of any execution of the capital punishment;
y) modify its legislation eliminating the death penalty currently applicable for the aggravating circumstance of dangerousness of the agent of a murder. Therefore, the death penalties imposed based on this circumstance must be commuted and the people convicted based on that stipulation must have the possibility to request the revision of their punishment in order to substitute the sentence imposed for a punishment in accordance with the guilt of the accused; and
z) take the necessary measures, of fact and of law, so that the Guatemalan legal system complies with the procedural requirements established in the national and international norms on human rights. It must also strengthen the Institute of Criminal Court Appointed Defense Counsel and approve an adequate budget for the public defender system.

In relation to the expenses and costs

aa) the stipulations of Guatemala's internal legislation must be applied for the calculation of professional fees of the lawyers that have represented Mr. Fermín Ramírez; and
bb) the Institute of Public Criminal Defense Services and the Institute of Compared Studies in Criminal Sciences have incurred in expenses related to the case before the national and international jurisdiction. The State must compensate them for these expenditures, which amount to $11,520.30 (eleven thousand five hundred and twenty United States dollars with thirty cents).

Arguments of the State

127. In general, it stated that there is no right to reparations in the present case.

Considerations of the Court

128. The Court has determined that the State violated in detriment of Mr. Fermín Ramírez the rights enshrined in Articles 8(2)(b), 8(2)(c), 4(6), 5(1), and 5(2), in relation with Article 1(1) of the American Convention, and Articles 4(6) and 9 in relation with Article 2 of the same instrument.

A) PECUNIARY AND NON-PECUNIARY DAMAGES

129. Pecuniary damage assumes the loss or detriment of the victim's income, the expenses incurred in virtue of the facts, and the pecuniary consequences that have a causal link to the violations. [FN107] On the other hand, non-pecuniary damages may include both suffering and affliction caused to the victims of violations of human rights and their next of kin, such as detriment to very significant personal values or their conditions of existence. [FN108]

[FN107] Cfr. Case of Huilca Tecse, supra note 102, para. 93; and Case of the Serrano Cruz Sisters, supra note 3, para. 150; and Case of "Juvenile Reeducation Institute", supra note 8, para. 283.

[FN108] Cfr. Case of Caesar, supra note 3, para. 125; Case of Huilca Tecse, supra note 102, para. 96; and Case of the Serrano Cruz Sisters, supra note 3, para. 156.

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130. The Court considers that it cannot convict to payment of compensation for the pecuniary damages alleged, since there is not evidence to prove them. In what refers to non-pecuniary damages, the Court considers that this judgment constitutes, per se, a form of reparation, pursuant to international jurisprudence. [FN109]. It also orders the following measures:

a) that the State hold, within a reasonable period of time, a new trial against Mr. Fermín Ramírez, satisfying the demands of the due process of law, with all the guarantees of hearings and defense for the accused. If he is charged with the crime of murder, classification that was in force when the facts that he was charged with occurred, the current criminal legislation must be applied with the exclusion of the reference to dangerousness, in the terms of the following paragraph;

b) the regulation of murder as stated in the second paragraph of Article 132 of the Criminal Code of Guatemala violates the American Convention (supra paras. 90 through 98). Therefore, the State must abstain from applying the part of Article 132 of the Criminal Code of Guatemala that refers to the dangerousness of the agent and modify it within a reasonable period of time, adjusting it to the American Convention, pursuant to the established in Article 2 of the same, thus guaranteeing the respect for the freedom from ex post facto laws, enshrined in Article 9 of the same international instrument. The reference to the dangerousness of the agent included in this stipulation must be eliminated;

c) based on equitable considerations, as has been stated by this Court in other cases, [FN110] the State must abstain from executing Mr. Fermín Ramírez, whichever the result of the trial referred to in subparagraph a) of the present paragraph;

d) the State must adopt, within a reasonable period of time, the legislative and administrative measures necessary to establish a procedure that guarantees that every person sentenced to death has the right to request pardon or commutation of the sentence, pursuant to a regulation that determines the authority with the power to grant it, the events in which it proceeds and the corresponding procedure; in these cases the sentence must not be executed while the decision regarding the pardon or commutation of the sentence requested is pending;

e) the State must provide Mr. Fermín Ramírez, prior manifestation of his consent for these effects, as of the notification of the present Judgment and for the time necessary, without any cost and through the national health services, with an adequate treatment, including the supply of medications; and

f) it is appropriate to order, as has been stated by the Court in other cases [FN111] and as a guarantee of non-repetition, that the State adopt, within a reasonable period of time, the measures necessary for the conditions of the prisons to adjust to the international norms of human rights.

[FN109] Cfr. Case of Caesar, supra note 3, para. 126; Case of Huilca Tecse, supra note 102, para. 97; and Case of the Serrano Cruz Sisters, supra note 3, para. 157.
[FN110] Cfr. Case of Hilaire, Constantine and Benjamin et al., supra note 86, para. 215.
[FN111] Cfr. Case of Caesar, supra note 3, para. 134; and Case of Hilaire, Constantine and Benjamin et al., supra note 86, para. 217.

B) Expenses

131. The Court appraises that Mr. Fermín Ramírez was defended in the internal realm by the Institute of Public Criminal Defense Services, to which a specific public budget is assigned. In the present case, the assistance offered and the expenses assumed by said Institute are included within its obligations and budget. Therefore, the reimbursement of costs and expenses made by the Institute of Public Criminal Defense Services does not proceed. On the other hand, the Court takes into consideration that Mr. Fermín Ramírez also acted before the Commission and the Court through representatives of the Institute of Compared Studies in Criminal Sciences, and that it has presented the corresponding evidence for its request for the reimbursement of expenses (supra para. 54(65)). The Tribunal considers it is fair to order the State to reimburse the amount of US$ 5,000.00 (five thousand United States dollars) or is equivalent in Guatemalan currency, to the Institute of Compared Studies in Criminal Sciences for the expenses it incurred in within the Inter-American realm.

XIII. MEANS OF COMPLIANCE

132. In order to comply with the instant Judgment, the State must pay the reimbursement of expenses (supra para. 131) within a one-year period as of its notification; and it must adopt the other measures of reparation in the terms of paragraph 130.

133. The State may comply with its obligation of pecuniary nature through payment in United States dollars or in an equal amount in the national currency of the State, using for the corresponding estimate the exchange rate between both currencies in force in the New York Stock Market of the United States of America on the day prior to the payment.

134. If due to causes attributable to the payee of the reimbursement of expenses it is not possible for it to receive it within the mentioned one-year term as of the notification of the instant Judgment, the State will consign said amount in its favour in an account or deposit certificate in a reputable Guatemalan bank, in United States, and under the most favourable conditions allowed by legislation and banking practices. If after ten years the amount corresponding to the reimbursement has not been claimed, it will be returned to the State along with the interests earned.

135. The amount ordered in the present Judgment for reimbursement of expenses may not be affected, reduced, or conditioned due to current or future taxes or charges. Therefore, it must be paid in full to the beneficiary Institute.

136. If the State falls in arrears, it shall pay interests over the amount due, corresponding to the bank interest on arrears in Guatemala.

137. In accordance with its consistent practice, and for the exercise of its powers and the compliance of its duties pursuant to the American Convention, the Court retains the authority inherent to its jurisdiction, to monitor compliance with this Judgment. The case will be closed once the State has fully implemented all of the provisions of this Judgment. Within one year of notification of this Judgment, the State must present a first report of the measures taken in its compliance of this Judgment.

XIV. OPERATIVE PARAGRAPHS

138. Therefore,

THE COURT

DECLARES,

unanimously, that:

1. The State violated, in detriment of Mr. Fermín Ramírez, the right to judicial guarantees enshrined in Article 8(2)(b) and 8(2)(c) of the American Convention on Human Rights, in relation with Article 1(1) of the same, in the terms of paragraphs 62, 63, 65, 66 through 68, 70 through 76, and 78 through 80 of this Judgment.
2. The State did not violate, in detriment of Mr. Fermín Ramírez the Right to Judicial Protection enshrined in Article 25 of the American Convention on Human Rights, based on the reasons established in paragraphs 82 and 83 of this Judgment.
3. The State violated, in detriment of Mr. Fermín Ramírez the Freedom from Ex Post Facto Laws enshrined in Article 9 of the American Convention on Human Rights, in relation with Article 2 of the same, in the terms of paragraphs 81, and 90 through 98 of this Judgment.
4. The State violated, in detriment of Mr. Fermín Ramírez, the right to request a pardon or commutation of the sentence enshrined in Article 4(6) of the American Convention on Human Rights, in relation with Articles 1(1) and 2 of the same, in the terms of paragraphs 105 through 110 of this Judgment.
5. The State violated, in detriment of Mr. Fermín Ramírez, the right to personal integrity enshrined in Article 5(1) and 5(2) of the American Convention on Human Rights, in relation with Article 1(1) of the same, in the terms of paragraphs 117 through 119 of this Judgment.
6. This Judgment is, per se, a form of reparation.

AND DECIDES:

unanimously, that:

7. The State must hold, within a reasonable period of time, a new trial against Mr. Fermín Ramírez, satisfying the demands of the due process of law, with all the guarantees of hearings and defense for the accused. If he is charged with the crime of murder, classification that was in

force when the facts that he was charged with occurred, the current criminal legislation must be applied with the exclusion of the reference to dangerousness, in the terms of the following operative paragraph.

8. The State must abstain from applying the part of Article 132 of the Criminal Code of Guatemala that refers to the dangerousness of the agent and modify it within a reasonable period of time, adjusting it to the American Convention, pursuant to the established in Article 2 of the same, thus guaranteeing the respect for freedom from ex post facto laws, enshrined in Article 9 of the same international instrument. The reference to the dangerousness of the agent included in this stipulation must be eliminated.

9. The State must abstain from executing Mr. Fermín Ramírez, whichever the result of the trial referred to in Operative Paragraph seven.

10. The State must adopt, within a reasonable period of time, the legislative and administrative measures necessary to establish a procedure that guarantees that every person sentenced to death has the right to request pardon or commutation of the sentence, pursuant to a regulation that determines the authority with the power to grant it, the events in which it proceeds and the corresponding procedure; in these cases the sentence must not be executed while the decision regarding the pardon or commutation of the sentence requested is pending.

11. The State must provide Mr. Fermín Ramírez, prior manifestation of his consent for these effects, as of the notification of the present Judgment and for the time necessary, without any cost and through the national health service, with an adequate treatment, including the supply of medications.

12. The State must adopt, within a reasonable period of time, the measures necessary so that the conditions of the prisons adjust to the international norms of human rights.

13. The State must pay the reimbursement of expenses within the one-year term as of the notification of the present judgment, in the terms of paragraphs 131 through 137 of this Judgment.

14. The obligations of the State within the framework of the provisional measures ordered are replaced by those ordered in this Judgment, once the State ensures compliance of Operative Paragraphs 7, 8, and 9 of the present Judgment.

15. It will supervise compliance of this Judgment in an integrated manner, in the exercise of its powers and in compliance of its duties pursuant to the American Convention, and will consider this case closed once the State has fully implemented that stated in it. Within one year of notification of this Judgment, the State must present to the Court a report of the measures adopted for its execution.

Judge Sergio García Ramírez and Judge ad hoc Arturo Herrador Sandoval advised the Court of their Concurring Opinions, which accompany this Judgment.

Sergio García Ramírez
President

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

Diego García-Sayán

Arturo Alfredo Herrador Sandoval
Judge ad hoc

Pablo Saavedra Alessandri
Secretary

Communicate and execute,

Sergio García Ramírez
President

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCIA RAMIREZ IN THE JUDGMENT ON THE CASE OF FERMIN RAMIREZ V. GUATEMALA, OF JUNE 18, 2005

A) Of the due process and the criminal function

1. In this first part of my Concurring Vote I will present some considerations on the position of the Inter-American Court regarding the due process in general, a notion that has oriented the decisions of the Tribunal in the legal proceedings that concern the matters of the trial. In separate paragraphs, infra, I will refer to the characteristics that the matter of the due process assumes in the case sub judice. It certainly offers specific characteristics, in good measure different to the ones present in other trials that have come to be known by this Court with regard to issues of the due criminal process.

2. As a previous clarification, it is appropriate to mention that the concept of due process that I will proceed to examine is the one that refers to procedural matters, called “adjective” (that has a paradigmatic reference in the classic reflection of Lord Coke on the impertinence of somebody being the judge of their own cause). This version of the due process refers to the adequate serving through jurisdictional instances and others that are responsible for the decision of controversies pursuant to certain principles and formal rules. Another thing is the due process in its “substantive” meaning, developed by the jurisprudence and the doctrine of the United States of America and received in other countries (whose paradigmatic reference was reexamined by the justice Samuel Miller, of the Supreme Court of the United States of America, in Davidson v. New Orleans (1878): “to take away from A to give to B”). Obviously, the American Convention and the Inter-American Court have taken into account –although under different expressions—the matters covered in the substantive version of the due process, focused on the consistency of the norms and decisions with a specific group of values and interests.

3. That substantive notion must be analyzed in the light of several precepts of the Convention and of various jurisprudence of the Court. Among those we can find the stipulations regarding the interpretation of the Pact of San Jose, especially those that prohibit its

interpretation in such a way that it may "preclude other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government" (Art. 29 (c)), or "exclude or limit the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have" (Art. 29 (d)); those that refer to admissible restrictions that "can only be applied in accordance with laws enacted for reasons of general interest and in accordance with the purpose for which they have been established" (Art. 30); and those that refer to the limit of the right of each person: "the rights of others, (…) the security of all and (…) the just demands of the general welfare, in a democratic society." (Art. 32(2))

4. The jurisprudence of the Court includes important information of the examination of the "substantive" due process, even though it has not used this approach. Without the intention of going into detail of these matters –taking into consideration that, as previously mentioned, this Opinion refers only to the "adjective" due process, which is the version explored under the area of the due process--, the Inter-American jurisprudence has referred to the characteristics the law that establishes limitations to rights must have: adopted within the framework of institutions and processes of a democratic society and seeking common good. The Court has reflected on the characteristics a law must have within the framework of the protection to human rights (OC-6/86, paras. 32 and following). And the Tribunal itself has mentioned that the concept of common good, within the context of the Convention, refers to "the conditions of social life that allow the members of society to reach their greatest level of personal development and the greatest validity of democratic values" (OC-5/85, para. 66). Likewise, the Inter-American jurisprudence examined the connection between radical concepts of political-legal order based on the philosophical convictions that form the basis of the American Convention: "The concept of rights and liberties and, therefore, that of there guarantees, is also inseparable from the system of values and principles that inspire it. In a democratic society the rights and liberties inherent to the person, their guarantees and the Constitutional State form a triad, and each of its components is defined, completed, and makes sense in function of the others" (OC-8/87, para. 26).

5. I return now to the procedural due process. This matter has occupied the Inter-American Court since it started it advisory functions. It has dealt with it, extensively, when deciding cases and provisional measures. It is a highly traveled road, maybe the most from among the many that this Tribunal has considered in its judicial exercise during a quarter of a century. From here on with the designation due process I will refer now to the issues analyzed in Article 8 of the Convention as well as those covered in Articles 5 and 7 regarding the treatment of people held in custody, the duration of the detention, and the conditions in which it occurs. Eventually, the issues of the due process are projected on other stipulations of the Convention that refer to different rights, or cover matters referred to in the mentioned articles: this has occurred, in some points, in the case of Article 4.

6. It seems natural that there is an abundance of matters regarding the due process within the scene of infringements of human rights. When serving criminal justice –or criminal injustice—there is an ample quota of violence comparable only with that committed by the criminals: there is a parallel course between the history of crime and that of the reactions devised to fight it, generally under the name of criminal justice. It is in that space that the most dramatic encounter –as I have mentioned on several occasions— between the State invested with all its

power and the individual divested of merits and defenses, except for those that may be provided to it by the kindness of the powerful, first, and the development of Law, later, has always wanted to be legitimized and many times has not even been legalized.

7. The overflowing of the repression occurs here with greater ease than in other areas of public work, because the first turns on those who have been designated “public enemies”: the criminal that damages individual and collective goods that are highly appreciated –thus the condition of criminal, and not just illicit, behavior of the act committed—and with it they put in risk the existence of society. They are, therefore, a greater social opponent; an enemy even. It would be difficult to find a more natural and vulnerable addressee of state actions. This explains the performance of the persecutions and punishments, their phenomenology, characteristics, consequences, and slow appearance of the means of protection for the individual that faces the State as a defendant, and that may, in effect, be guilty, but that may also be innocent of the charges made against him, and in any case continues to be a human being.

8. In the exercise of civilization the imperious need for the State to provide security to society –provision that constitutes one of the reasons for the existence of the State, among the most radical and necessary—and the ethical, and today judicial, demand that it be done without harming human dignity or prejudging with regard to the responsibility subject to trial. From this complicated conciliation –natural realm for the construction and preservation of the Constitutional State--, which guarantees the liberty of all, not only the security of the defendant, arises the due process of law in its different aspects, with the criminal one at the head, and with it what could be presented as a dilemma in other circumstances dispels: security or justice, peach or law. In the era of guarantees, the due process that leads to a clarification and a fair judgment –thus a due process that helps to have a formal and material access to justice—is a security of said conciliation and of the fragile balance on which it is installed.

9. When criminality increases, driven by numerous factors that rarely consider the political one –unless dealing with a politician used to looking beyond appearances and to acting beyond the symptoms--, the persecution is extreme. This behavior is explicable. Before social desperation, soon turned into exasperation, the conflict between the due process and crime control comes back into scene, a dialectic that is currently present throughout the criminal process, as has been stated by Mireille Delmas-Marty in what refers to Europe and that certainly finds multiple manifestations in other countries besieged by traditional crime and evolved delinquency, that public efforts cannot successfully prevent, face, or reduce.

10. The Inter-American Court, that has on many occasions dealt with the due process, as mentioned, stated that it is a “set of requirements that must be observed in the procedural instances so that the people are in condition to adequately defend their rights before any (…) act of the State that may affect them” (Advisory Opinion OC-18, para. 123). This concept, according to the jurisprudence of the Court, is not exclusive of criminal matters; it reaches other specialties of the trial and, in general, of the procedure, when dealing with the rights of people: the “group of minimum guarantees established in numeral 2 of (Article 8) is applied also to (other) orders and, therefore, in this type of matters the individual also has the right, in general, to the due process that applies in criminal matters.” (Case of the Constitutional Court, para. 70)

11. OC-16 established that in order for there to be a due process "a defendant must be able to exercise his rights and defend his interests in an effective manner and in conditions of equality with other defendants. To this effect, it is useful to remember that the process is a means to endure, to the extent possible, the fair solution of a controversy. The set of acts of different characteristics normally united under the concept of the due process of law attends to this purpose." (para. 117) On other opportunities, the Court stated that the existence of real judicial guarantees –in which the due process is affirmed—requires that in it all the requirements that "serve to protect, ensure, or enforce the title or exercise of a right, (OC-8/87, para. 25) be observed, that is, the "conditions that must be complied with to ensure the adequate defense of those whose rights or obligations are under judicial consideration." (OC-9/87, para. 28)

12. In my Concurring opinion to Advisory Opinion AO-16 I stated that "what we know as the 'due criminal process', the backbone of the prosecution of a crime, is the result of this long road, fed by the law, jurisprudence –among it, the progressive North American jurisprudence— and doctrine. This has occurred at a national level as well as in international matters. The developments of the first years have been surpassed by new progress and probably the years to come will bring novelties in the permanent evolution of the due process within the democratic conception of criminal justice."

13. At the time I added: "The rights and guarantees that make up the due process –never an exhausted reality, but a dynamic system in constant formation-- are necessary pieces of the same; if they disappear or are dwindled, the due process disappears. Therefore, they are indispensable parts of a whole; each of them is essential to its existence and survival. It is not possible to say that there is a due process when the trial does not take place before a competent court, independent and unbiased, or the defendant is not aware of the charges being made against him, or he does not have the possibility to present evidence and pleas, or control by a higher body is excluded.

14. "The absence or unawareness of those rights destroy the due process and may not be corrected with the desire to prove that despite the non-existence of procedural guarantees the judgment issued by the court at the end of an irregular criminal procedure is fair. To consider that it is enough to achieve a supposedly fair result, that is, a judgment pursuant to the act performed by the subject, so that the way in which it was obtained can be acquiesced, is equivalent to going back to the idea of 'the end justifies the means' and the lawfulness of the result purges the unlawfulness of the procedure. Today the formula has been inverted: 'the legitimacy of the means justifies the end reached'; that is, it is only possible to reach a fair judgment, which verifies justice in a democratic society, when the (procedural) means used to issue it have been licit.

15. "If to determine the need or relevance of a right in the course of the process –with the purpose of determining if in its exercise it is indispensable or dispensable—one were to resort to the examination and demonstration of its effects on each judgment, case by case, one would incur in a dangerous relativization of the rights and guarantees, which would take the development of criminal justice back to a previous time. With this concept it would be possible –and inevitable—to submit all rights to the same examination: the influence that the lack of a defense counsel, the ignorance of the charges, an irregular detention, the application of tortures,

the non-awareness of the procedural means of control, and so forth have on a judgment would have to be weighed case by case. The consequence would be the destruction of the concept of the due process, with all the consequences that would derive from that.

16. When I issued that Opinion --several years ago-- I examined the consequences that the serious defects of the procedure could entail over the process as a whole and the judgment issued in it. In this sense, I mentioned that the violation of the process "has the consequences that are necessarily produced by an illicit act of these characteristics: reversal and responsibility. This does not mean impunity, because it is possible to order the repeat of the trial so that it is developed in a regular manner. This possibility is widely known in procedural law and does not require greater consideration."

17. In the evolution of the jurisprudence of the Inter-American Court not only the concept of a due process must be assessed, but also its extension to matters different to and even distant from criminal subjects, taking as a reference, however, in all that results rationally applicable, the characteristics it has in criminal matters --which are more widely explored and detailed – in order to ensure an ample and certain protection.

18. In that jurisprudence the dynamic, expansive nature of the due process –to which I referred in my mentioned Concurring Opinion to OC-16-- can also be observed, to which new data that contributes to the most complete protection of the rights –and juridical rights deposited in them— through this notion is added. The incorporation of the right to know of the possibility to receive consular assistance, which favours the foreign detainee, has become plausible and its non-observance, negative, or detriment vitiates the procedure and deprives the judgment issued over those weak grounds of validity. This affirmation, originally made by the Inter-American Court in the OC-16, was later collected in the solution of cases before the International Court of Justice: LaGrand, of Germany v. United States, and Avena and other Mexicans, of Mexico v. United States.

B) Due process and fight against crime

19. Upon starting to know of the Case of Fermín Ramírez v. Guatemala and issuing the corresponding judgment, the Court has established once again the sense and limits of its function: a) know the need of the State to fight crime with strength, task that constitutes a peremptory duty of the latter, and b) at that same time it ensures that said indispensable battle be carried out as per the Law and pursuant to the principles and rights it recourses. When deciding, the Inter-American Court acts pursuant to its strict jurisdiction: it rules on the basis of the compatibility or incompatibility of a certain act of the State, subject to controversy, with the terms of the American Convention that the Court itself applies. It cannot do anything else. It is a court of human rights, not a criminal court. The research of criminal acts and the imposition of punishments corresponds to national courts. The Court does not question this function, it does not invade it, it does not prevent it. It has never tried to do so. It respects it.

20. The Inter-American Court has never assumed the defense –or the indictment—of the possible responsible parties of an illicit act. It has strictly limited its actions, and will continue to do so, to deciding upon the interpretation and application of the legal code it can invoke: the

American Convention on Human Rights. The national instances must apply, with great care and efficiency, respecting the stipulations of this Convention, the norms that correspond to them: the criminal codes and other bodies of law called upon to punish criminal acts. Whoever has read the decisions of the Inter-American Court, even superficially, will have noticed that this has been its invariable position. It could not be any different.

21. In the judgment corresponding to the Case of Castillo Petruzzi, of May 30, 1999, the Court held that "it is not empowered to issue a judgment regarding the nature and seriousness of the crimes attributed to the alleged victims," and it stated that it would not examine "the alleged criminal responsibility of the alleged victims, which corresponds to the national jurisdictions." (paras. 89-90) Finally, the Tribunal declared the existence of certain violations in the process against the defendants that had motivated the examination of the case and stated "that it would guarantee them a new trial with the complete observance of the due process of law." (operative paragraph 13).

22. In the case referred to in the judgment to which I attach this Concurring Opinion, the State was not charged with a brutal violation of the guarantees inherent to the due process. In several occasions notorious transgressions that involve the mistreatment of the defendant in order to obtain a confession, an irregular and prejudged investigations, acts of courts that lack independence or impartiality, complete deprivation of the right to a defense, obstruction of justice, elimination of the access to evidence, absence of ideal means of appeal, and other violations of the same nature have been brought to the consideration of the Court. This case is about a violation of another type: inconsistency between the indictment and the punishment, which implies –despite it does not offer a dramatic appearance or immediately offends social consciousness—a restriction to the right to a defense, which is the most valued right for the person who is subject to trial and it has an effect on the final decision of the court that convicts. Any person who supposes the possibility of being taken to a criminal trial --and who is absolutely free of this possibility? --, knows that the law acknowledges the right to a defense and trusts that he will have access to it.

23. It is probable that whoever observes this matter may consider that it is a mere procedural technicality. The separation between the so-called "technicalities" and serious violations is a matter frequently analyzed by the writers of the procedure and it is not foreign to debate in different circles of opinion. Now, it is important to mention that behind the so-called "technicalities", which some observers minimize and even attribute adverse results for security and justice, we find real human rights that must be respected. Finally, the moral and political strength of the democratic society is also measured through its capacity to attend to the specific rights of individuals and at the same time serve the objectives of security and justice demanded by society and that are the reason of existence of the legal system.

C) Principle of consistency between the indictment and the judgment

24. In the Case of Fermín Ramírez v. Guatemala, the Inter-American Court examined some matters of the due process that it had not known of previously. Today it has not focused, as in so many other cases, on the natural judge, the independence and impartiality of the judge, the possibility to appoint defense counsel and receive its assistance, the structure of the evidence, the

appeal against convictions, the reliability of the confession and others that have consistently been in its view. In this case, information of the criminal process in a democratic society has been put into game: the consistency between the indictment and the judgment, which not only involves a logical connection between two procedural acts of extreme importance, but it also involves the defendant's right to a defense –because it affects it deeply--, and therefore it is projected over the totality of the process and falls upon the validity of the judgment itself.

25. Even more so, the consistency I am referring to –which avoids legal decisions on the margin of the indictment made by a body different to and with independence from the judge— constitutes a regular expression of the division of powers and characterizes the accusatory criminal procedural system. In effect, it puts in evidence the separation between the accusing body and the body that issues the judgment, and acknowledges the persecutory function of the first and not the latter. If this was not so, that is, if the judge could exceed the terms of the indictment, ignore them, or substitute them at his discretion, we would be in the presence of an inquisitive judicial performance: the judicial body would itself include facts and charges in the sentence that have not been presented by the prosecution, and it would become, in great measure, an accusing agent.

26. In the democratic criminal process, the defendant, subject of the process, invested with procedural rights that allow it to hold and ensure its material rights, faces certain charges over which he awaits a judicial decision. Based on them, which are the "matter of the trial", it develops the acts of the defense. Thus the importance that he know, from the beginning of the process –and even more so, from the beginning of the process against him and since he is detained prior to his presentation before the judge--, the acts he is charged with, in order to be able to prepare his defense. This does not mean he must be informed of technical matters regarding the charges against him, but instead certainty regarding –and of course that his defense counsel also be informed—what acts are attributed to him, how they are said to be committed, how they were carried out, etcetera, so that he may have the necessary elements to contradict the indictment and, in the end, obtain a fair judgment.

27. The above not only substantiates the demand for precise, complete, and opportune information regarding the accusation –which is a fundamental right of the defendant, a crucial part of the due process, without which the condition of the defendant as subject of the trial to be reinstated as object of the investigation is declined--, but also the essential relationship that must exist between the indictment that presents the subject of the process and the judgment that decides this matter, not another or others that could be related to it, but that in any case were not subject of the evidence, the debate, the defense, and therefore could only be, in any case, matters for a different process in which the corresponding guarantees of information and defense are observed.

28. The conviction that the defendant must know, from the time of his arrest, the charges against him –not just their technical names, that say little or nothing to the common individual, but the acts that are being attributed--, has installed itself in the modern procedure of democratic orientation. It is found, for example, in the demand that those who arrest the alleged offender inform him of the charges, of the possibility to refer to them, to remain silent, and to appoint a defense counsel. The similar must occur when the defendant appears before the judge of his

cause. The same norm must be observed –as already mentioned—when the subject is a foreigner and he is notified of the possibility to resort to the assistance of the consul of his nationality.

29. In my opinion, nothing should oppose what the State law calls reclassification of the facts, that is, their observation from another technical perspective, under a classification or designation different to the one initially given, but keeping their identity invariable, as the matter or subject of the process. In this case the defense made and that continues to be made by the defendant and his defense counsel continues to be valid, because it has referred and refers to facts that have not been altered, changed, or increased, instead they have simply been designated with other terms. Said in another way: the facts are not altered; the only thing that changes is the nomen juris with which they are designated, and this variation does not have an effect different to that of a technical depuration in the use of concepts, but it does not affect the defense. Up to here, if we talk of a reclassification of the facts. And if things remain here, there is no violation to the right to a defense.

30. This is not what happens if what the judgment of the Inter-American Court has designated as "factual basis" of the criminal process is modified. If this occurs, the prosecutor that makes a new accusation must promote the acts that lead to a re-channeling of the process and, if it does not suggest it, the court itself must spontaneously decide it, since in a final analysis it is the latter who responds for the good operation of the trial, this is, for the due development of the process, attending to the demands of the law and the requirements of justice. This was not what occurred in the case that is now before us. It is true that some facts from the original indictment and the judgment with which the process was closed coincide, but it is also true that others, of great importance, do not coincide at all.

31. To prove the above one just has to observe the criminal description of aggravated rape in Article 175, in relation with 173, of the Criminal Code of Guatemala, and that of aggravated murder (called "murder" in the national criminal code), formulated in Article 132, in relation with 123 of the same code. Rape is forced carnal knowledge perpetrated against a women –states Article 173—and there is the possibility –states 175, that describes the complementary aggravated figure—that "with motive or as a consequence of the rape" the victim may die. Instead, murder is the deprivation of life –pursuant to Article 123—carried out in the form, with the means, under the impulse, or with the purpose described in Article 132. Thus, each punishable act is integrated by its own elements, characteristics that must be proposed in the indictment and that are or must be subject to the examination of the defendant and his defense. If the conviction is issued for acts different to those stated in the indictment, the consistency between the latter and the judgment will be breached. Only the integrity of that link proves that the defendant adequately exercised the right to a defense acknowledged by the State and that it is obliged to respect and guarantee.

32. In the light of Article 8 of the American Convention, a judgment adopted in this manner is not valid. Now, this does not mean, at all, that the Inter-American Court is freeing the defendant of his responsibility, nor does it mean that it is declaring that such responsibility exists. It is only issuing one conclusion: the violation of the due process deprives the judgment of judicial support and obliges the State, as has been mentioned by the Court, to proceed with, if it decides to do so, a new trial in which the requirements of the due process are observed in order

to reach the conclusion derived from the facts put forward by the accuser, the evidence presented by the parties or brought forward by the court, and the debate regarding them –not regarding other facts. Therefore, there is not a risk of impunity but a demand for justice pursuant to the stipulations of the American Convention, which the State has ratified.

33. It is important to point out, always regarding this matter, but also related to the one I will proceed to examine below, that the alleged change in the classification of the facts, that in this case has actually been a modification of the facts themselves –modification that may or may not have reflected reality; this is not being discussed by the Inter-American Court, because it does not have the power to do so—produces consequences of great importance. In effect, the punishment established for aggravated rape is imprisonment of 30 to 50 years, except when the victim is younger than 10 years old (Article 132 bis of the Criminal Code), which does not occur in this case. Instead, the punishment for murder is the death of the inmate when certain circumstances of the act are present, the occasion, the motives, or the commission of the act reveals "a greater specific dangerousness of the agent." This reference gave place to the examination of the Court and determined the conclusions I will proceed to comment.

D) Dangerousness of the agent

34. In this case the problem that arises from the old expression introduced in the second to last paragraph of Article 132 is presented: the "greater specific dangerousness of the agent," concept that was revised by the parties in the process before the Inter-American Court and through writs of amici curiae that we will analyze carefully. The concept of dangerousness has been eradicated by more modern currents of the Criminal law of democratic orientation –modern, however, with almost one century of validity--, which have insisted on the need to eliminate this notion of substantive nature, to replace it with guiding information of the criminal reaction, the entity of the crime, and the guiltiness of the agent.

35. The positivism that pervaded in the last third of the XIX century permeated in multiple criminal codes, among them the spate of Latin American codes with which our XX century begun. The lessons of positivism, whose appeal lies in the consideration of the causal factors of the crime, both in general and in the specific dynamics of the agent, were widely received by professionals and students, among which we were politically active for a long time. The "scientific" appeal of positivism and the rejection of the judicial formalism hid the risks that it had on liberty and democracy and the advantages of the latter for the same purposes. Dangerousness arose based on the hypothesis of the intervention of the State.

36. Based on its dangerousness, the offender –current or future-- could be punished not for what he has already done, his behavior, his illegal activity, damaging and culpable, but for what he is, his personality, his tendencies, his possible decisions, and future and probable behavior, appreciated in the only way it could be: through predictions. In the end, this generates a criminal system based on the situation of the perpetrator –in which the reaction is in function of the person--, which contrasts the Criminal system based on the crime, act or behavior committed –in which the reaction is to the behavior actually displayed by the agent, the damage or the risk actually produced, the proven guilt.

37. For the purposes of the trial before the Inter-American Court, the matter may be considered from a double perspective: as a breach of the right to evidence and to a defense, in the sense that the indictment did not include the charge of dangerousness and therefore the defendant was not given the chance to disprove it; as a transgression of the freedom from criminal ex post facto laws, which states that only a law adjusted to the act committed may be applied. In the Commission's application the first perspective, of procedural nature, prevailed; in the decision of the Court, which does not reject that approach, but instead complements it, the second, of material nature, prevails.

38. The Court considered that the inclusion of dangerousness as an element of the criminal description or as a factor for the determination of the punishment, in its respective cases, does not comply with the freedom from ex post facto laws that states the punishment of illicit acts or behaviors performed with guilt, but it does not authorize the sanction based on a combination of the certainty of pasts acts and the speculation on future behaviors. In the end, it would not have been satisfactory for the application of the Pact of San Jose, considered as a single legal body, to ensure the defendant the possibility to defend himself from the accusation of being dangerous, that is, of the prediction of possible crimes in sometime in the future. What is required is a complete elimination of the reference to dangerousness. Thus, the disposition of the Court in the chapter on reparations, where the possibility of a new trial subordinated to the due process is mentioned, but it also states that it is necessary to, in order to comply with Article 2 of the Convention, reform Article 132 of the Criminal Code.

E) Pardon

39. Finally, the Court has dealt with the matter of pardon, appeal to which the accused convicted to death must have access, in the terms of Article 4 of the American Convention. Obviously, to have the right to present this appeal does not necessarily mean the right to a favourable response. The pardon is gradually being removed from criminal legislation. In it we still find the remote power of pardon of the absolute monarch, lord of lives and estates, who precisely because of that could dispose of the life of the accused, saving him from the death ordered by the court. The criminal rationality, found in the political and judicial rationality, suggests that this figure should be eliminated, without this preventing the establishment, in its place, of appropriate substitutes that allow the conversion of the punishment imposed when there are causes that justify it.

40. The Court appreciates that the State lacks a certain and adequate regimen regarding the pardon. If this subsists, a matter that concerns a State decision, it must not be extent of precise rules regarding the authority called to grant it, the grounds for its granting, and the procedure to decide on it. On the contrary, it would be an expression of pure discretion, foreign to a Constitutional State in a democratic society. Even when it is a power to pardon, it is necessary that it be exercised with clarity and rationality.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri

Secretary

Concurring opinion of the Judge ad hoc Arturo Alfredo Herrador Sandoval in the case of Fermín Ramírez v. Guatemala

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"GUATEMALA IS A STATE OF TRANSITION, GUATEMALAN DEMOCRACY, THE PRODUCT OF DECADES OF GENERATIONAL FIGHTING, IS STILL YOUNG BUT PROMISING"

I. Introduction

In my quality of judge ad hoc appointed by the State of Guatemala I concur in my opinion with the eminent jurists that make up the Court, with whom I have had the undeserved honor of working on the present case.

The Inter-American Court of Human Rights as the highest instance of regional jurisdiction in this subject must always remain faithful to the principles that inspired its creation, reaffirming its purpose to consolidate democracy and full respect for human rights in the American Continent.

During the last decade the State of Guatemala has been repeatedly accused before this regional instance, some times for having maintained and promoted a hostile policy with regard to the human rights of its inhabitants, and, in others, for not having the political will or sufficient strength to vigorously defend them.

The present case escapes by far the previously mentioned situations.

As with the rest of the democracies of this part of the continent, the Guatemalan one is permanently besieged by the groups of factual power that co-opt the institutionalism of the State that must so necessarily be strengthened. The endemic problems of poverty and extreme poverty afflicting the country have only worsened the crime phenomena that threatens with devouring the Constitutional State causing with its whirl a dangerous undermining of the credibility of the judicial courts as the only ones legitimately empowered to exercise and apply justice.

The rates of common violence cause a daily impact on citizen awareness generating a sensation of defenselessness and powerlessness before said hardships. Within this framework of action, the fight to make the Constitutional State prevail and for the defense of human rights reaches an enormous stature.

When the social dynamic, degenerated by the system's malfunctions causes us to face crimes as abominable as the one that motivated the process that culminated with this new punishment to the Guatemalan State; our wish would be that the justice system in its totality would operate in an optimal matter so the State, as the representative of the society and protector of the life and security of its habitants, could transmit with the same certainty that these acts will not be repeated and that, if they are, the population can be sure that they will never go without punishment, since without excuse or pretext the most exemplary of the punishments established in the legal code in force will be imposed in order to establish a sound precedent that banishes the temptation to repeat this type of crimes that damage social conscience.

The present is a case in which the judges that examined the case coincided that it escapes the traditional turn of the matters submitted to the jurisdiction of this Honorable Court, where the States appear as the accused not for procedural violations, as in the present case, but for executing State policies that intentionally restrict the most elemental rights of its inhabitants.

Jurisdiction of the Court

The Honorable Court is competent to know the case of merit in virtue of the ratification made of the American Convention by the Guatemalan State on May 25, 1978 and of the acceptance of its jurisdiction on March 9, 1987.

As established in Article 62(3) of the American Convention, this Court is competent to know of all cases concerning the interpretations and application of the provisions of the Convention, that are submitted to it, provided that the State Party has previously recognized the jurisdiction of the Court, situation that does not permit doubts regarding said matter.

Despite the above, it is fair to mention that the Inter-American Commission on Human Rights, whenever possible, must support that the Court deal with paradigmatic cases that deal with situations that escape procedural slip-ups that affect a single individual tried and convicted in all instances by one of the State parties of the Convention for committing an abominable crime; to permit that this Honorable Court deal with those paradigmatic cases in which its intervention is of vital and urgent importance for the validity of human rights of groups of citizens that suffer from some type of violation that distances the signing States from the Convention, of its reason of existence as such and lead them astray from the purposes that the Convention seeks.

Of the procedural deficiencies

This case puts in evidence regretful and relevant mistakes of some operators of justice that committed errors not of bad faith in the process but of non-observance in the rigorous application of the procedural rules in force, situation that in a case as delicate as the present, whose sanction is the maximum punishment, must have been observed with extreme thoroughness. Failure to do so resulted in the Court having to issue a judgment against the State of Guatemala due to the procedural records because it was evident that said procedural omissions resulted in the violation of several of the precepts of the American Convention on Human Rights, as expressed in the operative paragraphs of the judgment of merit.

Trying to simplify as much as possible the detail of the procedural errors in which the different operators of justice that examined the case of merit participated, the following can be mentioned:

a. The Office of the Public Prosecutor did not present its indictment for the right crime, nor does it appear on the record that it requested the modification of the writ of indictment, which it had the power to do pursuant to that established in Article 320 of the Guatemalan Code of Criminal Procedures.
b. Regarding the Trial Court, even though it is true that it had the power to give the act a different legal classification to the one presented in the indictment or the order for trial to commence in the procedural stage of the judgment in virtue of the permissive rule that regulates that situation in Article 388 of the Guatemalan Code of Criminal Procedures; it is also true that said situation is motivated by the appearance of a new circumstance not mentioned in the order for trial to commence. This situation in the case of merit refers to the certainty of the Court regarding the strangulation of the minor as the cause of her death, situation that obviously modified the legal classification of the crime substituting that of aggravated rape for murder, and therefore the punishment to be imposed.

This situation places us under the legal rule established in Article 373 of the Guatemalan Code of Criminal Procedures having as a consequence the right of the parties to request the suspension of the debate in order to offer more evidence or prepare their intervention; right that was not used by the Office of the Public Prosecutor or the defense. However, the most evident violation to the due process occurs when despite having changed the legal classification of the crime and therefore its punishment, THE TRIAL COURT DOES NOT PROCEED TO RECEIVE A NEW STATEMENT FROM THE DEFENDANT as it was obliged to due based on that expressly stated in an imperative manner in the previously mentioned article.

The previous procedural errors resulted in the non-compliance by the State of Guatemala of the judicial guarantees enshrined in Articles 8(2)(b) and 8(2)(c) of the American Convention on Human Rights.

c. Regarding the court-appointed defense counsel, it is obliged to request the suspension of the debate and demand that the Trial Court receive a new statement from the defendant, which it did not do.

IV. Of the Pardon

In what refers to this situation, it is currently not regulated in Guatemala's legislation, which per se constitutes a violation to Article 4(6) of the American Convention. Mr. Fermín Ramírez presented on July 27, 1999 a measure of grace to the President of the Republic (Alvaro Arzú) through memorial received in the Reception Office of the Ministry of Government. On that same date, that office forwarded the dossier with the request to the Head Office of that Ministry, who at the same time forwarded it to the General Secretariat of the Presidency on May 31, 2000 (when the Presidency was in the hands of Mr. Alfonso Portillo). Said appeal was denied (by President Portillo) through agreement 235-2000 of May 31, 2000 that was published in the Diario de Centroamérica on June 2 of that same year.

It is true that the President of the Republic was not obliged to pardon the convicted party, since this decision is essentially optional, however, before the apparent legal limbo generated by the annulment of decree 159 of the Legislative Assembly that

contemplated the pardon, and before the current situation of its non-regulation, this Court was compelled to declare the violation of the State of Guatemala in this sense.

Of the conditions of the prison

From the study of the record we can conclude that the conditions of the prison where Mr. Fermín Ramírez is located waiting the definitive judgment regarding his case, lacks the minimum conditions to guarantee the respect for his physical, psychic, and moral integrity, reason why it is necessary to leave evidence of the concern of this Court regarding the need that the State of Guatemala substantially improve the imprisonment conditions of its inmates, both of those subject to serving a sentence as of others that are awaiting its fulfillment in virtue of appeals that have not yet been decided, as is the present case.

Conclusion

As Judge ad hoc I express that the study, analysis, and debate of this case produced opposing feelings among those who participated in it.

As stated in the transcripts that document the deliberation of the present case, it was analyzed taking into consideration all possible problems, reflecting the decision issued, the unanimous concern of the Court regarding the complete respect of the State of Guatemala of even the minimum detail of the human rights of its inhabitants, in the understanding that because of this it must not stop guaranteeing their public security, which is the greatest challenge to be overcome in a Constitutional State.

As Judge ad hoc I issue opinions so that the State of Guatemala does not have to be on trial before this Court ever again for having implemented institutional policies of harassment, persecution, or systematic violation of the human rights of its inhabitants and so that this type of cases, where the violations occurred are the product, not of intent but of an imperfect observance of up to the minimum detail of the procedural formalities established, be reduced to their minimum expression as a result of the diligence, efficiency, and effectiveness of the procedural subjects and operators of justice that will correct them.

To consider that this judgment is per se a form of reparation to Fermín Ramírez proves the legal stature and fair vision of the Honorable Permanent Judges that analyzed the present case with which as Judge ad hoc I am pleased.

Arturo Alfredo Herrador Sandoval
Judge ad hoc

Pablo Saavedra Alessandri

Secretary