

Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Ronald Ernesto Raxcaco Reyes 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; Manuel E. Ventura Robles; Alejandro Sanchez Garrido
Dated:	15 September 2005
Citation:	Raxcaco Reyes v. Guatemala, Judgement (IACtHR, 15 Sep. 2005)
Represented by:	APPLICANTS: CEJIL, ICCPG and IDPPG
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In the Case of Raxcacó Reyes,

the Inter-American Court of Human Rights (hereinafter “the Court” or “the Inter-American Court”), pursuant to Articles 29, 31, 56 and 58 of the Rules of Procedure of the Court (hereinafter “the Rules of Procedure”) and Article 63(1) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”), delivers the following judgment.

I. INTRODUCTION OF THE CASE

1. On September 18, 2004, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the Inter-American Commission”) filed before the Court an application against the State of Guatemala (hereinafter “the State” or “Guatemala”), which originated from petition No. 12,402, received by the Secretariat of the Commission on January 2, 2002.

2. The Commission filed the application for the Court to decide whether the State had failed to comply with its international obligations and had violated Articles 4 (Right to Life), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial) and 25 (Right to a Judicial Protection) of the American Convention, all in relation to Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, owing to the alleged imposition of a mandatory death sentence on Ronald Ernesto Raxcacó Reyes for the crime of kidnapping or abduction, for which this punishment was not provided for by law at the time Guatemala ratified the American Convention; the allegedly disproportionate punishment imposed on him; the prison conditions in which he is being kept, and the alleged ineffectiveness of the judicial remedies filed before the local courts. The Commission also requested the Court to order the State to adopt several measures of reparation.

II. JURISDICTION OF THE COURT

3. Guatemala ratified the American Convention on May 25, 1978, and accepted the contentious jurisdiction of the Court on March 9, 1987.

III. PROCEEDINGS BEFORE THE COMMISSION

4. On January 28, 2002, the Center for Justice and International Law (hereinafter “CEJIL”), the Instituto de Estudios Comparados en Ciencias Penales de Guatemala (hereinafter “IECCPG”) and the Instituto de la Defensa Pública Penal (hereinafter “IDPPG”) submitted a petition to the Inter-American Commission and requested precautionary measures in favor of Mr. Raxcacó Reyes. The request for precautionary measures was subsequently reiterated.

5. On January 30, 2002, the State was informed of the Inter-American Commission’s decision to grant precautionary measures in favor of Mr. Raxcacó Reyes.

6. On October 9, 2002, during its 116th regular session, the Commission adopted Report 73/02 in which it declared the case admissible and decided to continue considering its merits.

7. On October 8, 2003, during its 118th regular session, the Commission adopted Report on Merits No. 49/03, in which it recommended that the State should:

1. Grant Ronald Raxcacó reparation, including the commutation of his sentence.
2. Adopt the necessary legislative and other measures to ensure that the death penalty is not imposed in violation of the rights and freedoms guaranteed by the Convention, particularly by Articles 4, 5, 8 and 25, and ensure that, in Guatemala, no one is sentenced to a mandatory death penalty.
3. Adopt the necessary legislative and other measures to ensure that the right embodied in Article 4(2) of the American Convention that the death penalty should not be imposed for crimes that it was not provided for when Guatemala deposited its ratification of the Convention is effective in Guatemala, and to adapt its legislation to this instrument, in accordance with Article 2 thereof.
4. Adopt the necessary legislative and other measures to ensure that the right embodied in Article 4(6) of the American Convention to request amnesty, pardon or commutation of sentence is effective in Guatemala.
5. Adopt the necessary legislative and other measures to ensure that the rights to personal integrity and to humane treatment embodied in Articles 5(1) and 5(2) of the American Convention are effective in Guatemala, in relation to the detention conditions of Ronald Raxcacó [Reyes].

8. On December 19, 2003, the Commission forwarded Report on Merits No. 49/03 to the State and requested it to provide information on the measures adopted to comply with its recommendations within two months of the date on which the report was sent. In a note of the same date, the Commission informed the petitioners that it had adopted the said Report on Merits, in accordance with Article 50 of the Convention, and requested them to provide, within

one month, the information referred to in Article 43(3) of its Rules of Procedure as regards their position concerning the possibility of filing the case before the Inter-American Court.

9. On January 26, 2004, after an extension had been granted, the petitioners presented their reply to the Commission's communication of December 19, 2003, indicating that they wished the case to be filed before the Inter-American Court.

10. On July 22, 2004, after an extension had been granted, the State sent its response regarding the recommendations made by the Commission in Report on Merits No. 49/03.

IV. PROCEEDINGS BEFORE THE COURT

11. On September 18, 2004, the Inter-American Commission filed the application before the Court (*supra* para. 1) attaching documentary evidence, and offered testimonial and expert evidence. The Commission appointed Susana Villarán and Santiago A. Canton as delegates, and Ariel Dulitzky, Víctor Hugo Madrigal, María Claudia Pulido and Brian Tittimore as legal advisers.

12. On October 7, 2004, following a preliminary review of the application by the President of the Court (hereinafter "the President"), the Secretariat of the Court (hereinafter "the Secretariat") notified it with the attachments to the State and informed the latter of the time limits for answering it and appointing its representatives for the proceedings. The same day, on the instructions of the President, the Secretariat informed the State that it had the right to appoint a judge ad hoc to take part in the consideration of the case.

13. On October 7, 2004, in accordance with the provisions of Article 35(1)(d) and (e) of the Rules of Procedure, the Secretariat notified the application to the representatives of the alleged victim (hereinafter "the representatives"); namely, CEJIL, ICCPG and IDPPG.

14. On November 26, 2004, after an extension had been granted, the State designated Herbert Estuardo Meneses Coronado as Agent, and Luis Ernesto Cáceres Rodríguez as Deputy Agent in this case. It also appointed Alejandro Sánchez Garrido as Judge ad hoc.

15. On December 7, 2004, the representatives submitted their brief with requests, arguments and evidence (hereinafter "requests and arguments brief"), to which they attached documentary evidence, and offered testimonial and expert evidence.

16. On December 8, 2004, Alejandro Sánchez Garrido submitted a sworn statement in which he accepted the office of judge ad hoc, and also a declaration of confidentiality regarding any information he obtained as a result of his functions.

17. On January 10, 2005, the State requested an extension of five working days in order to take "a decision on the person who would substitute Alejandro Sánchez Garrido," who had been designated Judge ad hoc in the Case of Raxcacó Reyes.

18. On January 12, 2005, on the instructions of the President, the Secretariat informed the State that an extension could not be granted for the designation of a new judge ad hoc in the instant case, because it had already named one, who had accepted this office and, at that date, he had not submitted his resignation (*supra* para. 16).

19. On February 11, 2005, the State submitted its answer to the application together with its observations on the requests and arguments brief (hereinafter “answer to the application”), and offered testimonial evidence.

20. On March 30 and 31, 2005, on the instructions of the President, the Secretariat informed the parties that, having examined the principal briefs submitted by the Inter-American Commission, the representatives, and the State, the Inter-American Court in plenary considered that it was unnecessary to convene a public hearing in the instant case. Also, the Secretariat requested the Inter-American Commission, the representatives, and the State to each forward their final list of witnesses and expert witnesses.

21. On May 4, 2005, the President issued an order stating that he considered it desirable to receive, by means of a statement made before notary public (affidavit), the testimony of Ronald Ernesto Raxcacó Reyes and Reyes Ovidio Girón Vásquez, offered by the Commission and the representatives; and of Eduardo Zachrisson Castillo, María Concepción Reinhardt Mosquera and Conchita Mazariegos Tobías, offered by the State; also the expert evidence of Alberto Martín Binder, offered by the Commission and the representatives, and of Aída Castro-Conde, offered by the representatives. The President granted a non-extendible period of seven days from the reception of these affidavits for the Commission, the representatives, and the State to submit any observations they deemed pertinent. In the same order, the President informed the parties that they had until June 6, 2005, to submit their final written arguments on merits and possible reparations and costs. Lastly, the President rejected the representatives’ request to hold a “hearing exclusively for oral arguments.”

22. On May 20, 2005, the representatives forwarded the statements made before public notary (affidavits) by the witnesses, Ronald Ernesto Raxcacó Reyes and Ovidio Girón Vásquez, and by the expert witness, Aída Castro-Cónde. They also forwarded the “testimony of Mr. Raxcacó Reyes taken by the notary, Rafael Francisco Cetina Gutiérrez on May 18, 2005, by a video recording,” and also the document in which this notary certified that he was present when the video of Mr. Raxcacó was recorded.

23. The same day, the State forwarded the statements made before public notary (affidavits) by the witnesses, Conchita Mazariegos Tobías and Eduardo Zachrisson Castillo. The State also advised that, for personal reasons, María Concepción Reinhardt Mosquera, was unable to make a statement before public notary, consequently, it would not be submitted.

24. On May 31, 2005, the Inter-American Commission forwarded the statement made before notary public (affidavit) by the expert witness, Alberto Martín Binder.

25. On June 3, 2005, the State presented its observations on the statements made by Ovidio Girón Vásquez, Ronald Raxcacó Reyes, and Aída Castro-Conde. The representatives and the

Inter-American Commission did not submit observations on the affidavits presented by the State. On June 8, 2005, the State presented its observations on the expert evidence of Alberto Martín Binder.

26. On June 3, 2005, Amnesty International submitted an amicus curiae brief in this case.

27. On June 3 and 6, 2005, respectively, the State, the representatives and the Inter-American Commission presented their final written arguments on merits and possible reparations and costs. The representatives submitted documentation on costs and expenses with their final written arguments.

28. On July 6, 2005, on the instructions of the President, the Secretariat requested the State to present certain documentation as helpful evidence, in accordance with Article 45(2) of the Rules of Procedure.

29. On July 26, 2005, Guatemala presented part of the helpful evidence requested by the Court.

V. PROVISIONAL MEASURES

30. On August 16, 2004, the Commission submitted to the Inter-American Court a request for provisional measures pursuant to the provisions of Articles 63(2) of the American Convention and 25 of the Rules of Procedure, to be adopted urgently so that Guatemala would adopt the necessary measures to preserve the lives and physical integrity, including suspension of the executions, of Ronald Raxcacó Reyes, Hugo Humberto Ruiz Fuentes, Bernardino Rodríguez Lara and Pablo Arturo Ruiz Almengor, all of them sentenced to death, in order not to obstruct the processing of their cases before the inter-American system.

31. On August 30, 2004, the Court issued an order concerning the request for provisional measures requested by the Commission, in which it decided:

1. To enjoin the State to adopt, forthwith, the necessary measures to protect the lives of Ronald Ernesto Raxcacó Reyes, Hugo Humberto Ruiz Fuentes, Bernardino Rodríguez Lara and Pablo Arturo Ruiz Almengor in order not to obstruct the processing of their cases before the inter-American system for the protection of human rights.

2. To enjoin the State to inform the Inter-American Court of Human Rights, within fifteen days of notification of the [...] order, of the measures adopted to comply with it.

3. To enjoin the representatives of the beneficiaries of the provisional measures that had been ordered to submit their observations on the State's report within one week of receiving it, and the Inter-American Commission on Human Rights to submit its observations on the State's report within two weeks of receiving it.

4. To enjoin the State, following its first report [...], to continue informing the Inter-American Court of Human Rights, every two months, on the measures adopted, and to enjoin the representatives of the beneficiaries of the provisional measures ordered and the Inter-American Commission on Human Rights to present their observations on these reports of the State within four and six weeks, respectively, from the date of reception of the said State reports.

[...]

32. Up until the date on which this judgment is delivered, the State has complied with the provisional measures ordered in this case.

VI. EVIDENCE

33. Before examining the evidence received, the Court will make some observations, in light of the provisions of Article 44 and 45 of the Rules of Procedure, which are applicable to the specific case, and which have been developed in its case law.

34. The adversary principle, which respects the right of the parties to defend themselves, applies to matters pertaining to evidence. This principle is embodied in Article 44 of the Rules of Procedure, as regards the time at which the evidence should be submitted to ensure equality between the parties. [FN1]

[FN1] Cf. Case of Acosta Calderón. Judgment of June 24, 2005. Series C No. 129, para. 40; Case of Yatama. Judgment of June 23, 2005. Series C No. 127, para. 106, and Case of Fermín Ramírez. Judgment of June 20, 2005. Series C No. 126, para. 43.

35. In the matter of receiving and weighing evidence, the Court has indicated that its proceedings are not subject to the same formalities as domestic proceedings and, when incorporating certain elements into the body of evidence, particular attention must be paid to the circumstances of the specific case and to the limits imposed by respect for legal certainty and the procedural equality of the parties. Likewise, the Court has taken account of international case law; by considering that international courts have the authority to assess and evaluate the evidence according to the rules of sound criticism, it has always avoided a rigid determination of the quantum of evidence needed to support a judgment. This criterion is particularly valid for international human rights courts, which have ample latitude to evaluate the evidence on the pertinent facts, in accordance with the principles of logic and on the basis of experience, in order to determine a State's international responsibility for the violation of human rights. [FN2]

[FN2] Cf. Case of Acosta Calderón, *supra* note 1, para. 40; Case of Yatama, *supra* note 1, para. 106, and Case of Fermín Ramírez, *supra* note 1, para. 43.

36. Based on the foregoing, the Court will now proceed to examine and assess all the elements that compose the body of evidence in this case within the applicable legal framework.

A) DOCUMENTARY EVIDENCE

37. The documentary evidence provided by the parties includes the sworn statements made before notary public (affidavits) by the alleged victim and by the witnesses and expert witnesses,

as required by the President in an order of May 4, 2005 (supra para. 21). The Court deems it pertinent to summarize the relevant parts of these statements below:

a) Statement by Ronald Ernesto Raxcacó Reyes, alleged victim

He has been in prison since 1997 and was sentenced to death in 1999. He was initially detained in sectors one and two of the Zone 18 Preventive Detention Center. In June 2000, he was transferred to maximum security sector 11 of this Center. When he entered sector 11 of this prison, he was divested of his belongings and clothes and subjected to a search. During the first days he spent in this place, he requested the officials in charge to provide him with clothes and “chamarras” [Note: a type of woolen blanket]. They refused to give him clothes; the witness therefore had to request the intervention of the Ombudsman. They also refused to allow him to receive foodstuffs; he did not have a stove to cook on, and it was difficult for him to receive visitors. Ten months later he was transferred without previous notice or an order from a competent judge to the Escuintla maximum security prison, called El Infiernito (The Little Hell), where he was imprisoned for two months. Finally, on June 19, 2001, he was moved back to Cell 4(b) in maximum security sector 11 of the Zone 18 Preventive Detention Center, where he is still imprisoned. When he entered the said sector, the prison security guards beat him. The alleged victim could not walk or talk, his jaw was dislocated, his ribs fractured and his knees injured. That year there was a period of three months during which he only had the clothes he wore; his cell had neither mattresses nor light.

The cell where he is kept is small and he shares it with another prisoner. The sanitary installations are inside the cell, which has no ventilation system. His bed is made of concrete and is very narrow. Behind the cell there is a yard measuring approximately three square meters, where there is a sink and a water tank. Light from the outside enters the place through a hole.

His alimentation depends on what he receives from his family or what he can obtain through his cellmate, because the food provided by the penitentiary system is not healthy, and is often rotten or of poor quality. He fears that eating it will make him ill. Perishables cannot be kept in the cell and, for cooking; he has a stove that he himself made.

The penitentiary system does not provide either the means or the materials for prisoners to work. The materials (netting and raffia) needed for the handicrafts the alleged victim makes, such as bags and handbags, are provided by his family.

He is allowed visitors once a week, on Saturday, from 10 a.m. to 12 m. On Tuesday, he can make telephone calls for 10 minutes using a public telephone. These are the only opportunities he has to leave his cell; if he has no visitors and does not want to make telephone calls, he does not leave it. Since 2001, he has received his visitors handcuffed to a metal post, without being able to have physical contact with them, “because you can’t put your fingers through the wire mesh.” However, as of March 2005, visits are taking place more “humanely,” owing to the intervention of the Deputy Director of the Detention Center.

On doctor’s orders, he should exercise, but, owing to the limited space, he can only walk in the small yard of his cell, backwards and forwards, ten steps in each direction, and do squats.

Even though he has suffered from severe pain in different parts of his body, only the nurse on duty visited him up until 2003. As of that year, he began to receive visits from doctors, but they do not have the necessary equipment to evaluate him adequately and do not provide him with medication, which he himself has to acquire. He has not received any type of support to help him come to terms with his death sentence.

Faced with the denial of the judicial remedies he has filed and the possibility that he may be executed, the witness would prefer to kill himself before making an exhibition of himself “before the people of Guatemala and the whole world.” In order to endure his prison sentence, he thinks of his daughter and his mother, and about saving money for them, and he talks to friends within the sector.

His wife was sentenced to 20 years of imprisonment, so that, despite making the respective requests, they have not seen each other since the judgment was delivered. He sometimes calls her on Tuesdays; not always, because she has to pay for the telephone calls she receives.

It is not possible to study in maximum security sector 11, contrary to other sectors where primary education, baccalaureate, computer and other courses have been offered. The alleged victim believes that he is discriminated against, because he is considered a “disgrace to society.”

b) Testimony of Ovidio Girón Vásquez, Mr. Raxcacó Reyes’ defense lawyer in the domestic jurisdiction

The witness stated that, in 1999, he was assigned to the case of Mr. Raxcacó Reyes, in his capacity as a defense lawyer of the Appeals Unit of the Instituto de la Defensa Pública Penal de Guatemala (IDPPG). He prepared the special appeal against the judgment delivered by the Sixth Court for Criminal Sentencing, Drug-Trafficking and Environmental Crimes which had sentenced Mr. Raxcacó Reyes to death. Among other grounds, he argued that Article 4(2) of the American Convention had been violated, because the death penalty had been extended to a new crime, and because the punishment should be proportionate to the harm caused and not in excess of it. He filed an appeal for annulment against the judgment of the Fourth Chamber of the Court of Appeal before the Supreme Court of Justice and, finally, he filed a constitutional application for amparo before the Constitutional Court in its capacity as a special court of amparo. The three remedies were declared inadmissible.

The witness also filed a remedy for commutation of sentence in favor of Mr. Raxcacó Reyes but, owing to the annulment of Decree No. 159, the President of the Republic refused to admit it officially, on the pretext that there was no legally established procedure and no competent authority for processing it.

Currently, Mr. Raxcacó Reyes is imprisoned in sector 11 of the Zone 18 Men’s Preventive Detention Center. He was transferred to this Center to protect the prisoner and owing to the severity of his sentence. The actual conditions and regime in the detention center are very limited as regards space, and he is kept in a small enclosure without any activities, since there are no programs for hygiene, sports, work, leisure or others.

Mr. Raxcacó Reyes has asked him several times to submit requests to the General Directorate of Prisons to enable him to receive medical attention, because he suffers from several health problems and has not received any comprehensive or systematic treatment. Moreover, he has not received any psychological assistance since he has been in prison. When he visits the prisoner, they are separated by a wire mesh that divides the visiting room, which is three square meters in area. Since his detention, Mr. Raxcacó Reyes has not been able to see his wife who is serving a prison sentence for the same crime.

c) Testimony of Eduardo Zachrisson Castillo, Deputy of the Congress of the Republic of Guatemala, President of the Legislative and Constitutional Affairs Commission

Currently, the Legislative and Constitutional Affairs Commission of the Congress of Guatemala is considering a draft law presented by the President of the Human Rights Commission of the Congress of the Republic, which provides for the adoption of reforms to Decree No. 17/73 (Penal Code), to eliminate the death penalty as the maximum punishment under Guatemalan criminal legislation and, in cases where there has been a final ruling, commute it to the maximum prison sentence established for the crime in question. There is also another draft law to adapt Guatemalan laws to the American Convention on Human Rights and to re-establish commutation of sentence by adopting the law regulating pardons.

The Legislative and Constitutional Affairs Commission presided by the witness plans to issue opinions in both cases, to be considered by the Congress in a plenary session, before the end of 2005.

d) Testimony of Conchita Mazariegos Tobías, Deputy of the Congress of the Republic

She referred to the application of the death penalty in Guatemala. She stated that on April 9, 1996, Congress issued Decree No. 81/96 under which the death penalty was stipulated for two new crimes. Also, in appearance, it modified four categories of crime for which the death penalty was already established, including the crime of kidnapping or abduction. The death penalty was already established for this type of crime under Article 201 of the Penal Code, but the total substitution of this norm, de facto and de jure, created a new category of crime with the death penalty. She also stated that the American Convention on Human Rights became national law, prevailing over domestic law under Article 46 of the Constitution, which prohibits Guatemala from legislating on the matter.

e) Expert evidence of Aída Castro-Conde, graduate in psychology from the Universidad de San Carlos of Guatemala

She assessed the psychological and mental harm resulting from the prison conditions of those sentenced to death in Guatemala. The Zone 18 Men's Preventive Detention Center, where Mr. Raxcacó Reyes is imprisoned was among the prison centers she evaluated.

The physical conditions of sector 11 of the Zone 18 Men's Preventive Detention Center were examined and it was found that the size of the cells was approximately 3 to 4 by 4 to 5 meters. The yard measures between 4 and 5 square meters. There is insufficient ventilation, so that it is not possible to breathe fresh air in the cells; there is only one small window measuring 30 square centimeters in the lower part of the door. There is no natural light in the cells. Mr. Raxcacó Reyes is imprisoned in one of these cells.

The daily routine of those condemned to death and imprisoned in sector 11 of this prison center was also examined. They live in conditions of total seclusion; they have no adequate facilities for working and they are not allowed to exercise in the open air; besides, they are never allowed outdoors. A normal day in their lives consists in having breakfast, lunch and supper, watching television, listening to music or making handicrafts (those who have materials provided by their families), and sleeping.

Most of the requests for permission to be allowed to study and work, or to take part in a religious service are refused. The only work activities are the handicrafts produced by the prisoner who have the necessary materials. Any money obtained from their sale is only sufficient to buy more

materials; therefore, this activity is more of an occupational therapy than a way of earning a living.

With regard to alimentation, it was found that the food is not healthy and there are no special diets for prisoners with diabetes or hypertension, or with ulcers or gastritis, such as Mr. Raxcacó Reyes. Medical equipment is almost inexistent and there is a acute lack of trained personnel in this field; there is only one nurse in each prison center. Prisoners do not receive adequate medical care and they have received no psychological care throughout their time in prison.

Prisoners may receive visitors once a week, for two hours. The visits take place through a wire screen which prevents physical contact between the prisoners and their visitors. There is no specific time for conjugal visits and the rooms allocated to this are few and inadequate. At times, the guards watch the prisoners and their wives having sexual relations; this causes considerable anger.

The prisoners condemned to death live under the constant threat that, at any moment, they can be taken away and put to death by lethal injection. This terrifies and depresses them; they cannot sleep; they have nightmares and they even begin to consider the possibility of committing suicide. They suffer from psychosomatic illnesses resulting from their situation, which affects their mental health.

The individual interviews revealed that those condemned to death unconsciously develop defense mechanisms to combat anxiety, and disturbing information; thus, for example, Mr. Raxcacó Reyes told her: "I don't want to think about that; I prefer to think that I have been sentenced to a certain number of years of imprisonment; when they tell me that I only have a few days left, I will go mad."

With regard to the psychological damage to Mr. Raxcacó Reyes and his mental state, the expert witness stated that the total seclusion has caused "intense psychological distress"; he feels defenseless in the face of any event; he remains in a constant state of alert, fearful, restless; he has difficulty in sleeping, breathing and concentrating. The constant denial of opportunities to study or work makes him feel discriminated against, sad and hopeless. The visiting restrictions are the element he finds most annoying and distressing. The lack of the necessary medical care exacerbates his problems; he suffers from pain in his chest; he cannot breathe; half his face goes numb; he has palpitations, dizziness, sweating fits and the "feeling that one day he will be found dead in his cell." The foregoing leads to the conclusion that Mr. Raxcacó Reyes suffers from post-traumatic stress, as a result of the prison conditions described above and of having been sentenced to death six years ago.

f) Expert evidence of Alberto Martín Binder, Professor of Criminal Procedural Law in the Postgraduate Department of the Universidad de Buenos Aires and other Latin American universities, and co-author of the Guatemalan Code of Criminal Procedure

Following ratification of the American Convention, Article 201 of the Guatemalan Penal Code has been modified several times: in 1994, by Legislative Decree No. 38/94; in 1995, by Legislative Decree No. 14/95 and, finally, on October 21, 1996, by Legislative Decree No. 81/96, which is currently in force. The common purpose of the modifications has been to increase the punishment for the crime of kidnapping or abduction and to introduce new scenarios for imposing the death penalty. When Guatemala ratified the American Convention, Article 201 regulated two categories of crime encompassing different facts: (a) kidnapping, and (b) death as a result of kidnapping, and the imposition of the death penalty was only established for the latter

category. Decree No. 81/96 annulled the crime aggravated by the result and established the death penalty for all cases of kidnapping. Consequently, if, in 1978, the death penalty was only imposed when a death had occurred as a result of a kidnapping, as of 1996, the mere act of kidnapping authorized the application of the death penalty. Furthermore, the concept of perpetrator was expanded to include the ambiguous figure of the mastermind. Likewise, imprisonment was established, not as an alternative punishment, but as an adjustment to the constitutional prohibition to impose the death penalty on certain persons.

While retaining the same juridical designation for the crime established in Article 201 of the Penal Code, the State included a wide range of cases and perpetrators for application of the death penalty. The reformed crime has a different factual basis, which, together with the expansion of the scope of the perpetrators, means that the punishment has been extended to new cases that were not previously included.

The crime of kidnapping [as it appears in the Penal Code] currently in force in Guatemala is also incompatible with the provisions of the Convention, because it establishes the death penalty for cases in which the restrictive factor of “the most serious crimes” stipulated in Article 4(2) of the Convention is not respected. Lastly, it is incompatible because it states that imposition of the death penalty is of a mandatory nature, disregarding the personal circumstances of the person convicted.

In addition, the State has not respected the provisions of Article 4(6) of the American Convention, which establishes the right of every person condemned to death to apply for amnesty, pardon, or commutation of sentence. The annulment of the norms that established this possibility, via Legislative Decree No. 32/2000, produced a legal vacuum in the domestic legal system that prevents commutation of the death sentence and its replacement by a prison sentence.

B) ASSESSMENT OF THE EVIDENCE

38. In this case, as in others, [FN3] the Court accepts the probative value of the documents presented by the parties at the proper procedural opportunity that were not contested or opposed, and whose authenticity was not questioned.

[FN3] Cf. Case of Acosta Calderón, supra note 1, para. 45; Case of Yatama, supra note 1, para. 112, and Case of Fermín Ramírez, supra note 1, para. 48.

39. With regard to the statement made by the alleged victim (supra para. 37(a)), the Court admits it to the extent that it corresponds to the purpose established in the order of May 4, 2005 (supra para. 21). In this regard, since the alleged victim has a direct interest in the case, his statement must be assessed together with all the evidence in the proceedings and not in isolation, applying the rules of sound criticism. [FN4]

[FN4] Cf. Case of Yatama, supra note 1, para. 122; Case of Fermín Ramírez, supra note 1, para. 49, and Case of the Indigenous Community Yakye Axa. Judgment of June 17, 2005. Series C No. 125, para. 43.

40. In relation to the statements made before notary public (affidavits) by the witnesses, Reyes Ovidio Girón Vásquez, Conchita Mazariegos Tobías and Eduardo Zachrisson Castillo, and also the expert witnesses, Alberto Martín Binder and Aída Castro-Cónde (supra para. 37(b), (c), (d), (e) and (f)), the Court admits them to the extent that they correspond to their purpose and assesses them together with all the evidence applying the rules of sound criticism.

41. The Court considers that the documents provided by the representatives with their final written arguments (supra para. 27) are useful for deciding the instant case, to the extent that they were not contested or opposed, and their authenticity was not questioned. Consequently, it adds them to the body of evidence, pursuant to Article 45(1) of the Rules of Procedure. [FN5]

[FN5] Cf. Case of Yatama, supra note 1, para. 118; Case of Fermín Ramírez, supra note 1, para. 52, and Case of the Indigenous Community Yakye Axa, supra note 4, para. 42.

42. With regard to the documents requested and submitted as helpful evidence (supra paras. 28 and 29), the Court adds them to the body of evidence of the instant case in application of the provisions of Article 45(2) of the Rules of Procedure.

VII. PROVEN FACTS

43. Having examined the evidence, the statements of the witnesses and expert witnesses, and the arguments of the Inter-American Commission, the representatives, and the State, the Court considers that the following facts have been proved:

Background elements: the definition of the crime of kidnapping or abduction

43(1) When Guatemala deposited the instrument ratifying the American Convention, Legislative Decree No. 17/73 (Penal Code) was in force. Article 201 of the Code established the death penalty as the punishment for the crime of kidnapping or abduction when the person kidnapped died, owing to the kidnapping or during it. The same crime, which did not result in death, was punished by 8 to 15 years of imprisonment:

The kidnapping or abduction of a person in order to obtain a ransom, an exchange for third parties, or other illegal purpose of the same or similar nature, shall be punished by eight to fifteen years of imprisonment.

The death penalty shall be imposed on the perpetrator when, owing to the kidnapping or abduction or during it, the person kidnapped dies. [FN6]

[FN6] Cf. copy of Legislative Decree No. 17/73 (Penal Code) issued by the Congress of the Republic of Guatemala on July 5, 1973 (file of helpful evidence submitted by the State, appendix 1, folios 662 to 689).

43(2) The said Article 201 of the Guatemalan Penal Code has been modified three times. The first reform was introduced by Legislative Decree No. 38/94, which established the death penalty for cases in which the person kidnapped was under the age of 12 years or over the age of 60 years, and when the person kidnapped died or received serious or very serious injuries or permanent mental or psychological traumas as a result of the kidnapping. If the perpetrator of the crime expressed regret, the norm establishes the benefit of mitigation of the punishment:

The kidnapping or abduction of a person in order to obtain a ransom, a remuneration, an exchange for third parties, or any other illegal or lucrative purpose of the same or similar characteristics and identity shall be punished by twenty-five to thirty years' imprisonment. The death penalty shall be imposed on the perpetrator in the following cases: (a) if the person is under the age of 12 years or over the age of 60 years; (b) when, owing to or during the kidnapping or abduction, the person kidnapped receives serious or very serious injuries or permanent mental or psychological traumas or dies. The corresponding punishment may be mitigated if the perpetrator of this crime shall express regret at any stage or provide information leading to a satisfactory conclusion to the kidnapping or abduction. [FN7]

[FN7] Cf. copy of Legislative Decree No. 38/94 issued by the Congress of the Republic of Guatemala on April 26, 1994 (file of helpful evidence submitted by the State, appendix 2, folio 691).

43(3) The second reform was introduced by Legislative Decree No. 14/95, which punished anyone guilty of the crime of kidnapping with the death penalty. The reform excluded all causes for mitigation of the punishment.

The death penalty shall be imposed on the perpetrators of the crime of the kidnapping or abduction of one or more persons to obtain a ransom, an exchange of persons or a decision contrary to the will of the person kidnapped or for any other similar or equal purpose. In this case, no attenuating circumstances shall be taken into consideration. [FN8]

[FN8] Cf. copy of Legislative Decree No. 14/95 issued by the Congress of the Republic of Guatemala on March 16, 1995 (file of helpful evidence submitted by the State, appendix 3, folio 693).

43(4) The third reform of the said Article 201 of the Penal Code was introduced by Legislative Decree No. 81/96, [FN9] in force in Guatemala as of October 21, 1996. This reform establishes

the death penalty as the sole punishment applicable to the perpetrators or masterminds of the crime of kidnapping:

The death penalty shall be imposed on the perpetrators or masterminds of the crime of the kidnapping or abduction of one or more persons to obtain a ransom, an exchange of persons or a decision contrary to the will of the person kidnapped or for any similar or equal purpose and, when this cannot be imposed, the punishment shall be twenty-five to fifty years of imprisonment. In this case, no attenuating circumstances shall be taken into consideration.

Accomplices or accessories after the fact shall be punished with twenty to forty years of imprisonment.

Those who are sentenced to imprisonment for the crime of kidnapping or abduction shall not be granted a reduction in the punishment for any reason.

[FN9] Cf. copy of Legislative Decree No. 81/96 issued by the Congress of the Republic of Guatemala on September 19, 1996 (file of helpful evidence submitted by the State, appendix 3, folio 695).

43(5) On October 31, 2000, the Constitutional Court of Guatemala, in its capacity as a special court of amparo, issued a ruling in which it questioned the expansion of the application of the death penalty for the crime of kidnapping in the latest reform of the Penal Code (supra para. 43(4)). This tribunal considered:

That the criminal act sanctioned with the death penalty in Article 201 of the Penal Code before the Pact of San José came into force was a complex crime and its definition included two types of punishable conduct: (a) the kidnapping of a person, and (b) the death of the victim. That the one crime (kidnapping plus the death of the victim) is a different crime from the other (simple kidnapping), even though the name has not changed, because in the case of the former, the highest juridical right: life, is protected. In contrast, in the other, the protected right is individual freedom [...]. Article 201 of the Penal Code in force when the American Convention on Human Rights became legally binding for the State of Guatemala did not include the death penalty for the crime of kidnapping or abduction that was not followed by the death of the victim. [FN10]

[FN10] Cf. judgment delivered by the Constitutional Court of Guatemala, as a Special Court of Amparo, on October 31, 2000 (file of appendixes to the brief with requests, arguments and evidence, appendix 1, folios 524 and 530).

43(6) The Constitutional Court of Guatemala changed its opinion when Mr. Raxcacó Reyes filed an application for amparo. This court indicated, inter alia, that there was no incompatibility between the different reforms of Article 201 of the Penal Code and the American Convention, because the legislators had extended the application of the punishment based on the criterion of the perpetrator of the crime of kidnapping, an extension that the Convention does not prohibit,

since it is the same crime for which this punishment had already been established when the Convention came into force (infra para. 49(16)).

The criminal proceedings and the sentencing to death of Mr. Raxcacó Reyes

43(7) On August 5, 1997, at 6.50 a.m., the child, Pedro Alberto de León Wug, was kidnapped by three armed men. In repeated telephone communications, the kidnappers demanded that the child's father, Oscar de León Gamboa, pay Q.1,000,000.00 (one million quetzales) to obtain his freedom. [FN11]

[FN11] Cf. judgment delivered by the Sixth Court on Criminal Sentencing, Drug-Trafficking and Environmental Crimes of Guatemala on May 14, 1999 (file of appendixes to the application, appendix 5, folios 109 and 110).

43(8) On August 6, 1997, the child was found and freed unharmed, as the result of a police operation carried out by investigators attached to the Anti-Kidnapping and Extortion Section of the National Civil Police. [FN12]

[FN12] Cf. judgment delivered by the Sixth Court on Criminal Sentencing, Drug-Trafficking and Environmental Crimes of Guatemala on May 14, 1999 (file of appendixes to the application, appendix 5, folio 111).

43(9) During the police operation Ronald Raxcacó Reyes, Jorge Mario Murga Rodríguez, Carlos Manuel García Morales, Hugo Humberto Ruiz Fuentes and Olga Isabel Vicente were captured and placed at the disposal of the Second Magistrate for Criminal Affairs of the Municipality of Mixco, Department of Guatemala. Subsequently, the prosecutor from the Public Prosecutor's Office (Ministerio Público) charged these people with committing the crime of kidnapping or abduction, defined in Article 201 of the Penal Code of Guatemala, in force at the time of the facts (supra para. 43(4)), and this initiated the proceedings. [FN13]

[FN13] Cf. judgment delivered by the Sixth Court on Criminal Sentencing, Drug-Trafficking and Environmental Crimes of Guatemala on May 14, 1999 (file of appendixes to the application, appendix 5, folio 111).

43(10) On May 14, 1999, the Guatemalan Sixth Court for Criminal Sentencing, Drug-Trafficking and Environmental Crimes delivered judgment convicting Mr. Raxcacó Reyes and the other accused. Ronald Raxcacó Reyes, Jorge Mario Murga Rodríguez and Hugo Humberto Ruiz Fuentes were sentenced to death, as established in Article 201 of the Penal Code (supra para. 43(4)), as they were found to be "direct authors" of the crime of kidnapping or abduction; Carlos Manuel García Morales was declared to be an "author" of the same crime and received a

40-year incommutable prison sentence, and Olga Isabel Vicente was sentenced to 20 years of imprisonment, for her participation in the facts as an “accomplice.” [FN14]

[FN14] Cf. judgment delivered by the Sixth Court on Criminal Sentencing, Drug-Trafficking and Environmental Crimes of Guatemala on May 14, 1999 (file of appendixes to the application, appendix 5, folios 100-165).

43(11) This judgment (supra para. 43(10)) was accompanied by the separate opinion of Judge Silvia Morales Alvarado, a members of the Sixth Court for Criminal Sentencing, Drug-Trafficking and Environmental Crimes of Guatemala, in which she stated that:

Decree No. 81/96 of the Congress of the Republic of Guatemala, which imposes the death penalty for the crime of kidnapping, was issued by the Congress of the Republic [...] on September 19, 1996; namely more than 20 years after the entry into force for Guatemala of the [American] Convention; therefore this reform of the Penal Code violates the Constitution and the constitutional laws, since it is an ordinary decree with the rank of an ordinary law. This decree constitutes an expansion of the crime defined in Article 201 of the Penal Code, because, prior to the reform the death penalty was not applied in cases in which the victim of a kidnapping did not die; consequently this expansion violates the provisions of the Pact of San José. Judges, whatsoever their hierarchy, should not disregard the existence, exercise and positivity of the [American] Convention as a law of the Republic, let alone issue opinions and deliver judgments that violate, diminish or distort it, because such judgments would be null ipso jure. [FN15]

[FN15] Cf. separate opinion of Judge Silvia Morales Alvarado to the judgment delivered by the Sixth Court on Criminal Sentencing, Drug-Trafficking and Environmental Crimes of Guatemala on May 14, 1999 (file of appendixes to the application, appendix 5, folios 168-169).

43(12) On July 9, 1999, the special remedies of appeal filed by Ronald Raxcacó Reyes, Hugo Humberto Ruiz Fuentes and Jorge Mario Murga against the judgment delivered on May 14, 1999, by the Guatemalan Sixth Court for Criminal Sentencing, Drug-Trafficking and Environmental Crimes were declared admissible (supra para. 43(10)). [FN16] Mr. Raxcacó Reyes based his appeal [FN17] on the grounds: that the court had erroneously applied the death penalty based on a law that violated the constitutional principle according to which, in the sphere of human rights, international treaties and conventions prevail over ordinary domestic laws; that, according to Article 46 of the Guatemalan Constitution and Article 4(2) of the American Convention, the death penalty should not be imposed, since the punishment should be proportionate to the damage caused and not in excess of this; that the principle of the proportionality of the punishment had been contravened and Articles 3 and 19 of the Guatemalan Constitution had been violated, because the victim of the alleged kidnapping had not died, and that the sentence imposed was not in keeping with the law.

[FN16] Cf. judgment delivered by the Fourth Chamber of the Court of Appeal of Guatemala on September 13, 1999 (file of appendixes to the application, appendix 9, folio 176).

[FN17] Cf. judgment delivered by the Fourth Chamber of the Court of Appeal of Guatemala on September 13, 1999 (file of appendixes to the application, appendix 9, folio 183).

43(13) On September 13, 1999 the Fourth Chamber of the Court of Appeal declared that the appeal filed by Mr. Raxcacó Reyes was inadmissible (supra para. 43(12)). Regarding the alleged failure to respect Article 4(2) of the American Convention, the ruling stated that:

This Court considers that the said Article of the [...] Pact [of San José] authorizes the application of the death penalty for the most serious crimes, and for those crimes for which it was already established before the entry into force of the Pact of San José. It is well known that the crime of kidnapping or abduction already provided for this punishment when a victim died, and this was so as of the promulgation of Decree [No.] 17-73 of the Congress of the Republic; and since the American Convention on Human Rights was ratified subsequently, becoming law for Guatemala as of the promulgation of Decree [No.] 6-78 of the Congress of the Republic, it is therefore clearly established that Article 201 of Decree [No.] 17-73 and its reforms are fully applicable to the case that concerns us; moreover, there is no violation of the provisions of Article 46 of the Constitution of the Republic, because there is no conflict between domestic law and the provisions of the said human rights treaty; consequently, it is concluded that the higher tribunal acted correctly and based on the law in force in the country, because the crime prosecuted is extremely serious and the death penalty has been established for it since 1973. [FN18]

[FN18] Cf. judgment delivered by the Fourth Chamber of the Court of Appeal of Guatemala on September 13, 1999 (file of appendixes to the application, appendix 9, folios 185-186).

43(14) Messrs. Raxcacó Reyes, Ruiz Fuentes and Murga Rodríguez filed an appeal for annulment of the judgment delivered by the Fourth Chamber of the Court of Appeal (supra para. 43(13)). Mr. Raxcacó Reyes alleged that the Court of Appeal had disregarded Articles 3, 19 and 46 of the Guatemalan Constitution and Article 4(2) of the American Convention, by extending and applying the death penalty to crimes for which the law had not established it at the time when Guatemala ratified the said international instrument. [FN19]

[FN19] Cf. judgment delivered by the Supreme Court of Justice on July 20, 2000 (file of appendixes to the application, appendix 10, folios 208 and 216).

43(15) On July 20, 2000, the Criminal Chamber of the Supreme Court of Justice declared inadmissible the appeals for annulment that had been filed (supra para. 43(14)). [FN20] The Supreme Court of Justice indicated that:

When the American Convention on Human Rights came into force, [Article 201 of the Penal Code] already established the death penalty and, even with the reforms included in Decrees [Nos.] 14-95 [supra para. 46] and 81-96 [supra para. 47] of the Congress of the Republic, the structure of this type of crime has not been modified, because it continues to individualize the same conducts that it prohibited before these decrees and, under specific conditions, the death penalty was already imposed. [FN21]

[FN20] Cf. judgment delivered by the Supreme Court of Justice on July 20, 2000 (file of appendixes to the application, appendix 10, folios 199 and 221).

[FN21] Cf. judgment delivered by the Supreme Court of Justice on July 20, 2000 (file of appendixes to the application, appendix 10, folio 219).

43(16) On August 25, 2000, Mr. Raxcacó Reyes filed an application for amparo against the said ruling of the Supreme Court of Justice (supra para. 43(15)), which was rejected by the Constitutional Court on June 28, 2001, in a judgment from which there is no appeal. [FN22] In its decision, the Constitutional Court concluded, inter alia, that: (a) the application of the death penalty for serious crimes, including the crime of kidnapping, is possible; (b) there is no incompatibility between the different reforms of Article 201 of the Penal Code and the American Convention, because the legislators have extended the application of the punishment based on the criterion of the perpetrator of the crime of kidnapping, an extension that is not prohibited by the Convention, since it is the same crime for which this punishment had already been established when the Convention entered into force, and (c) the application of reformed Article 201 of the Penal Code by the Guatemalan courts in the case of Mr. Raxcacó Reyes did not violate Article 46 of the Guatemalan Constitution or Article 4(2) of the Convention, “even in the case of a kidnapping or abduction that was not followed by the death of the victim.”

[FN22] Cf. judgment delivered by the Constitutional Court of Guatemala on June 28, 2001 (file of appendixes to the application, appendix 11, folios 223 and 247).

Petition for pardon and clemency before the domestic authorities

43(17) On June 1, 2000, in Legislative Decree No. 32/00, [FN23] the Congress of Guatemala annulled Decree No. 159 of 1892, [FN24] which established the power of the Executive Branch to grant pardon or commutation of sentence and regulated the procedure to put this right into effect. Congress gave the following reasons for annulling Decree No. 159:

That the National Legislative Assembly of the Republic of Guatemala adopted Decree No. 159 on April 19, 1892, which regulated the power that Article 78 of the Constitution in force at that time vested in the President of the Republic to commute a death sentence and grant pardons in pre-established cases, a constitutional provision that, with some changes, was maintained in subsequent Constitutions until 1985 when the current Constitution of the Republic was promulgated, which does not provide for it.

[...]

That, on May 31, 1985, the Constitution of the Republic promulgated by the National Constitutional Convention, in force since January 14, 1986, expressly revoked all the Constitutions of the Republic of Guatemala and any previous laws with similar effects, and established the independence of the branches of government, by declaring that sovereignty is rooted in the people, which delegates its exercise to the Legislative, Executive and Judicial Organs, among which subordination etcetera is prohibited; and the power to judge and execute judgment corresponds exclusively to the Judiciary and no other authority may intervene in the administration of justice.

[...]

That the Constitution of the Republic establishes that it shall prevail over any other law or treaty and that, since there is no norm that gives grounds for the Executive Organ to commute the death penalty as established in Decree No. 159 of the National Legislative Assembly of the Republic, owing to the revocation of the previous Constitutions, it is necessary to expressly revoke this Decree in order to create legal certainty and avoid ambiguity in the interpretation of the law.

[FN25]

[FN23] Cf. copy of Legislative Decree No. 32/00 issued by the Congress of the Republic of Guatemala on May 11, 2000 (file of helpful evidence submitted by the State, appendix 5, folio 699).

[FN24] Cf. copy of Legislative Decree No. 159 issued by the National Legislative Assembly of the Republic of Guatemala on April 20, 1892 (file of helpful evidence submitted by the State, appendix 5, folios 697 and 698).

[FN25] Cf. copy of Legislative Decree No. 32/00 issued by the Congress of the Republic of Guatemala on May 11, 2000 (file of helpful evidence submitted by the State, appendix 5, folio 699).

43(18) As a result of this absence of legal regulation, the appeal for commutation of sentence filed by Mr. Raxcacó Reyes before the Ministry of Governance of Guatemala on May 19, 2004, [FN26] has not been processed. [FN27]

[FN26] Cf. copy of request for commutation of sentence filed by Mr. Raxcacó Reyes before the Ministry of Governance of Guatemala on May 19, 2004 (file of appendixes to the brief with requests, arguments and evidence, appendix 12, folio 630).

[FN27] Cf. testimonial statement of Ovidio Girón made before notary public (affidavit) on May 17, 2005 (file on merits, reparations, and costs, Volume III, folios 461-476).

The prison conditions of those sentenced to death in Guatemala and of Mr. Raxcacó Reyes in particular

43(19) On May 14, 1999, the day on which he was sentenced to death, Mr. Raxcacó Reyes was 24 years old. [FN28] As of that time, he has been confined in a maximum security establishment

known as the Zone 18 Men's Preventive Detention Center, sector 11, waiting for his sentence to be executed. [FN29] His cell is approximately four square meters. Mr. Raxcacó Reyes can only go out into a cement yard of the same size, located beside his cell, with a roof of bars and wire mesh, which provides him with the only entry of natural light and ventilation. [FN30] The sanitary installations are in the same cell as the prisoners who share the enclosure, and they are extremely unhygienic and inadequate. [FN31]

[FN28] Cf. judgment delivered by the Sixth Court on Criminal Sentencing, Drug-Trafficking and Environmental Crimes of Guatemala on May 14, 1999 (file of appendixes to the application, appendix 5, folio 101), and testimonial statement of Mr. Raxcacó Reyes made before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 448-460).

[FN29] Cf. expert evidence of Aída Castro-Conde given before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 478-498), and testimonial statement of Ovidio Girón made before notary public (affidavit) on May 17, 2005 (file on merits, reparations, and costs, Volume III, folios 461-476).

[FN30] Cf. testimonial statement of Mr. Raxcacó Reyes made before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 448-460), and expert evidence of Aída Castro-Conde, given before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 478-498).

[FN31] Cf. testimonial statement of Mr. Raxcacó Reyes made before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 448-460); expert evidence of Aída Castro-Conde, given before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 478-498); final report of the Advisory Commission of the National Penitentiary System, Guatemala, July 3, 2002 (file of appendixes to the requests and arguments brief, appendix 3, folios 553 to 555); report on the situation of the death penalty in Guatemala prepared by the Instituto de Estudios Comparados en Ciencias Penales of Guatemala (IECCPG) (file of appendixes to the requests and arguments brief, appendix 8, folios 588 to 616), and report on prison conditions in Guatemala prepared by the United Nations Verification Mission (file of appendixes to the requests and arguments brief, appendix 4, folios 567-585).

43(20) Mr. Raxcacó Reyes complains of medical problems, such as depression, anxiety, breathing difficulties, chest pains, ulcer and gastritis, related to the tension he endures waiting for the execution of his sentence. However, he does not receive adequate medical care or medication of any type. Moreover, he has not received any psychological care during his time in prison. [FN32]

[FN32] Cf. testimonial statement of Mr. Raxcacó Reyes made before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 448-460), and expert evidence of Aída Castro-Conde, given before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 478-498).

43(21) Mr. Raxcacó Reyes has a daughter with Olga Isabel Vicente. The child is being cared for by her paternal grandmother, because Mrs. Vicente is serving a 20-year prison sentence in the Centro de Orientación Femenino, because she was convicted of being an accomplice to the same crime of kidnapping for which Mr. Raxcacó Reyes was convicted [FN33] (supra para. 43(10)).

[FN33] Cf. judgment delivered by the Sixth Court for Criminal Sentencing, Drug-Trafficking and Environmental Crimes of Guatemala on May 14, 1999 (file of appendixes to the application, appendix 5, folio 160); testimonial statement of Mr. Raxcacó Reyes made before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 448-460), and testimonial statement of Ovidio Girón made before notary public (affidavit) on May 17, 2005 (file on merits, reparations, and costs, Volume III, folios 461-476).

43(22) Visits by the next of kin of Mr. Raxcacó Reyes are limited to two hours a week and take place in the same block, with considerable physical restrictions. Up until March 2005, family visits were conducted through a wire mesh that prevented all physical contact between the prisoner and the visitor; moreover, one of the prisoners' arms was tied to a metal post. [FN34] Mr. Raxcacó Reyes has been able to see his daughter, who is taken to the prison by her grandmother, under these visiting conditions. [FN35] Mr. Raxcacó Reyes has not received visits from his companion, Olga Isabel Vicente, since his detention, because she is also in prison (supra para. 43(21)) and is not allowed out for visits. [FN36]

[FN34] Cf. testimonial statement of Mr. Raxcacó Reyes made before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 448-460), and expert evidence of Aída Castro-Conde, given before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 478-498).

[FN35] Cf. testimonial statement of Mr. Raxcacó Reyes made before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 448-460); expert evidence of Aída Castro-Conde, given before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 478-498), and testimonial statement of Ovidio Girón made before notary public (affidavit) on May 17, 2005 (file on merits, reparations, and costs, Volume III, folios 461-476).

[FN36] Cf. testimonial statement of Mr. Raxcacó Reyes made before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 448-460), and testimonial statement of Ovidio Girón made before notary public (affidavit) on May 17, 2005 (file on merits, reparations, and costs, Volume III, folios 461-476).

43(23) Mr. Raxcacó Reyes receives little food of a poor quality; he must therefore buy his own foodstuffs. Likewise, the alleged victim does not receive any articles of personal hygiene. Under his prison regime, Mr. Raxcacó Reyes cannot take part in work, education or rehabilitation programs. The alleged victim makes handicrafts with materials provided by his family to obtain money for his own needs and to occupy his time. [FN37]

[FN37] Cf. testimonial statement of Mr. Raxcacó Reyes made before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 448-460), and expert evidence of Aída Castro-Conde, given before notary public (affidavit) on May 18, 2005 (file on merits, reparations, and costs, Volume III, folios 478-498).

VIII. VIOLATION OF ARTICLE 4 OF THE AMERICAN CONVENTION (RIGHT TO LIFE) IN RELATION TO ARTICLES 1(1) AND 2 THEREOF

Arguments of the Commission

44. In relation to Article 4(1) of the Convention, the Commission argued that:

- (a) By imposing a mandatory death sentence on Mr. Raxcacó Reyes under Article 201 of the Penal Code, the State violated his right not to be arbitrarily deprived of his life, embodied in Article 4(1) of the American Convention;
- (b) Owing to the current wording of Article 201 of the Penal Code, which stipulates that once the authorship of a crime of kidnapping has been established the only punishment is the death penalty, a court cannot assess whether there are any attenuating circumstances in order to adjust the punishment. As it is drafted, the law obliges the sentencing court to impose the punishment based solely on the type of crime of which the accused is found guilty;
- (c) When imposing punishments on those found guilty, Article 65 of the Guatemalan Penal Code obliges the courts to examine a series of factors in addition to the crime, such as the greater or lesser dangerousness of the guilty person, his personal background and that of the victim, the motive for the crime, the extent and severity of the harm caused, and any attenuating or aggravating circumstances relating to the fact, both the quantity and quality of which are assessed. In the specific case of Mr. Raxcacó Reyes, the particular circumstances of the fact and of the accused were never considered. Once the sentencing court found him guilty of the crime of kidnapping, it imposed the death penalty immediately, as established by domestic law; and
- (d) The supervisory organs of international human rights instruments have subjected provisions concerning the death penalty to a restrictive interpretation, to ensure that the law controls and limits the circumstances in which a State may deprive a person of his life.

45. In relation to Article 4(2) of the American Convention, the Commission indicated that:

- (a) Article 201 of the Penal Code in force on May 25, 1978, the date on which the State deposited the instrument ratifying the American Convention, established the death penalty as the punishment for the crime of kidnapping or abduction only if the person kidnapped died, while the same type of conduct which did not result in death was punished by 8 to 15 years of imprisonment;
- (b) The norm in question was modified in 1994, 1995 and 1996, extending the death penalty to conducts that constituted kidnapping, and which did not call for this punishment when the American Convention was ratified. The third reform, carried out by Legislative Decree No.

81/96, in force in Guatemala since October 21, 1996, prescribed the death penalty as the only punishment applicable for the crime of kidnapping in all its forms;

(c) While the juridical right protected by the penal regime in force in 1973 was the life of the person kidnapped, the violation of which was punishable by the death penalty, under the 1996 reform, the juridical right protected is the freedom of the person kidnapped. Consequently, it is not reasonable to conclude, as did the Guatemalan authorities, that both texts describe the same category of crime, even though both offenses have the same name;

(d) The application of the death penalty to Mr. Raxcacó Reyes, for a crime for which it was not established by law when Guatemala became a party to the American Convention, constitutes a violation of Article 4(2) of this instrument, in relation to the general obligation to respect and guarantee rights established in Article 1(1) thereof.

46. The Commission also argued that the State's punitive powers are limited juridically by the obligations assumed on ratifying international treaties and by the development of international human rights law. Consequently, the States have a margin of discretion to determine the severity of the punishment for a specific act. In this context, with regard to capital punishment, the punishment must be proportionate to the harm that the criminal act has caused to the victim and to society. For the crime of simple kidnapping, the punishment of the death penalty is disproportionate and excessive.

47. In relation to Article 4(6) of the Convention, the Commission argued that:

(a) At the end of May 2000, the Guatemalan Congress revoked Legislative Decree No. 159 of 1892 (the Pardon Law), which established the procedure for processing petitions for clemency before the President of the Republic. Accordingly, by abstaining from regulating the procedure for guaranteeing the access of those sentenced to death to the remedy of pardon or amnesty, as established in Article 4(6) of the American Convention, the State has committed a violation that entails international responsibility;

(b) The right to apply for pardon includes certain minimum procedural guarantees for those sentenced to death to ensure that this right is respected and may be enjoyed effectively. These protections include the right of the condemned man to apply for pardon, to be informed of when the competent authority will consider his case, to present arguments before the competent authority, and to receive a decision within a reasonable time before his execution; and

(c) With regard to the specific situation of Mr. Raxcacó Reyes, his defense lawyer could not apply for pardon or commutation of sentence before the President of the Republic, because the decree regulating this remedy had been revoked; therefore, it was not possible to file this remedy. The absence of a law regulating the remedy of pardon denies those sentenced to death, in this case Mr. Raxcacó Reyes, the right of access to a clemency procedure in accordance with the international obligations assumed by the State in the sphere of human rights.

Arguments of the representatives

48. In relation to Article 4(1) of the American Convention, the representatives argued that:

(a) The right to life is recognized to be the supreme human right and although the American Convention does not prohibit the application of the death penalty, it does tend towards its gradual

elimination. In other words, the death penalty is considered only in the context of truly exceptional circumstances;

(b) The State condemned Mr. Raxcacó Reyes to death for the crime of kidnapping or abduction established in Article 201 of the Penal Code, which was reformed by Decree No. 81/96, thus mandatorily establishing the death penalty in all cases of kidnapping or abduction, irrespective of the victims, the circumstances surrounding the facts and the results. All of this in evident contradiction of the general obligation concerning the obligations to respect the right of all persons subject to its jurisdiction and to adopt provisions of domestic law adapted to the standards established in the American Convention; and

(c) By automatically imposing the death penalty, the State disregarded the fundamental principles of the theory of crime and punishment, which call for consideration of both the individual circumstances of the person participating in the crime and the specifics of the crime itself. The mandatory death penalty violates the understanding that each person is unique and, consequently, merits individual consideration by the criminal justice system.

49. Regarding Article 4(2) of the Convention, the representatives indicated that:

(a) Mr. Raxcacó Reyes was condemned to death as a result of a crime that was not included in domestic law when Guatemala ratified the American Convention;

(b) In 2000, the Constitutional Court of Guatemala delivered a ruling in which it questioned the expansion of the scope of the death penalty, because the crime punishable by this penalty under Article 201 of the Penal Code, before the entry into force of the Pact of San José, was a complex crime that included two types of punishable conduct: (a) the kidnapping of a person, and (b) the death of the victim. These are two different types of crimes, even though the name is the same, because the purpose of the former category is to protect the juridical right to life while the purpose of the latter category is to protect the right to individual freedom. There are notorious differences in the nature of the crime between the original Article 201 and the reformed Article 201. The original crime category related to a result, and the current version relates to the mere act; and

(c) By varying substantially the contents of Article 201 of the Penal Code, the application of the death penalty was extended to a new crime, violating Article 4(2) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Raxcacó Reyes.

50. In relation to Article 4(6) of the Convention, the representatives indicated that the Guatemalan Congress revoked the decree regulating the domestic procedure regarding requests for clemency. Despite the legal vacuum, Mr. Raxcacó Reyes' defense lawyer applied for a pardon before the Ministry of Governance on May 19, 2004. This request has not been decided to date. According to the representatives, the State violated Article 4(6) of the American Convention by failing to decide on the request for clemency and by not establishing a legal procedure for processing such petitions.

Arguments of the State

51. Regarding Article 4(1) of the American Convention, the State argued that:

- (a) It recognizes the fundamental right of the individual to the protection of his life and that he should not be deprived of it arbitrarily; and
- (b) A court does not impose the death penalty mandatorily, but conducts the respective assessment of all the elements of evidence submitted by the parties and determines the punishment to be imposed on each guilty party.

52. Regarding Article 4(2) of the Convention, the State indicated that:

- (a) The death penalty is a punishment established and recognized by Guatemalan constitutional law, and the cases in which this punishment may not be imposed are regulated by law;
- (b) The death penalty is a punishment that should only be imposed in special circumstances; it is established for specific crimes, allowing the court to decide on its application, if it considers that the circumstances in which the crime was committed reveal the greater or special dangerousness of the perpetrator;
- (c) When delivering judgment, the Sixth Court for Criminal Sentencing, Drug-Trafficking and Environmental Crimes indicated that the imposition of the death penalty for the crime of kidnapping or abduction did not violate Article 4 of the Convention, because this punishment was established in Article 201 of the Penal Code, before the ratification of the American Convention in 1978; and
- (d) The reform of Article 201 of the Penal Code “entailed a clear violation of the provisions of Article 4(2) of the American Convention on Human Rights, because it established the death penalty as the principal punishment and 25 to 50 years of imprisonment as the secondary punishment.”

53. In relation to Article 4(6) of the Convention, the State indicated that it recognized that a pardon is the final remedy that can be granted to a person sentenced to death. It also recognized the existing legal vacuum, because the Penal Code regulates the pardon but there are no legal regulations to make this effective. To remedy this vacuum, it stated that it was developing a proposal to present a draft law to Congress to regulate the procedure for pardons.

Findings of the Court

54. In this case, the Court has been called on to determine whether the imposition of the death penalty on Mr. Raxcacó Reyes was carried out in accordance with the provisions of Article 4 of the American Convention, which establishes that:

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

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.

55. The proceedings against Mr. Raxcacó Reyes originated in the kidnapping of a child. In this regard, it should be reiterated that the Court is not a criminal tribunal in which the criminal responsibility of the individual can be examined; [FN38] this task corresponds to the domestic courts. The Court emphasizes the obligation that States have to protect all persons, avoiding crime, punishing those responsible, and maintaining public order, particularly in the case of facts such as those that gave rise to the criminal proceedings against Mr. Raxcacó Reyes, in the understanding that a State's fight against crime must be carried out within limits and according to procedures that allow both public safety and full respect for human rights to be preserved. [FN39]

[FN38] Cf. Case of Fermín Ramírez, *supra* note 1, para. 63; Case of Castillo Petruzzi et al., Judgment of May 30, 1999. Series C No. 52, para. 90, and Case of the "White Van" (Paniagua Morales et al.), Judgment of March 8, 1998. Series C No. 37, para. 71. [FN39] Cf. Case of Fermín Ramírez, *supra* note 1, para. 63; Case of Hilaire, Constantine and Benjamin et al., Judgment of June 21, 2002. Series C No. 94, para. 101; Case of Bámaca Velásquez. Judgment of November 25, 2000. Series C No. 70, para. 174; Case of Durand and Ugarte. Judgment of August 16, 2000. Series C No. 68, para. 69, and Case of Castillo Petruzzi et al., *supra* note 39, paras. 89 and 204.

56. Even though the Convention does not expressly prohibit the application of the death penalty, the respective treaty-based norms should be interpreted in terms of "delimit[ing] strictly its application and scope, in order to reduce the application of the penalty and bring about its gradual disappearance." [FN40]

[FN40] Cf. Case of Hilaire, Constantine and Benjamin et al., *supra* note 39, para. 99, and 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. 57.

i) Expansion of the list of crimes punishable by the death penalty

57. When interpreting Article 4(2) of the American Convention, this Court stated that:

There cannot be the slightest doubt that Article 4(2) contains an absolute prohibition that no State Party may apply the death penalty to crimes for which it was not provided previously under the domestic law of that State. [FN41]

[FN41] Cf. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), supra note 40, para. 59.

58. The representatives and the Inter-American Commission argue that the modifications that were made to Article 201 of the Guatemalan Penal Code, which defined the crime of kidnapping or abduction, are contrary to Article 4 of the Convention because they apply the death penalty to conducts for which it was not provided when Guatemala ratified the American Convention. The State indicated, initially, that this violation of the Convention did not exist, because the death penalty was already established for the crime of kidnapping or abduction before the entry into force of the Convention. Nevertheless, in its final written arguments the State acknowledged that “the reform of Article 201 of the Penal Code entailed a clear violation of the provisions of Article 4(2) of the American Convention [...] because it established the death penalty as the principal punishment and 25 to 50 years of imprisonment as the secondary punishment.”

59. In its concluding observations on the second periodic report [FN42] submitted by Guatemala, the Human Rights Committee indicated that it was:

Concerned about the application of the death penalty and, in particular, about the increase in the number of crimes carrying that penalty, its application having been extended to abduction not resulting in death, contrary to the provisions of the Covenant. The State party should limit the application of the death penalty to the most serious crimes and restrict the number of crimes carrying that penalty in accordance with Article 6, paragraph 2, of the Covenant. The State party is invited to move towards the full abolition of the death penalty. [FN43]

[FN42] Cf. Second periodic report submitted by Guatemala to the United Nations Human Rights Committee (CCPR/C7GTM/99/2 and HRI/CORE/1/Add. 47).

[FN43] Cf. UN, Human Rights Committee. Concluding observations on Guatemala issued on August 27, 2001, CCPR/CO/72/GTM, paragraph 17.

60. When Guatemala ratified the American Convention, Decree No. 17/73 (Penal Code) was in force (supra para. 43(1), and its Article 201 established the punishment of the death penalty for kidnapping followed by the death of the person kidnapped:

The kidnapping or abduction of a person in order to obtain a ransom, an exchange for third parties or other illegal purpose of the same or similar nature, shall be punished by eight to fifteen years of imprisonment.

The death penalty shall be imposed on the person responsible, when owing to the kidnapping or abduction or during it, the person kidnapped dies.

61. This norm was modified on several occasions (supra paras. 43(1) to 43(4)), and finally the provision established in Legislative Decree No. 81/96, of September 25, 1996, was applied to the alleged victim in the instant case. This establishes that:

The death penalty shall be imposed on the perpetrators or masterminds of the crime of the kidnapping or abduction of one or more persons in order to obtain a ransom, an exchange of persons, or a decision contrary to the will of the person kidnapped, or with any similar or equal purpose and, when this cannot be imposed, the punishment shall be twenty-five to fifty years of imprisonment. In this case, no attenuating circumstances shall be taken into consideration.

Accomplices or accessories after the fact shall be punished with twenty to forty years of imprisonment.

Those who are sentenced to imprisonment for the crime of kidnapping or abduction shall not be granted a reduction in the punishment for any reason.

62. The phrase “and when this cannot be imposed” refers to Article 43 of the same Penal Code, which establishes that:

The death penalty shall not be imposed:

1. For political crimes.
2. When the sentence is based on presumptions.
3. On women.
4. On men over the age of 60 years.
5. On persons whose extradition has been granted on this condition.

[...]

63. To establish whether the modification introduced by Legislative Decree No. 81/96 to the crime category of kidnapping or abduction entails an “extension” of the application of the death penalty, prohibited by Article 4(2) of the American Convention, it should be recalled that the crime category delimits the scope of the criminal prosecution, delimiting the juridical conduct.

64. The action described in the first paragraph of Article 201 of Legislative Decree No. 17/73 corresponds to the abduction or fraudulent detention of a person for a specific purpose (obtaining a ransom, an exchange for third persons, or other illegal purpose); thus, the crime category basically protects individual freedom. The act embodied in the second paragraph of this Article included an additional element: in addition to the abduction or detention: the death, in any circumstances, of the victim; this protected the juridical right to life. Consequently, there is a difference between simple kidnapping and kidnapping aggravated by the death of the victim. In the first case, the punishment of deprivation of liberty was applied; in the second, the death penalty.

65. Article 201 of Legislative Decree No. 81/96, which was applied in the sentencing of Mr. Raxcacó Reyes, defines a single conduct: abduction or detention of a person for a specific purpose. The act of assassination is not included in this crime category which protects individual freedom, not life, and provides for the imposition of the death penalty on the kidnapper.

66. Although the nomen iuris of kidnapping or abduction remains unaltered from the time Guatemala ratified the Convention, the factual assumptions contained in the corresponding crime categories changed substantially, to the extent that it made it possible to apply the death penalty for actions that were not punishable by this sanction previously. If a different interpretation is accepted, this would allow a crime to be substituted or altered with the inclusion of new factual

assumptions, despite the express prohibition to extend the death penalty contained in Article 4(2) of the Convention.

ii) Limitation of the death penalty to the most serious crimes

67. The Commission and the representatives argued that the death penalty applied in Guatemala as a punishment for the crime of simple kidnapping “is disproportionate and excessive.”

68. In this regard, the Court has stated that the American Convention reduces the scope of application of the death penalty to the most serious common crimes; [FN44] in other words, “it was designed to be applied in truly exceptional circumstances only.” [FN45] Indeed, Article 4(2) of the American Convention stipulates that “[i]n countries that have not abolished the death penalty, it may be imposed only for the most serious crimes.”

[FN44] Cf. Case of Hilaire, Constantine and Benjamin et al., supra note 39, para. 106.

[FN45] Cf. Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights), supra note 40, para. 54.

69. The United Nations Human Rights Committee [FN46] has stated that “crimes that do not result in loss of life” may not be punished by the death penalty.

[FN46] Cf. UN, Human Rights Committee. Concluding observations on Iran (Islamic Republic of) issued on August 3, 1993. CCPR/C/79/Add.25, para. 8; and UN, Human Rights Committee. Concluding observations on Iraq issued on November 19, 1997. CCPR/C/79/Add.84, paras. 10 and 11.

70. A distinction must be made between the different degrees of seriousness of the facts that permits distinguishing serious crimes from the “most serious crimes”; namely, those that affect most severely the most important individual and social rights and therefore merit the most vigorous censure and the most severe punishment.

71. The crime of kidnapping or abduction may include different nuances of seriousness, ranging from simple kidnapping, which does not fall within the category of the “most serious crimes,” to kidnapping following by the death of the victim. Even in the latter case, which would constitute an extremely serious act, it would be necessary to consider the conditions or circumstances of the case sub judice. All of this must be examined by the court and, to this end, the law must grant it a margin of subjective appraisal.

72. In the case that concerns us, Article 201 of the Penal Code, applied to Mr. Raxcacó Reyes, punished both simple kidnapping and any other form of kidnapping or abduction with the

death penalty, thus disregarding the restriction imposed by Article 4(2) of the American Convention regarding the application of the death penalty only for the “most serious crimes.”

iii) Mandatory death penalty

73. The representatives and the Inter-American Commission state that the Guatemalan Penal Code punishes the crime of kidnapping or abduction by the “mandatory” death penalty, and that Mr. Raxcacó Reyes was a victim of this violation of Article 4(1) of the American Convention. The State disputes this affirmation indicating that the court does not impose the death penalty mandatorily, but makes the respective assessment of all the evidence presented by the parties and determines which punishment to impose on each guilty party. The State adduced in this regard that Carlos Manuel García Morales, who was tried with Mr. Raxcacó Reyes, was not sentenced to death.

74. In this regard, the Court notes that, in the judgment of May 14, 1999, the Sixth Court for Criminal Sentencing, Drug-Trafficking and Environmental Crimes (supra para. 43(10)) made a distinction between the authors of the crime of kidnapping or abduction. On the one hand, they classified Mr. Raxcacó Reyes and two of the other accused persons as “direct authors” and, on the other hand, they classified Carlos Manuel García Morales as an “author.” The Sentencing Court explained that the distinction was based on the fact:

That the participation of the accused García Morales was circumscribed to “taking care of the kidnapped child during the night he remained captive,” thus showing that he had not taken part in the criminal act, even though he had played a role, which, in the court’s opinion, was less immediate and decisive, because it was dependent on the perpetrator carrying out the illegal criminal act. No element of evidence produced during the hearings revealed that the defendant Carlos Manuel García Morales had agreed and taken part in the crime category of perpetration, but rather had collaborated in the perpetration of the crime. The foregoing has led the court to consider that the criminal responsibility of the accused could not be sanctioned with the punishment corresponding to the perpetrators. [FN47]

[FN47] Cf. judgment delivered by the Sixth Court on Criminal Sentencing, Drug-Trafficking and Environmental Crimes of Guatemala on May 14, 1999 (file of appendixes to the application, appendix 5, folios 100-167).

75. Therefore, the Sentencing Court decided:

That CARLOS MANUEL GARCÍA MORALES, is responsible for the crime of KIDNAPPING OR ABDUCTION, committed against the individual safety and freedom of the child PEDRO ALBERTO DE LEON WUG, as an AUTHOR [and,] as a result of this criminal offense, he is sentenced to FORTY YEARS’ INCOMMUTABLE IMPRISONMENT [...]. [FN48]

[FN48] Cf. judgment delivered by the Sixth Court on Criminal Sentencing, Drug-Trafficking and Environmental Crimes of Guatemala on May 14, 1999 (file of appendixes to the application, appendix 5, folios 100-167).

76. From the Sentencing Court's reasoning, it is clear that the participation of Mr. García Morales in the crime was not considered to be actual perpetration, but rather the cooperation characteristic of an accomplice. Consequently, the punishment corresponding to the latter was applied, rather than the punishment reserved for the former (supra para. 43(4)).

77. Moreover, the Sentencing Court limited itself to examining the level of participation of the different actors in the illegal act they were accused of, but did not assess possible attenuating or aggravating factors, or take into account the guilt of those responsible or the specific circumstances of the crime, as established in Article 65 of the Guatemalan Penal Code, which states:

The judge or tribunal shall determine, in the judgment, the corresponding punishment, within the maximum and minimum indicated by law for each crime, taking into account the greater or lesser dangerousness of the guilty person, his personal history and that of the victim, the motive for the crime, the extent and severity of the harm caused and the attenuating or aggravating circumstances that exist in relation to the act, both the quantity and quality of which should be assessed. The judge or tribunal shall record expressly the matters referred to in the preceding paragraph that have been considered determinant for adjusting the punishment. [FN49]

[FN49] It should be indicated that the Inter-American Court condemned the criteria of dangerousness in the following terms: "the introduction into the penal text of the dangerousness of the agent as a criterion for classifying the facts and applying determined penalties is incompatible with the principle of criminal legality and, consequently, contrary to the Convention." Case of Fermín Ramírez, supra note 1, para. 96.

78. Once the court had classified some of the defendants, including Mr. Raxcacó Reyes, as "direct authors" of kidnapping or abduction, it applied the death penalty to them. It declared that:

Having proved the effective participation of the accused as immediate authors of the illegal act that is being prosecuted [...], the Court imposes on them the punishment indicated in the operative paragraphs of this judgment[,] because no one has the right to deprive another person of his freedom and to negotiate this, without taking into account the minimum respect for the human rights of the victim. The mere abduction and deprivation of freedom of movement, in the way the fact that is being prosecuted occurred, produces irreparable damage to the victim, considering also that the person kidnapped was a child, which reveals total contempt for a child's innocence and purity, as well as a challenge and an affront to society [...]. [FN50]

[FN50] Cf. judgment delivered by the Sixth Court on Criminal Sentencing, Drug-Trafficking and Environmental Crimes of Guatemala on May 14, 1999 (file of appendixes to the application, appendix 5, folios 100-167).

79. The Court finds that the regulation in force for the crime of kidnapping or abduction in the Guatemalan Penal Code orders the automatic and generic application of the death penalty to the perpetrators of this illegal act (“the death penalty shall be applied to them”) and, in this regard, considers it pertinent to recall that the United Nations Human Rights Committee considered that the mandatory nature of capital punishment which deprives the subject of his right to life, prevents consideration of whether, in the specific circumstances of the case, this exceptional form of punishment is compatible with the provisions of the International Covenant on Civil and Political Rights. [FN51]

[FN51] Cf. UN, Human Rights Committee, *Kennedy v. Trinidad and Tobago* (Communication No. 845/1999), UN Doc. CCPR/C/74/D/845/1999 of March 28, 2002, para. 7(3); UN, Human Rights Committee, *Thompson v. Saint Vincent and the Grenadines* (Communication No. 806/1998), UN Doc. CCPR/C/70/D/806/1998 of December 5, 2000, para. 8(2); UN, Human Rights Committee, *Pagdayawon v. the Philippines*, Communication 1110/2002, para. 5(2).

80. Likewise, in a previous case, the Court found that the application of the mandatory death penalty treated the accused “not as individual, unique human beings, but as undifferentiated and faceless members of a mass who will be subjected to the blind application of the death penalty.” [FN52]

[FN52] Cf. *Case of Hilaire, Constantine and Benjamin et al.*, supra note 39, para. 105.

81. Article 201 of the Penal Code, as it is written, has the effect of subjecting those accused of the crime of kidnapping or abduction to criminal proceedings in which the specific circumstances of the crime and of the accused are never considered, such as the criminal record of the accused and of the victim, the motive, the extent and severity of the harm caused, and the possible attenuating or aggravating circumstances, among other considerations concerning the perpetrator and the crime.

82. In view of the above, the Court concludes that Article 201 of the Guatemalan Penal Code, on which the sentence of Mr. Raxcacó Reyes was based, violated the prohibition to arbitrarily deprive a person of their life established in Article 4(1) and 4(2) of the Convention.

iv) Right to apply for a pardon or commutation of sentence

83. As described in the chapter on Proven Facts (supra para. 43(17)), Decree No. 159 of April 18, 1892, established the authority of the President of the Republic to hear and decide on

pardons. However, Decree No. 32/2000 expressly revoked this authority and the pertinent procedure.

84. Despite the foregoing, Mr. Raxcacó Reyes applied for a pardon before the Minister of Governance of Guatemala on May 19, 2004 (*supra* para. 43(18)), basing his petition, *inter alia*, on Articles 1(1), 2 and 4(6) of the American Convention. From the Court's case file, it is clear that the Ministry of Governance has not processed the said application for pardon (*supra* para. 43(18)).

85. On this point, in a previous case the Inter-American Court ruled against the State, in the sense that the revocation of Decree No. 159 of 1892, by Decree No. 32/2000, resulted in the elimination of the powers granted to an organ of the State to hear and decide the right to a pardon stipulated in Article 4(6) of the Convention. [FN53] Consequently, the Court considered that the State failed to comply with the obligation arising from Article 4(6) of the Convention, in relation to Articles 1(1) and 2 thereof. [FN54]

[FN53] Cf. Case of Fermín Ramírez, *supra* note 1, para. 107.

[FN54] Cf. Case of Fermín Ramírez, *supra* note 1, para. 110.

86. In the instant case, the Court finds no cause to deviate from its previous case law.

87. Article 2 of the American Convention obliges the States Parties to adopt, in accordance with their constitutional processes and the provisions of the Convention, such legislative or other measures as may be necessary to give effect to the rights and freedoms that it protects. It is necessary to reaffirm that the obligation to adapt domestic laws is only complied with when the reform is effectively carried out. [FN55]

[FN55] Cf. Case of the Indigenous Community Yakyé Axa, *supra* note 4, para. 100, and Case of Caesar. Judgment of March 11, 2005. Series C No. 123, paras. 91 and 93.

88. In this case, the Court finds that, even though Mr. Raxcacó Reyes has not been executed, the State has failed to comply with Article 2 of the Convention. The mere existence of Article 201 of the Guatemalan Penal Code, which punishes any form of kidnapping or abduction with the mandatory death penalty and expands the number of crimes punishable with this sanction is, *per se*, a violation of this provision of the Convention. [FN56] This opinion corresponds to the Court's Advisory Opinion OC-14/94, according to which "in the case of self-executing laws, [...] the violation of human rights, whether individual or collective, occurs upon their promulgation." [FN57]

[FN56] Cf. Case of Lori Berenson Mejía. Judgment of November 25, 2004. Series C No. 119, para. 221; Case of Hilaire, Constantine and Benjamin et al., supra note 39, paras. 114 and 116; Case of Cantoral Benavides. Judgment of August 18, 2000. Series C No. 69, para. 176, and Suárez Rosero case, Judgment of November 12, 1997. Series C No. 35, para. 98.

[FN57] Cf. Case of Hilaire, Constantine and Benjamin et al., supra note 39, para. 116, and International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 American Convention on Human Rights). Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 43.

89. Likewise, the lack of national legislation to make effective the right to apply for pardon, amnesty or commutation of sentence, in the terms of Article 4(6) of the American Convention, constitutes a fresh violation of Article 2 thereof.

90. In view of the above, the Court considers that the State violated the rights embodied in Article 4(1), 4(2) and 4(6) of the American Convention, in relation to Articles 1(1) and 2 thereof, to the detriment of Ronald Ernesto Raxcacó Reyes.

IX. ARTICLE 5(1) AND 5(2) OF THE AMERICAN CONVENTION (RIGHT TO HUMANE TREATMENT) IN RELATION TO ARTICLE 1(1) THEREOF

Arguments of the Commission

91. With regard to Article 5 of the American Convention, the Commission indicated that:

(a) By depriving a person of his freedom, the State places itself in a special position of guarantor, which implies that its agents must not only abstain from performing acts that may harm the life and physical integrity of a detainee, but must also endeavor, by all possible means, to ensure that the person detained may continue to enjoy his fundamental rights and, in particular, the right to life and to personal integrity. When the State fails to provide this protection for prisoners, it violates Article 5 of the Convention and incurs international responsibility;

(b) As a person sentenced to death, Mr. Raxcacó Reyes has been subjected by the State to detention conditions that are not adapted to international standards and has had to endure a prolonged wait for execution, lasting almost five years;

(c) Those sentenced to death in Guatemala suffer from different illnesses arising mainly from the tension they endure waiting for execution. However, the State does not provide them with adequate treatment, and does not even allow them to attend hospital appointments;

(d) The State has not respected the minimum standards for the treatment of prisoners established by the United Nations in relation to Mr. Raxcacó Reyes. Indeed, the conditions in which he has been detained, in particular the isolation, the prolonged enclosure without access to daylight, the absence of adequate facilities for his personal hygiene, and the lack of medical care, added to the prolonged time that he remained imprisoned during the criminal proceedings and, subsequently, as a result of his sentencing, cannot be considered to be in keeping with the right to humane treatment embodied in Article 5 of the Convention; and

(e) By sentencing Mr. Raxcacó Reyes to the mandatory death penalty without considering his individual circumstances, the State has violated his rights to physical, mental and moral integrity in violation of Article 5(1) of the Convention, and has subjected him to cruel, inhuman and degrading treatment or punishment in violation of Article 5(2) thereof. The essential respect for the dignity of the individual, which underlies Article 5(1) and 5(2) of the Convention cannot be conciliated with a system that deprives the individual of his most fundamental rights, such as the right to life, without considering whether this exceptional form of punishment is adapted to the circumstances of the case. The determination of the mandatory death penalty which entails the arbitrary deprivation of life reinforces its characterization as cruel, inhuman and degrading treatment or punishment.

Arguments of the representatives

92. In relation to Article 5 of the American Convention, the representatives indicated that the State is violating the right of Mr. Raxcacó Reyes to personal integrity in three ways: by imposing a mandatory death penalty; by the death row phenomenon, and by the prison conditions that he endures currently.

Arguments of the State

93. In relation to Article 5 of the American Convention, the State indicated that Mr. Raxcacó Reyes was interviewed in order to verify his current prison conditions. According to the State, Mr. Raxcacó Reyes considered that his alimentation, medical, physical, visiting regime, hygiene and access to training and work conditions were good and his only request was for an effective remedy to decide his juridical situation as regards commutation of sentence.

Findings of the Court

94. Article 5 of the American Convention establishes that:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with regard for the inherent dignity of the human person.

[...]

95. The Court has stated that any person deprived of his freedom has the right to live in prison conditions that are compatible with his personal dignity, [FN58] and that the State must ensure the right to life and to personal integrity of all prisoners. [FN59] Since the State is responsible for detention centers, it must guarantee the existence of conditions that respect the prisoners' rights. [FN60] Keeping a person imprisoned in overcrowded conditions, without ventilation and natural light, without a bed to rest on or adequate conditions of hygiene, in isolation or incommunicado, or with undue restrictions in the visiting regime, is a violation of his personal integrity. [FN61]

[FN58] Cf. Case of Fermín Ramírez, supra note 1, para. 118; Case of Caesar, supra note 55, para. 96; Case of Lori Berenson Mejía, supra note 56, para. 102, and Case of Tibi. Judgment of September 7, 2004. Series C No. 114, para. 150.

[FN59] Cf. Case of Bulacio. Judgment of September 18, 2003. Series C No. 100, para. 126; Case of Hilaire, Constantine and Benjamin et al., supra note 39, para. 65; Case of Cantoral Benavides, supra note 57, para. 87, and Case of Durand and Ugarte, supra note 39, para. 78.

[FN60] Cf. Case of Lori Berenson Mejía, supra note 56, para. 102; Case of Tibi, supra note 59, para. 150, and Case of Bulacio, supra note 59, para. 126.

[FN61] Cf. Case of Fermín Ramírez, supra note 1, para. 118; Case of Caesar, supra note 55, para. 96, and Case of Lori Berenson Mejía, supra note 56, para. 102.

96. The Human Rights Committee has stated that keeping a person confined in a small cell, twenty-three hours each day, isolated from other prisoners, in darkness, without anything to keep him occupied, and without being allowed to work or to undergo education, constitutes a violation of his right to be treated with humanity and with regard for the inherent dignity of the human person. [FN62] In the Mukong case, [FN63] the Committee insisted on the universality of the right to decent and humane treatment and rejected scarcity of resources as an excuse for the failure to respect this right.

[FN62] Cf. UN, Human Rights Committee, Anthony McLeod v. Jamaica, Communication No. 734/1997 (CCPR/C/62/D/734/1997), para. 6(4).

[FN63] Cf. UN, Human Rights Committee, Mukong v. Cameroon, Communication No. 458/1991, (CCPR/C/51/D/458/1991), para. 9(3).

97. In *Soering v. United Kingdom*, the European Court determined that the so-called “death row phenomenon,” consisting of a prolonged period of detention awaiting and prior to execution, during which the condemned man suffers mental anguish and is subject to extreme tension and psychological trauma as a result of the constant waiting for what will be the ritual of his own execution, involves cruel, inhuman and degrading treatment. [FN64]

[FN64] Cf. *Soering v. United Kingdom*. Judgment of July 7, 1989. Series A, Vol. 161. Likewise, Case of Hilaire, Constantine and Benjamin et al., supra note 39, para. 167.

98. That same Court has established that, in all cases in which the death penalty is imposed, it is necessary to consider the personal circumstances of the condemned man, the conditions of his detention while he awaits execution and the duration of the detention prior to the execution in light of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. [FN65]

[FN65] Cf. *G.B. v. Bulgaria*, No. 42346/98, § 73, ECHR March 11, 2004.

99. Numerous decisions of international organizations invoke the United Nations Standard Minimum Rules for the Treatment of Prisoners, in order to interpret the content of the right of prisoners to decent and humane treatment. These rules prescribe the basic rules for a prisoner's accommodation, hygiene, medical care and exercise. [FN66]

[FN66] Cf. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held in Geneva in 1955, and adopted by the Economic and Social Council in its resolutions 663C (XXIV) of July 31, 1957, and 2076 (LXVII) of May 13, 1977, inter alia:

10. All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

11. In all places where prisoners are required to live or work,

(a) The windows shall be large enough to enable the prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;

(b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner. [...]

15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet Articles as are necessary for health and cleanliness. [...]

21. (1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits. (2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided.

100. In the instant case, the State has not complied with the minimum standards during the detention of Mr. Raxcacó Reyes in sector 11 of the Zone 18 Men's Preventive Detention Center (supra paras. 43(19) to 43(23)).

101. The expert evidence of Aída Castro-Conde (supra para. 37(e)) concluded that the prison conditions in which Mr. Raxcacó Reyes lives have caused him intense psychological distress. She diagnosed that the prisoner suffers from post-traumatic stress and indicated that he suffers from psychosomatic illnesses as a result of his situation awaiting execution.

102. The Court considers that the prison conditions to which Ronald Ernesto Raxcacó Reyes has been subjected have violated his right to physical, mental and moral integrity contained in Article 5(1) of the Convention, and have constituted cruel, inhuman and degrading treatment contrary to Article 5(2) thereof.

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

Arguments of the Commission

103. In relation to Article 8 of the American Convention, the Commission indicated that the State had violated this Article by imposing a mandatory death penalty on Mr. Raxcacó Reyes, denying him the opportunity of presenting arguments and evidence before the court of first instance concerning the pertinence of applying the death penalty in his case, and preventing the court of second instance from reviewing the sentence for the same purpose.

Arguments of the representatives

104. In relation to Article 8 of the American Convention, the representatives indicated that:

(a) In the case of Mr. Raxcacó Reyes, the sentencing to the mandatory death penalty prevented his personal circumstances from being taken into consideration, such as the inexistence of a criminal or police record and his age at the time, about 22 years old, factors that reveal that he was a young man without the level of dangerousness that would merit the imposition of the most severe punishment. The court was unable to consider independently and impartially the characteristics of the case, including the short duration of the abduction, which only lasted about 30 hours, and the fact that the victim of the kidnapping was not killed, and this violated Article 8(1) of the American Convention;

(b) The mandatory death penalty deprives a defendant of the possibility of exercising his right to defense, since all his arguments and evidence are reduced to the sole possibility of proving that he did not commit the act that it considered a crime. He is unable to prove that the death penalty is inappropriate for the case and for himself, or that there are circumstances that attenuate his guilt. In brief, the alleged victim's possibility of presenting evidence and making statements so that the court could assess whether the death penalty was the appropriate punishment was restricted. Therefore, the domestic criminal proceedings did not conclude with an individualized sentence that took into account the particularities of the case and the personal circumstances of the defendant; and

(c) Finding itself obliged to impose the death penalty, the court of second instance that decided the appeal filed by Mr. Raxcacó Reyes did not assess whether this was the appropriate punishment for the personal situation of the accused and the specific circumstances in which the act was carried out, nor did it assess the proportionality between the crime and the punishment. The access to this instance was merely of a formal nature, and there was no real, comprehensive and thorough analysis of the merits of the case, and of all the pertinent issues of the particular case decided by the lower court.

Arguments of the State

105. In relation to Article 8 of the American Convention, the State indicated that it had complied with Guatemalan domestic laws, carrying out the respective criminal proceeding and conducting the oral public debate in which the principle of promptness was observed, and the

judges had access to the parties and to the evidence presented in order to subsequently assess them and decide on the criminal responsibility of the accused and on the respective punishment.

Findings of the Court

106. The Court finds that the facts alleged in this case with regard to Article 8 of the American Convention were examined when analyzing the mandatory death penalty imposed on Mr. Raxcacó Reyes (*supra* paras. 73 to 82); consequently, it is not necessary to rule on them separately.

XI. VIOLATION OF ARTICLE 25 OF THE AMERICAN CONVENTION (RIGHT TO JUDICIAL PROTECTION)

Arguments of the Commission

107. The Commission alleged that the State had violated Article 25 of the American Convention, because the remedies provided for by law to contest the mandatory imposition of the death penalty are not appropriate for producing the result for which they have been created. Since capital punishment is imposed mandatorily, the only issue the superior court may decide is whether the accused was guilty of the crime for which it is mandatory to impose this punishment. The mandatory nature of the punishment prevents a higher court from considering whether it is an appropriate punishment for the conditions of the defendant and the circumstances of the case, and also the proportionality between the crime and the punishment.

Arguments of the representatives

108. The representatives alleged that Mr. Raxcacó Reyes filed an application for amparo on August 25, 2000, which was decided by the Constitutional Court almost one year later, on July 28, 2001. This remedy was unable to produce the result for which it was created: the protection of the violated rights. Owing to the mandatory nature of the death penalty imposed, the alleged victim was denied an effective review of the judgment convicting him, thus violating the right to judicial protection.

Arguments of the State

109. The State acknowledged that every person condemned to death has the right to an effective remedy to obtain commutation of sentence.

Findings of the Court

110. Article 25 of the Convention stipulates that:

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

2. The States Parties undertake:
 - a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
 - . to develop the possibilities of judicial remedy; and
 - . to ensure that the competent authorities shall enforce such remedies when granted.

111. The judgment on merits delivered by the Criminal Sentencing Court, which sentenced Mr. Raxcacó Reyes to death (supra para. 43(10)) was contested by different remedies existing in Guatemala (supra paras. 43(12), 43(14) and 43(16)). The decisions delivered coincided in stating that the actions of the Sentencing Court were adapted to the criminal, constitutional and international norms applicable to the case (supra paras. 43(13), 43(15) and 43(16)).

112. The higher instances admitted for processing the remedies filed by Mr. Raxcacó Reyes' defense lawyer and decided on them according to the law. The fact that the remedies filed were not decided favorably for the defendant's interests do not imply that the alleged victim did not have access to an effective remedy to protect his rights. [FN67]

[FN67] Cf. Case of Fermín Ramírez, supra note 1, para. 83

113. After examining the de facto and de jure legal conclusions contained in the decisions on the remedies filed during the criminal proceedings (supra paras. 43(12) to 43(16)), this Court does not find that it has been proved that the State violated the right of Mr. Raxcacó Reyes to an effective remedy to contest the judgment delivered against him, in the terms of Article 25 of the American Convention.

XII. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE CONVENTION)

OBLIGATION TO REPAIR

114. This Court has established that it is a principle of international law that any violation of an international obligation that has produced damage entails the obligation to repair it adequately. [FN68] According to Article 63(1) of the American Convention, which reflects a customary norm that constitutes one of the fundamental pillars of contemporary international law on State responsibility: [FN69]

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party. [FN70]

[FN68] Cf. Case of Acosta Calderón, supra note 1, para. 145; Case of Yatama, supra note 1, para. 230, and Case of Fermín Ramírez, supra note 1, para. 122.

[FN69] Cf. Case of Acosta Calderón, supra note 1, para. 146; Case of Yatama, supra note 1, para. 231, and Case of Fermín Ramírez, supra note 1, para. 122.

[FN70] Cf. Case of Acosta Calderón, supra note 1, para. 145; Case of Yatama, supra note 1, para. 230, and Case of Fermín Ramírez, supra note 1, para. 122.

115. Reparation of the damage caused by the violation of an international obligation requires full restitution (*restitutio in integrum*), which consists in the re-establishment of the previous situation. If this is not possible, as in most cases, the Court must determine measures to guarantee the violated rights and repair the consequences of the violations committed. [FN71] It is also necessary to add any positive measures the State must adopt to ensure that the harmful acts, such as those that occurred in this case, are not repeated. [FN72] The responsible State may not invoke provisions of domestic law to modify or fail to comply with its obligation to provide reparation, which is regulated by international law. [FN73]

[FN71] Cf. Case of Acosta Calderón, supra note 1, para. 147; Case of Yatama, supra note 1, para. 232, and Case of Fermín Ramírez, supra note 1, para. 123.

[FN72] Cf. Case of Acosta Calderón, supra note 1, para. 147; Case of Yatama, supra note 1, para. 232, and Case of Fermín Ramírez, supra note 1, para. 123.

[FN73] Cf. Case of Acosta Calderón, supra note 1, para. 147; Case of Yatama, supra note 1, para. 232, and Case of Fermín Ramírez, supra note 1, para. 123.

116. The nature and amount of the reparations depend on both the characteristics of the violations committed and the pecuniary and non-pecuniary damage that has been caused. Reparations should be proportionate to the violations that have been declared in the judgment and should not make the victims or their successors either richer or poorer. [FN74]

[FN74] Cf. Case of Acosta Calderón, supra note 1, para. 148; Case of Yatama, supra note 1, para. 233, and Case of Fermín Ramírez, supra note 1, para. 124.

Arguments of the Commission

117. With regard to the beneficiaries, the Commission indicated that Mr. Raxcacó Reyes is the beneficiary of the reparations ordered by the Inter-American Court.

118. Regarding pecuniary damage, the Commission stated that it did not consider that compensation for this concept was applicable in the instant case.

119. However, regarding non-pecuniary damage, the Commission alleged that it was pertinent for the Court to order the State to pay compensation, based on the principle of equity, to repair the damage inflicted on Mr. Raxcacó Reyes for this concept.

120. Also, regarding other forms of reparation, the Commission requested the Court to order the State:

- (a) To adopt any legislative or other measures necessary to ensure that the death penalty is imposed with strict respect for the rights and freedoms guaranteed by the Convention;
- (b) To adapt its domestic laws to the Convention, in order to guarantee the rights embodied therein;
- (c) To reform Article 201 of the Penal Code, in order to define different categories of kidnapping, according to the gravity of the facts, taking into account the circumstances of the crime and of the person responsible;
- (d) To abstain from applying Article 201 of the Penal Code, while the said reforms are being effected;
- (e) To regulate the remedy of pardon or commutation of sentence;
- (f) To adapt the prison regime conditions to the international standards applicable in this sphere; and
- (g) To declare the nullity of the sentence and to decide another one which imposes on Mr. Raxcacó Reyes a punishment proportionate to the nature and gravity of the crime committed.

121. Lastly, the Commission requested the Court to order the State to assume the payment of the costs and expenses in which Mr. Raxcacó Reyes incurred in processing the case at both the national level and before the inter-American system for the protection of human rights.

Arguments of the representatives

122. Regarding the beneficiaries, the representatives stated that Mr. Raxcacó Reyes is the beneficiary of the reparations ordered by the Court.

123. With regard to pecuniary damage, the representatives alleged that, owing to the maximum security regime imposed on Mr. Raxcacó Reyes, he has been unduly deprived of his right to work in the prison and to earn the minimum wage that the Guatemalan Constitution guarantees to workers. Consequently, they requested the Court to condemn the State to pay compensation for loss of earnings equivalent to the wages that Mr. Raxcacó Reyes would have earned from August 6, 1997, to date, in accordance with the minimum wage in force in Guatemala.

124. Regarding non-pecuniary damage, the representatives stated that:

- (a) The State should pay Mr. Raxcacó Reyes a compensation based on the principle of equity, because, from the facts of the case, it is clear that Mr. Raxcacó Reyes has suffered moral and emotional anguish by being tried and sentenced to death in a proceeding that violated due process, in addition to the mental suffering resulting from awaiting the execution of the punishment and being subjected to the death row phenomenon, as well as to the prison conditions in which he is kept; and
- (b) The sufferings endured by Mr. Raxcacó Reyes have been increased because the possibility of pardon, amnesty or commutation of sentence does not exist in Guatemala, and the State is unwilling to adapt its legislation to international norms.

125. Also, regarding other forms of reparation, the representatives requested the Court to order the State:

- (a) To adapt its domestic legislative framework and adopt the necessary legislative or other measures to ensure that the death penalty is imposed, strictly respecting the rights and freedoms guaranteed by the American Convention;
- (b) To reform Article 201 of the Guatemalan Penal Code, since it violates the American Convention. The reform should respect the contents of this international instrument. To this end, the reform to the law should include the introduction of different categories in the crime classified as kidnapping, corresponding to the different degrees of seriousness of the facts, taking into account the circumstance of the crime and of those responsible. Also, the different levels of severity of the punishment should be ranked in relation to the gravity of the facts and the guilt of the accused, respecting the principle of the proportionality of the punishment;
- (c) To establish a domestic procedure for processing applications for pardon, which should respect the norms of due process of law embodied in the American Convention;
- (d) To improve prison conditions, principally to achieve the following objectives:
 - (i) To provide medical and psychological care and to ensure that Mr. Raxcacó Reyes receives medical evaluation in a hospital establishment outside the prison center and that, based on the respective findings, he is provided with the necessary care and medication;
 - (ii) To feed prisoners adequately, in accordance with acceptable standards of nutrition and hygiene;
 - (iii) To expand the visiting regime for prisoners to ensure that their family and relatives can have real and effective physical contact with them, eliminating undue restrictions;
 - (iv) The prison system should ensure that the ties of affection between prisoners and their next of kin can be maintained by means of different types of contact. In the specific case of Mr. Raxcacó Reyes, he should be authorized to receive conjugal visits and to be in telephone communication with his wife;
 - (v) To provide the conditions to ensure that professional technical assistance visits can be carried out in adequate physical spaces, and for the time and with the privacy necessary;
 - (vi) To provide appropriate conditions for physical exercise and maintenance, adequate hours of sunlight, and access to adequate ventilation and air;
 - (vii) To implement, provide and support public or private initiatives for rehabilitation, training, recreation, spiritual development, and access to work;
 - (viii) To promulgate a law that regulates the prison system, incorporating the rights and obligations of prisoners, and guaranteeing them the right to serve their prison sentences in a way that is compatible with the dignity of the human being; and
 - (ix) To adapt its laws in order to establish that anyone sentenced to a term of imprisonment can reduce it by performing educational and work activities.
- (e) To acknowledge publicly that it incurred international responsibility when it reformed Article 201 of the Penal Code and revoked Decree No. 159 with regard to pardon; it should also acknowledge that being on death row implies cruel, inhuman and degrading treatment, which is aggravated by the abysmal prison conditions in high and maximum security centers. The State's highest authorities should attend the act during which international responsibility is acknowledged and it should be publicized through the principal national media;

- (f) To publish the judgment that the Court delivers in this case in the official gazette of Guatemala and in a newspaper with national circulation;
- (g) To abstain from executing anyone who has been condemned to death based on a law that is incompatible with the American Convention, such as Article 201 of the Penal Code. The State should also abstain from imposing the death penalty in cases of kidnapping until it has carried out the pertinent reforms;
- (h) To conduct a new criminal trial for the crime of which Mr. Raxcacó Reyes is accused, applying the reformed law, which is the only way to ensure an individualized and proportionate punishment, resulting from a fair trial that considers all the specific circumstances and elements of the case; and
- (i) To modify the prison term for the crime of kidnapping. The current punishment of 25 to 50 years of imprisonment is contrary to the American Convention. The length destroys the identity of the person who has been sentenced and causes irreversible psychological damage.

126. With regard to costs and expenses, the representatives requested the Court to order the State to pay the costs arising at the national and international levels. To this end, they calculated the sum of US\$2,090.87 (two thousand and ninety United States dollars and eight-seven cents) in favor of IECCPG, and US\$2,918.92 (two thousand nine hundred and eighteen United States dollars and ninety-two cents) in favor of CEJIL. They also requested that the expenses incurred by Mr. Raxcacó Reyes for the professional fees of his representatives at the national level should be established, according to the principle of equity.

Arguments of the State

127. The State requested that, irrespective of its ruling in this case, the Court should take into consideration the country's economic situation and reject the request for financial reparations made by the representatives, and also the procedural costs and expenses.

Findings of the Court

A) BENEFICIARY

128. In the terms of Article 63(1) of the American Convention, the Court considers that Ronald Ernesto Raxcacó Reyes is the injured party, as victim of the violations described in the preceding chapters of this judgment.

B) PECUNIARY AND NON-PECUNIARY DAMAGE

129. Pecuniary damage presumes loss of or detriment to income, the expenses incurred as a result of the facts, and the consequences of a pecuniary nature that have a causal relationship with the violations. [FN75] Non-pecuniary damage can include the suffering and hardship caused to the victims of human rights violations and to their next of kin, as well as the harm to objects of very significant value to an individual, and to his living conditions. [FN76]

[FN75] Cf. Case of Acosta Calderón, *supra* note 1, para. 157; Case of Yatama, *supra* note 1, para. 242, and Case of Fermín Ramírez, *supra* note 1, para. 129.

[FN76] Cf. Case of Acosta Calderón, *supra* note 1, para. 158; Case of Yatama, *supra* note 1, para. 243, and Case of Fermín Ramírez, *supra* note 1, para. 129.

130. In this case, the Court will not establish compensation for pecuniary damage related to the lack of work or economic activity of Mr. Raxcacó Reyes, as requested by the representatives, because there is no causal relationship between the violations that have been declared and the damage invoked.

131. With regard to non-pecuniary damage, the Court recognizes that Mr. Raxcacó Reyes was subjected to inhuman, cruel and degrading prison conditions, that he was sentenced to a mandatory death penalty for a crime for which this punishment was not provided when the State ratified the American Convention, and that he was deprived of his right to apply for pardon or commutation of sentence, all of which produced suffering and also physical and psychological consequences (post-traumatic stress) (*supra* para. 43(19) to 43(23)). The Court considers that, in the instant case, it is not pertinent to order the payment of financial compensation for non-pecuniary damage, bearing in mind that this judgment constitutes, *per se*, a form of reparation, [FN77] and that the actions of a public nature or with public effects described in the following section signify due reparation in the terms of Article 63(1) of the American Convention.

[FN77] Cf. Case of Acosta Calderón, *supra* note 1, para. 159; Case of Yatama, *supra* note 1, para. 260, and Case of Fermín Ramírez, *supra* note 1, para. 130.

c) OTHER FORMS OF REPARATION

a) Adaptation of domestic legislation to the American Convention

132. The Court declares the existence of a violation of Articles 4(1), 4(2) and 4(6) of the Convention, in relation to Articles 1(1) and 2 thereof. Consequently, it orders that the State should adopt the legislative, administrative and any other measures necessary to adapt its domestic legislation to the American Convention; in particular:

(i) Modification, within a reasonable period, of Article 201 of the Penal Code in force, in order to define various specific crime categories that distinguish the different forms of kidnapping or abduction, based on their characteristics, the gravity of the facts, and the circumstances of the crime, with the corresponding provision of different punishments, proportionate to each category, and the empowerment of the courts to individualize punishments in keeping with the specifics of the crime and the perpetrator, within the maximum and minimum limits that each crime category should include. This modification should, under no circumstances, expand the list of crimes punishable with the death penalty established prior to ratification of the American Convention. While reforming this Article, the State must abstain

from applying the death penalty and executing those convicted exclusively of the crime of kidnapping or abduction.

(ii) Adoption, within a reasonable period, of a procedure that ensures that any person condemned to death has the right to apply for and, if applicable, obtain pardon or commutation of sentence, in accordance with a regulation that establishes the authority empowered to grant this, the presumptions of admissibility and the respective procedure; in these cases, the sentence must not be executed while the decision on the pardon or commutation of sentence applied for is pending. [FN78]

[FN78] Cf. Case of Fermín Ramírez, *supra* note 1, para. 130.

b) Revocation of the death sentence against Mr. Raxcacó Reyes

133. The Commission and the representatives requested that a new criminal trial should be held for Mr. Raxcacó Reyes, in which the reformed legislation would be applied. In its final written arguments, the Commission reconsidered this claim, taking into account that what is at issue in the instant case, is not the validity of the criminal proceeding that was conducted against the victim, but rather the consequence established by law; namely, the death penalty. This Court orders that, within a reasonable period, the punishment imposed on Mr. Raxcacó Reyes in the judgment of the Sixth Court for Criminal Sentencing, Drug-Trafficking and Environmental Crimes (*supra* para. 43(10)) should be annulled and, without the need for a new trial, another punishment should be ordered, which, under no circumstances, may be the death penalty. To this end, the Court takes into account that this punishment is incompatible with the American Convention, based on the considerations in this regard included in another section of this judgment (*supra* paras. 54 to 90), from which it is clear that the State could not apply this punishment in the specific case examined herein. The State must ensure that the new punishment is proportionate to the nature and gravity of the crime punished and that it takes into account any attenuating or aggravating circumstances related to the case. To this end, before delivering judgment, it should offer the parties the opportunity to exercise their right to a hearing.

c) Adaptation of prison conditions to international standards

134. As the Court has ordered in other cases, [FN79] and as a guarantee of non-repetition, the State must adopt, within a reasonable period, the necessary measures to adapt prison conditions to the corresponding international standards.

[FN79] Cf. Case of Fermín Ramírez, *supra* note 1, para. 130; Case of Caesar, *supra* note 55, para. 134, and Case of Lori Berenson Mejía, *supra* note 57, para. 241.

135. From the evidence submitted in this case, it is evident that Mr. Raxcacó Reyes suffers physical and psychological problems (*supra* para. 43(20)). The Court therefore considers it appropriate to order, as it has in other cases [FN80] that, as of notification of this judgment, the

State should provide Mr. Raxcacó Reyes, if he should require it and for the time necessary, without any cost and through the national health services, with adequate medical and psychological treatment, including any medication prescribed by duly qualified specialists. Also, since Mr. Raxcacó Reyes' wife, Olga Isabel Vicente, is in prison as a result of her conviction for participating as an accomplice in the kidnapping of which Mr. Raxcacó Reyes is accused (supra paras. 43(21) and 43(22)), the State must order the necessary measure to allow him to receive visits from his wife. Lastly, the State must adopt, within a reasonable time, the educational, work-related and other measures necessary to ensure the social readaptation of Mr. Raxcacó Reyes when he has served the sentence imposed, as provided for in Article 5(6) of the American Convention:

Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

[FN80] Cf. Case of Fermín Ramírez, supra note 1, para. 130; Case of Caesar, supra note 55, para. 131, and Case of Lori Berenson Mejía, supra note 57, para. 238.

d) Dissemination of the judgment

136. As it has on other occasions, [FN81] the Court orders that the State shall publish in the official gazette and in another newspaper with widespread national circulation, at least once, the chapter on Proven Facts, paragraphs 65, 66, 72, 81, 82, 85, 86, 102 and 113, corresponding to Chapters VIII, IX, X and XI, and the first to sixteenth operative paragraphs of this judgment. The publication should include the titles of the said chapters and omit the footnotes. The publication should be carried out within one year from notification of this judgment.

[FN81] Cf. Case of Acosta Calderón, supra note 1, para., 164; Case of Yatama, supra note 1, para. 252, and Case of the Indigenous Community Yakye Axa, supra note 4, para. 227.

e) Costs and expenses

137. The Court has established that costs and expenses are included in the concept of reparation embodied in Article 63(1) of the American Convention. [FN82] The Court must prudently assess their scope, considering the expenses incurred in both the domestic and the inter-American jurisdiction and taking into account the authentication of the expenses incurred, the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be based on the principle of equity. [FN83]

[FN82] Cf. Case of Yatama, supra note 1, para. 264; Case of the Indigenous Community Yakye Axa, supra note 4, para. 231, and Case of the Moiwana Community. Judgment of June 15, 2005. Series C No. 124, para. 222.

[FN83] Cf. Case of Yatama, supra note 1, para. 264; Case of the Indigenous Community Yakye Axa, supra note 4, para. 231, and Case of the Moiwana Community, supra note 83, para. 222.

138. The Court takes into consideration that Mr. Raxcacó Reyes acted through his representatives in both the domestic sphere and before the Commission and this Court. Therefore, the Court considers that it is equitable to order the State to reimburse Mr. Raxcacó Reyes the sum of US\$5,000.00 (five thousand United States dollars) or the equivalent in Guatemalan currency, for costs and expenses. Mr. Raxcacó Reyes shall deliver the corresponding amounts to his representatives, in keeping with the assistance they have provided.

XIII. MEANS OF COMPLIANCE

139. To comply with this judgment, the State must effect the payment for reimbursement of costs and expenses (supra para. 138) within one year of notification of this judgment; and must adopt the other measures of reparation in the terms of paragraphs 132 to 136 of this judgment.

140. The State may comply with its pecuniary obligations by payment in United States dollars or the equivalent amount in the State's national currency, using the exchange rate between the two currencies in force on the New York, United States of America, market the day before the payment to make the respective calculation.

141. If, for reasons not attributable to the State, Mr. Raxcacó Reyes is unable to receive the reimbursement of costs and expenses in order to deliver the corresponding amounts to his representatives within the indicated period of one year from notification of this judgment, the State shall deposit the amount in his favor in an account or a deposit certificate in a solvent Guatemalan banking institute, in United States dollars, and in the most favorable financial conditions permitted by law and banking practice. If, after 10 years, the amount corresponding to the reimbursement of these expenses has not been claimed, it shall revert to the State with the accrued interest.

142. The amount allocated in this judgment for expenses may not be affected, reduced or conditioned by current or future taxes or charges. Consequently, it shall be delivered to Mr. Raxcacó Reyes integrally, as established in this judgment.

143. If the State falls into arrears, it shall pay interest on the amount owed, corresponding to banking interest on arrears in Guatemala.

144. In accordance with its consistent practice, in exercise of its attributes and in compliance with its obligations deriving from the American Convention, the Court shall exercise the authority inherent in its attributes to monitor compliance with all the terms of this judgment. The case will be closed when the State has fully complied with the terms of the judgment. Within one year of notification of the judgment, Guatemala shall provide the Court with a first report on the measures adopted to comply with the judgment.

XIV. OPERATIVE PARAGRAPHS

145. Therefore,

THE COURT

DECLARES,

Unanimously, that:

1. The State violated to the detriment of Mr. Raxcacó Reyes the rights embodied in Article 4(1), 4(2) and 4(6) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 thereof, in the terms of paragraphs 54 to 90 of this judgment.
2. The State violated to the detriment of Mr. Raxcacó Reyes the right to humane treatment embodied in Article 5(1) and 5(2) of the American Convention on Human Rights, in relation to Article 1(1) thereof, in the terms of paragraphs 93 to 102 of this judgment.
3. It has not been proved that the State violated to the detriment of Mr. Raxcacó Reyes the right to judicial protection embodied in Article 25 of the American Convention on Human Rights, for the reasons described in paragraphs 110 to 113 of this judgment.
4. This judgment constitutes, per se, a form of reparation, in the terms of paragraph 131 hereof.

AND DECIDES:

unanimously that:

5. The State shall modify, within a reasonable time, Article 201 of the Penal Code in force, in order to define various specific crime categories that distinguish the different forms of kidnapping or abduction, based on their characteristics, the gravity of the facts, and the circumstances of the crime, with the corresponding provision of different punishments, proportionate to each category, and also the empowerment of the courts to individualize punishments in keeping with the specifics of the crime and the perpetrator, within the maximum and minimum limits that each crime category should include. This modification shall, under no circumstances, expand the list of crimes punishable with the death penalty established prior to ratification of the American Convention.
6. While carrying out the modifications indicated in the previous paragraph, the State shall abstain from applying the death penalty and executing those convicted of the crime of kidnapping or abduction, in the terms of paragraph 132 of this judgment.
7. The State shall adopt, within a reasonable period, a procedure that ensures that any person condemned to death has the right to apply for and, if applicable, obtain pardon or commutation of sentence, in accordance with a regulation that establishes the authority empowered to grant this, the presumptions of admissibility and the respective procedure. In such cases, the sentence shall not be executed while the decision on the pardon or commutation of sentence applied for is pending.
8. The State shall annul the punishment imposed on Mr. Raxcacó Reyes in the judgment of the Sixth Court for Criminal Sentencing, Drug-Trafficking and Environmental Crimes (supra para. 43(10)) within a reasonable time and, without the need for a new trial, shall decide another

punishment which, under no circumstances, may be the death penalty. The State shall ensure that the new punishment is proportionate to the nature and seriousness of the crime prosecuted and takes into account any attenuating or aggravating circumstances related to the case; to this end, before delivering judgment, it shall offer the parties the opportunity to exercise their right to a hearing.

9. The State shall adopt, within a reasonable time, the necessary measures to adapt prison conditions to the corresponding international standards.

10. The State shall provide Mr. Raxcacó Reyes, as of notification of this judgment and after he has expressed his consent, for the time necessary, without any cost and through the national health services, with adequate medical and psychological treatment, including the medication prescribed by duly qualified specialists.

11. The State shall adopt, as of notification of this judgment, the necessary measures to enable Mr. Raxcacó Reyes to receive periodic visits from Olga Isabel Vicente.

12. The State shall adopt, within a reasonable time, the educational, work-related and other measures necessary to ensure the social readaptation of Mr. Raxcacó Reyes when he has served the sentence imposed in accordance with the eighth operative paragraph of this judgment.

13. The State shall publish, within one year from notification of this judgment, in the official gazette and in another newspaper with widespread national circulation, at least once, the chapter on Proven Facts, paragraphs 65, 66, 72, 81, 82, 85, 86, 102 and 113, corresponding to Chapters VIII, IX, X and XI, and the first to sixteenth operative paragraphs of this judgment. The publication shall include the titles of the said chapters and omit the footnotes.

14. The State shall make the payment for reimbursement of expenses within one year of notification of this judgment, in the terms of paragraph 138 hereof.

15. The State's obligations in the context of the provisional measures ordered by the Court in the instant case are replaced, exclusively with regard to Mr. Raxcacó Reyes, by those ordered in this judgment, as of the date on which it is notified.

16. It shall monitor full compliance with this judgment, in exercise of its attributes and in compliance with its obligations under the American Convention, and shall close this case when the State has complied fully with its terms. Within one year of notification of the judgment, Guatemala shall provide the Court with a report on the measures adopted to comply with it.

Judge Sergio García Ramírez informed the Court of his concurring opinion which accompanies this judgment.

Sergio García Ramírez
President

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

Alejandro Sánchez Garrido
Judge ad hoc

Pablo Saavedra Alessandri
Secretary

So ordered,

Sergio García Ramírez
President

Pablo Saavedra Alessandri
Secretary

SEPARATE OPINION OF JUDGE SERGIO GARCIA RAMIREZ IN RAXCACO REYES V.
GUATEMALA. JUDGMENT OF SEPTEMBER 15, 2005

A) THE DEATH PENALTY IN THE AMERICAN CONVENTION AND THE INTER-AMERICAN CASE LAW

1. In the case referred to by this separate opinion accompanying the judgment adopted unanimously by Inter-American Court, the Court once again broaches the issue of the death penalty, previously examined in the performance of the Court's advisory functions: OC-3/83 on Restrictions to the Death Penalty (Articles 4(2) and 4(4) American Convention on Human Rights) of September 8, 1983, and with regard to the contentious matters raised in various applications: the Hilaire, Constantine and Benjamin et al. cases (judgment of June 21, 2002) and the Fermín Ramírez case (judgment of June 18, 2005), to which I will refer at some length below. In addition, the Court issued an order on June 24, 2005, as a result of a consultation submitted by the Inter-American Commission on Human Rights concerning matters relating to capital punishment, which I will also examine

2. Thus, there is nothing new as regards raising such issues before the inter-American jurisdiction; however, each case has contributed relevant aspects to them. The analysis of these aspects helps shape the Court's legal doctrine on this point of law, whose importance is evident and, as a whole, they involve a contemporary review of the matter from the perspective of inter-American case law. In recent years, particularly, this has begun to permeate strongly the laws and case law of the countries that have accepted the Court's contentious jurisdiction. The reiteration of certain principles can have an influence on the political and juridical decisions of the countries of the hemisphere. Moreover, this effect is the greatest contribution that an international human rights court can make, since it is not a final instance for hearing domestic lawsuits and cannot hear a large number of cases.

3. When the final version of the American Convention on Human Rights was examined and signed in 1969, there was a strong "pro-life" tendency that contested the legitimacy and the utility of the death penalty. This tendency, which was very strong at both the regional and the global level, was revealed by the work of the Inter-American Specialized Conference on Human Rights, which met in San José from November 7 to 22, 1969. At that time, it was not possible to take the essential step of abolishing the death penalty. Perhaps the delegates did not encounter favorable conditions for this step forward; nevertheless they did not overlook the desirability of

issuing a ruling that expressed the belief of many countries – and, in any case, of innumerable persons – that capital punishment should be eliminated. This was a warning sign and a guideline for future work, which is still ongoing.

4. As I recalled in my concurring opinion to the judgment in the *Hilaire, Constantine and Benjamin et al.* cases, 14 States – that is, most of those present at the meeting in San José – expressed their intention of advancing the cause of humanity very shortly by abolishing capital punishment. During the plenary session of November 22, 1969, following the signature of the final Conference Proceedings and before the closing address, the declaration signed by these States was read. It established the desirability of issuing an additional protocol to the American Convention stipulating the elimination of the death penalty in this region.

5. The Declaration stated: “The undersigned Delegations, participants in the Specialized Inter-American Conference on Human Rights, in response to the majority sentiment expressed in the course of the debates on the prohibition of the death penalty, in agreement with the most pure humanistic traditions of our peoples, solemnly declare our firm hope of seeing the application of the death penalty eradicated from the American environment as of the present and our unwavering goal of making all possible efforts so that, in a short time, an additional protocol to the American Convention on Human Rights - Pact of San José, Costa Rica - may consecrate the final abolition of the death penalty and place America once again in the vanguard of the defense of the fundamental rights of man.”

6. The Declaration was signed by the delegations of the following countries, which I mention in the order used by the Chairman of the Plenary Session: Costa Rica, Uruguay, Colombia, Ecuador, El Salvador, Panama, Honduras, the Dominican Republic, Guatemala, Mexico, Venezuela, Nicaragua, Argentina and Paraguay (Cf. *Inter-American Specialized Conference on Human Rights, San José, Costa Rica, November 7 to 22, 1969, Actas y Documentos, OEA/Ser.K/XVI/1.2, Washington, D.C., 1973, p. 467*). At the date of the Declaration, several of these countries still retained the death penalty among their domestic laws. Accordingly, the document had a twofold intention: of international scope, in all cases; of national scope, in some of them.

7. The concern of the Conference, embodied in the Convention, can be seen in the formula used in Article 4 of the Pact, to which the Inter-American Court has had to refer on several occasions. The Article appears until the title “Right to Life.” Under this phrase – which expresses the most valuable entitlement, consequent with the most important juridical right subject to international protection: life – one paragraph of the Article expresses respect for the life of every person, and immediately initiates a normative consideration on the deprivation of life: “No one shall be arbitrarily deprived of his life.” The remaining six paragraphs of the Article on the “Right to Life” refer to the death penalty, and they are all concerned with announcing prohibitions, restrictions and exclusions. In brief, the authors of the Convention began immediately to close the door they had reluctantly left open. The same situation had occurred in the case of the International Covenant on Civil and Political Rights three years before: of the six paragraphs that compose Article 6 on the right to life, four refer exclusively to the death penalty.

8. This is why the Inter-American Court, when dealing with the death penalty in one of its first advisory opinions, indicated clearly that, even though the American Convention did not eliminate the death penalty, “it reveals a clear tendency to restrict the scope of this penalty as regards both its imposition and its application”; and that, consequently, and with regard to the issue examined, “the Convention adopts an approach that is clearly incremental in character. That is, without going so far as to abolish the death penalty, the Convention imposes restrictions designed to delimit strictly its application and scope, in order to reduce the application of the penalty to bring about its gradual disappearance” (Restrictions to the Death Penalty (Articles 4(2) and 4(4) American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A, No. 3, paras. 52 and 57).

9. In the years following 1969, humanity returned to the attack, at the universal level and at the European and American regional levels. In 1984 the Safeguards Guaranteeing Protection of the Right of Those Facing the Death Penalty were issued, and in 1989 the Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty was signed and adopted by the United Nations General Assembly. In Europe, two protocols to the 1950 Convention were signed with the same increasingly emphasized purpose: Protocol No. 6 of April 28, 1983, and Protocol No. 13 of May 3, 2002.

10. In our hemisphere, the Protocol to the American Convention on Human Rights to Abolish the Death Penalty of June 8, 1990, was signed. Up until June 2005, this instrument had been ratified by Brazil, Costa Rica, Ecuador, Nicaragua, Panama, Paraguay, Uruguay and Venezuela. The 1990 American Protocol has begun its own ascent towards full acceptance by the States of the hemisphere or, at least, by an important number of them: the members of the American Convention on Human Rights system. It constitutes the target announced by those 14 countries that submitted the Declaration I mentioned above to the Specialized Inter-American Conference on Human Rights.

11. The preambular paragraphs to the 1990 Protocol express the reasons for the instrument: recognition of the right to life and restriction of the death penalty, under Article 4 of the Convention; the inalienable right of everyone “to respect for his life, a right that cannot be suspended for any reason”; the tendency of the American States to favor the abolition of the death penalty; the irrevocable consequences of the application of the death penalty, which “forecloses the correction of judicial error and precludes any possibility of changing or rehabilitating those convicted” (a reference to the “readaptation” purpose of punishments involving deprivation of liberty, reflected in Article 5(6) of the American Convention); the need to “ensure more effective protection of the right to life”; the pertinence of arriving at “an international agreement [...] that will entail progressive development of the American Convention on Human Rights”; and the expression of the intention of the States Parties to the Convention “to adopt an international agreement with a view to consolidating the practice of not applying the death penalty in the Americas.”

12. It is evident that the 1990 Protocol continues on the path towards the elimination of the death penalty, in its own sphere and at the corresponding stage, an elimination that we trust will be final, as has been the normative exclusion – even though at times actions rebel against laws – of other primitive and unjustified forms of response to crime. It is in this restrictive sense, then,

that Article 4 must be interpreted. In this case, the *pro homine* – or *pro personae* – principle invariably endorsed by the Inter-American Court, as is to be expected of the human rights system (attentive to the content of the corresponding juridical declarations and to the nature of the respective international conventions), follows the most restrictive application of the death penalty. It does not eliminate it, when trying to apply treaty-based provisions that expressly retain it, but provides the strictest interpretation of these norms.

13. This reference to the Court's method of interpretation in cases submitted to its consideration, and which it has clearly used in the Case of Raxcacó Reyes, as on previous occasion, allows us to recall that *pro personae* constitutes a method of examining the ultimate meaning of juridical provisions in the sphere that concerns us for the effects of their jurisdictional or non-jurisdictional application; in this sense, it is a "principle of interpretation" that is amply accredited, but it is also a rigorous principle for the elaboration of national and international norms on this issue, and owing to this, it is also "a principle of regulation."

14. Of particular significance is the position of the Rome Statute of the International Criminal Court, which does not include the death penalty among the punishments contemplated in the substantive international penal law system. I believe that this fact is especially eloquent, both because this penal legal system has been designed precisely to confront the most serious crimes against the most important right whose protection is of interest to humanity – a protection that suggests particularly severe penal responses – and because the 1998 Statute constitutes the most recent expression of a penal system agreed on between countries with diverse juridical traditions, including several that still retain capital punishment in their domestic laws.

B) A RECENT REVISION

15. I believe that I should mention here the request for an advisory opinion formulated by the Inter-American Commission on Human Rights on April 20, 2004, which was responded to by an order of the Court of June 24, 2005. The Commission requested the Inter-American Court's opinion on certain provisions relating to the death penalty adopted by Caribbean countries, especially those referring to the mandatory death penalty. The Court decided not to answer the questions posed, because "it had already established its opinion on the points set out in this consultation," as it indicated in the preambular paragraphs of the order of June 24, 2005.

16. Reading these preambular paragraphs that justify the decision adopted by the Court, also informs us of the Court's formal position on the issues raised and involves a review of the established case law. This explains my interest in recalling now, in brief, the content of the Commission's questions and the Court's observations in the said preambular paragraphs, some of which are reflected in the judgment in the Case of Raxcacó Reyes and in my concurring opinion.

17. The Commission asked whether it was compatible with the provisions of the inter-American system "that a State adopt legislative or other measures that deny those condemned to death access to a judicial or other effective remedy to contest the mandatory nature of the punishment imposed." In this regard, the Court invoked (ninth preambular paragraph) its case law concerning Article 2 of the Convention, which alludes to the need to adapt the national legal

system to the international legal system, and referred to the decision in *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*.

18. We should recall that the obligation to adapt domestic legislation to international law has been sovereignly accepted by the State, by means of an explicit commitment documented by the ratification of the international instrument. The rulings mentioned by the Court in this part of the order establish “the incompatibility with the American Convention of laws that impose the death penalty mandatorily and, consequently, the obligation of the State to modify them and not to apply them, because they result in arbitrary deprivation of life by not taking into consideration the particular circumstances of the accused and the specific characteristics of the crime.” Likewise, the Court affirmed the State’s obligation “to guarantee the most strict and rigorous respect for the right to a fair trial when applying this type of punishment,” and confirmed the “right of every person condemned to death to apply for amnesty, pardon, or commutation of sentence, in accordance with the provisions of Article 4(6) of the American Convention”.

19. The Commission also asked about the compatibility with various inter-American provisions of legislative or other measures adopted by a State “that deny those condemned to death access to a judicial remedy or any other effective remedy to contest the punishment imposed, based on the delay or the conditions in which the person is being detained.” On this point, the Inter-American Court invoked (tenth preambular paragraph) the judgments in the *Hilaire... cases*, and in *Fermín Ramírez v. Guatemala*. On those occasions, the Court had “ordered the State to abstain from executing the death penalty, taking into account, among other matters, the prison conditions which the victims were and are subjected to, which violate Article 5 (Right to Humane Treatment) of the Convention.” There is, thus, an implicit recognition of equity.

20. Finally, the consultation of April 20 asked about the compatibility with the inter-American norms of State measures “that deny those condemned to death access to a judicial or any other effective remedy to contest the punishment imposed, based on the fact that they have a proceeding pending before the inter-American human rights system.” On this issue, the Court referred to its rulings on provisional measures and to the judgment in the *Hilaire... cases*. With regard to provisional measures, the Court has decided: “in order not to obstruct the processing of a case before the inter-American system and to prevent irreparable damage, the State may not execute” the death penalty. Incidentally, the International Court of Justice ruled similarly in the *LeGrand and Avena cases*, also relating to proceedings that had culminated in the application of the death penalty and that were in question. In the judgment in the *Hilaire... cases*, the Inter-American Court “declared the violation of Article 4 (Right to Life) of the Convention because the State executed a victim during the international proceeding in violation of the orders of the Court in its decisions on provisional measures.”

21. In the latter cases, three points should be emphasized, in particular: (a) the mandatory nature of provisional measures for State that are bound by the normative system that provides the framework for their adoption; (b) the need for special attention to be paid to compliance with such measures when failure to comply with them may result in irreparable damage; a concept that arises from the very reason for these precautionary instruments, and (c) the existence of a

violation when the measure is disregarded and, in consequence, the right being protected by the measure is affected; in those cases, there was an arbitrary violation of that right.

C) SCOPE OF ARTICLE 4 OF THE AMERICAN CONVENTION ON HUMAN RIGHTS: EXPANSION OF THE HYPOTHESIS AND SERIOUSNESS OF THE FACT

22. We cannot ignore that, despite substantial advances on the path towards abolition (to which I have alluded above), the authorization and application of the death penalty still persists in some countries – none of them a party to the American Convention – and on an isolated basis in others. It has not been possible to declare that proscription of the death penalty is a principle of peremptory law; namely, international *jus cogens*, which entails obligations *erga omnes* of the States, as is, conversely – and paradoxically – the absolute and definitive exclusion of torture and cruel, inhuman and degrading treatment (in this regard, see the judgments in the Cantoral Benavides, "Street Children" (Villagrán Morales et al.), Maritza Urrutia, Gómez Paquiyauri Brothers, and Caesar cases), and even of certain punishments that are still permitted – although rarely and censured by the Constitutions of the countries that allow them – under some penal laws: punishments that entail torture or treatment of that nature, as the Inter-American Court has indicated. An example of the latter is the judgment delivered in the Caesar case regarding a national judicial ruling that called for the application of the punishment of flogging, provided for in the penal laws.

23. The Inter-American Court has acted within this context when examining and deciding the Case of Raxcacó Reyes in the judgment of September 15, 2005. First, the Court considered the scope of Article 4(2) of the American Convention with regard to the case *sub judice*; a restrictive provision on the one hand and an abolitionist provision on the other. Both aspects of this provision were examined: (a) from the perspective of the authorization of capital punishment only for the so-called "most serious crimes," which is found in the first part of paragraph 2, and (b) from the perspective of the future proscription, in relation to States that, at the time they ratified the Convention or adhered to it, had not yet abolished the death penalty, as regards "crimes to which it is not applied presently"; that is, to crimes punishable by a juridical effect other than the death penalty.

24. Article 4(2), which the Court declares has been violated, contains "substantive" and "non-substantive" points of law. With regard to the former, the paragraph refers to three issues: (a) the importance of the crime, considered in itself ("the most serious crimes"); (b) the specific respect for the principle of legality (*nulla poena sine praevia lege*), and (c) the restriction of the death penalty to crimes for which it is applied presently (namely, illegal actions punishable by the death penalty when the State became bound by the Convention) and the absolute exclusion of crimes "to which it is not applied presently." I shall not examine the second issue, which is not relevant to the present case. I shall only examine the first and third. Furthermore, there is no need to examine the "non-substantive" elements contained in Article 4(2) at this time: competent court and final judgment, with regard to which no violation of the Convention was found.

25. In my concurring opinion to the judgment in the Hilaire... cases, I examined the concept of "the most serious crimes." At that time, I observed, and now repeat, that, in order to establish the seriousness of the crimes that may be punished by the death penalty, certain objective

elements of the criminal judgment must be taken into account; above all, the juridical right protected by the crime category and harmed by the violator; and then, the way in which this juridical right has been affected, which can also involve new information to weigh the greater or lesser seriousness of the conduct executed by the agent. Evidently, the most important juridical right protected by the penal system is human life. This is also the central right – the support or linchpin of all the others – in the order of human rights.

26. The greatest harm to this right is its elimination or destruction, not the attempt to eliminate it. In terms of penal law, we are alluding to the crime of homicide and not to attempted homicide and, subjectively, to the perpetrator of the crime, not to the accomplice, collaborator or accessory after the fact. However, this is not sufficient to resolve the point that we are examining now, because there are different manifestations of illicit and culpable elimination of human life with malice aforethought; indeed, criminal extinction exists in the case of simple homicide (basic type), but also in the case of aggravated homicide (due to the relationship that exists between the perpetrator and the victim, the motives of the former, the means used, etcetera). Consequently, the law usually provides for different punishments for each category of homicide.

27. If aggravated homicide is the most serious crime, the possibility of applying the death penalty should be confined to this case. I prefer not to enter into other considerations on this matter now, such as those derived from the difference between aggravated homicide when the victim is an individual and the same conduct (essentially) when the victim is a group or a multitude (e.g. genocide). Ultimately, all these cases refer to intentional, illegal and culpable deprivation of human life.

28. Other crimes are not as serious, because they do not affect a right of the same rank as human life. Other rights are not comparable, even though they are extraordinarily relevant and must, therefore, be protected by penal laws: physical or mental integrity (injuries), freedom (kidnapping or abduction), property (theft), etcetera. In brief, the most serious crimes, which entail the application of the most severe punishments and, specifically, the most severe of these: death, and which can be punished by the death penalty (in a State that retains this and must subject this retention to the stipulations of the American Convention) are aggravated homicide.

29. The excessive application of the penal system – and, because it is excessive, possibly arbitrary, in violation of Article 4 of the Convention – revealed by meting out the most severe punishment for acts that do not constitute the most serious crimes, is also evident when the penal laws exclude the possibility of the court weighing the characteristics of the act and the conduct of the perpetrator. This is what occurs in the case of the “mandatory death penalty.”

30. When the mandatory, almost mechanical, application of a specific punishment is ordered for any illegal conduct that produces a determined result, the comprehensive assessment of the fact with all its components is excluded (in other words, the possibility of distinguishing between simple homicide and aggravated homicide is prevented; and these are not the same crime, even though the result is the same in both cases: deprivation of life); also, the assessment of the guilt of the agent is omitted, which is a necessary reference for a rational determination of the punishment.

31. In this case, the Court has considered that another substantive aspect of the authorization contained in Article 4(2) to which I referred above has been violated: the restriction of the death penalty only to the crimes to which it is applied presently (namely, to those that were punished with the death penalty when the State became bound by the Convention) and the consequent and absolute exclusion of crimes “to which it is not applied presently.”

32. When the State ratified the American Convention, a text of Article 201 was in force according to which: (a) the kidnapping or abduction of a person, for specific purposes, would be punished with from 8 to 15 years of imprisonment, and (b) the kidnapping or abduction associated with the death of the victim (a death “because of or during the kidnapping or abduction”) – in other words, acts that culminated in a twofold result (deprivation of liberty and deprivation of life) – would be punished by the death penalty.

33. In this context, the State could maintain the application of the death penalty in the case mentioned in the preceding paragraph sub (b), punished with the death penalty, but not in the hypothesis identified sub a), which, at the time, was only punished by deprivation of liberty. It appears evident, but it is necessary to emphasize this, because it is a central element of the contentious matter submitted to the Inter-American Court, that the crime punished by the death penalty under Article 201 of the Penal Code, in accordance with Legislative Decree 17/73, in force when the Convention was ratified, is not the same crime punished with the death penalty in that Article according to Legislative Decree 81/96, used to condemn the defendant Raxcacó Reyes.

34. The facts that the State could retain as hypotheses for the application of the death penalty, without conflicting with Article 4(2), in fine, of the American Convention, constitute in reality a conjunction of two different crimes: kidnapping or abduction, on the one hand, which violates the liberty of the victim, and homicide, on the other hand, which deprives the victim of his life. The possibility and necessity of making this distinction is manifest and essential. In contrast, the act for which the accused was convicted did not entail any conjunction of crimes, but only kidnapping or abduction; that is, deprivation of liberty. Thus, if kidnapping is punished by death, without the victim having been deprived of his life, then there has been an extension of the applicability of the death penalty. Indeed, it would have been used with regard to an act for which it was not provided when the State ratified the Convention.

D) PROCEDURAL MATTERS

35. The Court has declared that there has been a violation of Article 4(6), which embodies the right of every person condemned to death “to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases.” On this point, I consider that there has been a concurrence of rights deriving from the application or applicability of the death penalty, on the one hand, and rights inherent in due process of law during the procedural stage subsequent to the guilty verdict, on the other hand. The recognition of a right entails, logically, the establishment of the means to make it effective, which in this case are organic and procedural: attribution of the corresponding powers to a specific organ of the State and definition of a procedure for the exercise of the recognized right so that this “may be granted.” This does not mean that the pardon or commutation of sentence must be granted, but merely that it is possible to grant it.

How can this be achieved if there is no means to this end, despite the stipulation embodied in the Pact ratified by the State, which thereby assumed sovereignly the obligations established in Articles 1 and 2?

36. In the judgment that this opinion accompanies, the Court has decided, as a reparation, that “the punishment imposed should be annulled and, without the need for a new trial, another punishment should be ordered, which, under no circumstances, may be the death penalty” (para. 133). Subsequently, the same judgment indicates that “before delivering (the new) judgment, [the State] should offer the parties the opportunity to exercise their right to a hearing” (ibidem). Regarding this part of the judgment of the international court, I consider it pertinent to offer the following observations:

- (a) It is evident that the Inter-American Court did not rule on the guilt of the accused. This is an element which only the national criminal courts are competent to decide. Anyone who considers that the Court is conducting a criminal proceedings on the person accused of committing the crime would be incurring in error;
- (b) The decision of the Inter-American Court in no way obstructs the State’s response to crime in general and to a certain crime in particular; the Court itself has emphasized that the State has the obligation, and not only the authority, to defend society against crime;
- (c) The Court has not ordered that a new trial should be held, because the existence of procedural violations that would make it necessary to conduct an effective trial, respecting the principles of due process on which the *res judicata* authority of the judgment is based, has not been proved;
- (d) It has merely been indicated that the State may deliver a new ruling, which would not be the death penalty. This proviso does not arise from the judgment of the Inter-American Court, but from the commitment assumed by the State when it ratified the American Convention: not to extend the applicability of the death penalty to crimes for which it was not provided for at the time of ratification; and
- (e) The decision that the opportunity should be provided for the parties to assert their right to a hearing concerning the new final ruling issued, reflects the awareness that this ruling will affect their claims, and therefore the guarantee of a hearing must be respected so that they may provide any evidence they deem pertinent and formulate any arguments they consider relevant.

E) PRISON CONDITIONS

37. I do not wish to omit an allusion, however brief, to the other issue considered in the judgment of the Inter-American Court: the prison conditions. In various concurring opinions to judgments, provisional measures and advisory opinions, I have called attention to international standards concerning the deprivation of liberty for procedural reasons or for punishment. We are faced with a growing problem, which on many occasions has caused a crisis with dramatic results. This can happen again, in catastrophic conditions. The issue is not exhausted with this case. The Court has had the opportunity to observe its appearance and persistence in different countries in the hemisphere. It is necessary – absolutely urgent and necessary – to undertake a real prison reform, which establishes living conditions compatible with human dignity. We are far, very far, from having achieved this.

F) APPRAISAL OF ACTIONS

38. The judgments of the Inter-American Court usually note and record, when applicable, the efforts made by the State to improve the prevailing situation with regard to the respect and guarantee of human rights within its jurisdiction, either by legislative measures or draft laws – such as the initiative announced by the State to incorporate into domestic law the regulation corresponding to the remedy established in Article 4(6) of the Convention, or through actions of another nature.

39. A judgment should decide on contentious matters submitted to the Court that delivers it. It is not a general appraisal of what occurs in the State. This corresponds to other types of documents – general or special reports – the elaboration of which is not within the Court’s mandate. Consequently, its resolutions are limited to the brief notes or statements to which I have referred. However, an individual opinion which is not in itself a ruling of the Court with binding effects, but rather its author’s assessment of the facts, reasoning and decisions in relation to the case sub judice, can advance a little further – although not unrestrictedly – in considering the context and expressing points of view.

40. In view of the above, appreciation should be expressed for the efforts that many State officials have made, before and currently, in favor of respect for human rights. It is worth recalling the contributions to the construction of the inter-American system of the illustrious Guatemalan jurist and diplomat, Carlos García Bauer. This professor of the Universidad de San Carlos was prominently involved in the preparation of the draft convention entrusted to the Inter-American Juridical Committee – of which he formed part – during the Meeting of Consultation of Ministers of Foreign Affairs (Santiago, Chile, 1959), and in the Specialized Conference from which the American Convention emerged in 1969. García Bauer chaired Commission II during this Conference, which was responsible for the Articles referring to “organs of protection and general provisions.”

41. During the 1969 Conference, the Guatemalan delegation proposed important elements: for example, the specific treatment of economic, social and cultural rights (Specialized Conference..., *Actas y Documentos*, op. cit., p. 269); the mission of the State in the observance of human rights and the complementary nature of the inter-American protection system; the possibility of extending to individuals and groups legitimacy to present their cases before the Inter-American Court (id., p. 119), etcetera. It was García Bauer, Head of the Guatemalan Delegation, who proposed the name of the Convention (id., p. 438). It is also necessary to add the initiative adopted by 14 States, including Guatemala, which expressed, as I indicated above, “the majority sentiment expressed in the course of the debates on the prohibition of the death penalty, in agreement with the most pure humanistic traditions of our peoples,” and the solemn declaration of the “firm hope of seeing the death penalty eradicated from the American environment as of the present.”

42. The Court is aware of the recent actions of the State that entail the willingness to respect human rights and comply with the international commitments it sovereignly assumed. In this regard, it is worth mentioning, as an expression of this willingness, the acts of acknowledgement and solidarity with the victims of different events in which the President of the Republic has

participated – in relation to the Myrna Mack case – and the Vice President – in relation to the Plan de Sánchez Massacre case. These are actions that contribute to the advancement of a cause shared by the States and the organs of protection of the inter-American system.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary