In the case of Usón Ramírez,

the Inter-American Court of Human Rights (hereinafter the "Inter-American Court", "the Court" or "the Tribunal"), pursuant to Articles 62(3) and 63(1) of the American on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 29, 31, 37(6), 56 and 58 of the Rules of Procedure of the Court [FN2] (hereinafter "the Rules of Procedure"), pronounces the following Judgment.

[FN2] According to Article 72(2) of the Inter-American Court Rules of Procedure which came into effect on March 24, 2009, "[t]he cases underway will continue to be transmitted in accordance with the Rules, with the exception of those which have requested a hearing at the time the Rules came into effect, to which those cases shall continue to be transmitted in accordance with the prior Rules". In this sense, the Rules of the Court mentioned in the present case, correspond to the instrument approved by the Tribunal on its XLIX Regular Period of Sessions, celebrated from November 16 to 25 of 2000, and was partially reformed by the Court on LXI Ordinary Period of Sessions, celebrated from November 20 to December 4, 2003.

I. INTRODUCTION TO THE CAUSE AND OBJECT OF THE DISPUTE

1. On July 25, 2008 pursuant to Articles 51 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted an application to the Court against the Bolivarian Republic of Venezuela (hereinafter "the State" or "Venezuela"). The application was based on the petition presented on May 23, 2005 before the Inter-American Commission by Mr. Héctor Faúndez Ledesma, then joined to the Impact Litigation Project of Washington College of Law (WCL) of the American University (hereinafter "the representatives"). [FN3] On March 15, 2006, the Commission declared the application was admissible in Report No. 36/06, and on March 14, 2008, it approved Merit Report No. 24/08, according to Article 50 of the Convention. Such report included certain recommendations for the State. [FN4] Considering that the term granted to the State to comply with such recommendations had elapsed without the State presenting information showing satisfactory compliance with such recommendation, the Commission decided to submit the case to the Court's jurisdiction, pursuant to Articles 51(1) of the Convention and 44 of the Commission's Rules of Procedure. The Commission appointed Messrs. Paulo Sergio Pinheiro, Commissioner, and Santiago A. Canton, Executive Secretary, and as legal consultants Mrs. Elizabeth Abi-Mershed, Assistant Executive Secretary, and Mrs. Verónica Gómez, Débora Benchoam, and Lilly Ching, as specialists of the Commission's Executive Secretariat.

[FN3] On January 23, 2007, the Impact Litigation Project of the Washington College of Law (WCL) of American University submitted a brief, wherein it requested the Commission allow them to be co-petitioners in the present case

[FN4] In the report on the merits No. 24/08, the Commission concluded that "the State of Venezuela violated the rights to freedom of expression, personal liberty, right to a fair trial, included in Articles 13, 7, 8, and 25 of the American Convention on Human Rights, in connection with Articles 1(1) and 2 of the same, to the detriment of [Mr. Francisco Uson Ramirez]." As such, the Commission recommended that the State "1) […] adopt all the judicial, administrative, and other measures necessary to leave without effect […] all military criminal proceedings […] against [Mr. Uson Ramirez] and his judgments, including omitting the criminal charges from the registrar and their implications to all extents; 2) […] order a reparation for Mr. Francisco Uson Ramirez for the violation of his rights; 3) […] take all the measures necessary so that Mr. Francisco Uson Ramirez is granted his personal liberty indefinitely without any conditions, and 4) […] to order their domestic legislation so it is in conformance with Articles 13, 7, and 8 of the American Convention, in accordance with what has been established in the […] report."

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2. As indicated by the Commission, the application refers to the alleged "filing of a criminal action before the military court due to the crime of Slander against the National Armed Forces, to the detriment of Retired General Francisco Usón Ramírez […] and the subsequent judgment of deprivation of liberty for five years and six months as a consequence of certain [alleged] statements that Mr. Usón made in a television interview about some facts that [allegedly] were the subject of controversy and public debate at that time".

3. In the application the Commission requested the Court declare that the State had violated the rights set forth in Articles 13 (Freedom of Thought and Expression), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the American Convention, in connection with Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Affects) of the same, to the detriment of Mr. Francisco Usón Ramírez. Consequently, the Commission requested the Court order the State to adopt certain measures of reparation pursuant to Article 63(1) of the American Convention.

4. On October 21, 2008, the representatives of the alleged victim, Messrs. Héctor Faúndez Ledesma and Claudio Grossman and Mrs. Agustina del Campo submitted a written brief containing pleadings, motions, and evidence (hereinafter the "writ of pleadings and motions"), pursuant to Article 23 of the Rules of Procedure. The representatives requested the Court declare that the State had committed the same violation of rights mentioned by the Commission, particularly for "having deprived Francisco Usón Ramírez arbitrarily of his personal liberty, […] having punished him for exercising his legitimate freedom of expression, […] having tried and judgmentd him without the guarantees inherent in due process, and […] not having provided him with an effective, simple, and rapid judicial remedy that could have rectified the violations to his fundamental rights". Likewise, the representatives requested the Court order the State to adopt certain measures of reparation and reimburse costs and legal fees.

5. On December 22, 2008, the State, represented by Mr. Germán Saltrón Negretti, Agent, and Mr. Larry Devoe Márquez, Alternate Agent, submitted its plea to the claims and observations in the writ of pleadings and motions (hereinafter the "Defendant's plea"), whereby it argued a preliminary objection based on the alleged lack of exhaustion of remedies under the domestic legal system. Furthermore, the State requested the following: i) to exclude any new facts and allegations in the representatives' written pleadings of October 23, 2008; ii) to declare the alleged violation of Articles 1, 2, 7, 8, 13 and 25 of the Convention irrelevant and nonexistent, and iii) to declare the pleadings for reparation and reimbursements of costs and legal fees irrelevant and unfounded. Specifically, the State argued that it is not liable for the violations alleged against it, since Mr. Usón Ramírez "was not censored previously [nor detained arbitrarily] but tried and judgmentd [by a competent tribunal] for further responsibilities resulting from the statements he made on [a] television interview, which are the crime of slander, offense, and contempt against the National Armed Forces, according to Article 505 of the Organic Code of Military Justice."

6. Pursuant to Article 37(4) of the Rules of Procedure, on February 5 and 11, 2009, the representatives and the Commission respectively, presented their allegations on the preliminary objection made by the State (supra para. 5), whereby the representatives requested the Court dismiss the claim and hear the merits of the case.

II. PROCEEDING BEFORE THE COURT

7. The Commission's application was notified to the State and the representatives on August 21 and 25, 2008, respectively, upon a preliminary examination by the President of the Court and pursuant to Articles 35 and 36(1) of the Rules of Procedure [FN5].

[FN5] When the application was notified, the State was informed that it could designate an ad hoc judge to participate in the consideration of the present case. Nevertheless, the State did not designate an ad hoc judge in this regard.

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8. On February 23, 2009, the President of the Court issued an Order, whereby the presentation was ordered, from statements made before a public notary (affidavit), of six affidavits from witnesses and three expert witnesses proposed by the representatives, and two expert witnesses proposed by the Commission, to which the parties had the opportunity to present their observations. Likewise, in view of the particular circumstances of this case, the President called the Commission, the representatives, and the State to hold a public hearing and listen to the deposition of the alleged victim, offered by the Commission, a deposition offered by the representatives, and two expert reports offered by the State, as well as the final oral allegations of the parties about the preliminary objection and possible merit, reparations, and costs. [FN6]

[FN6] Cf. Order of the President of the Inter-American Court of Human Rights on February 23, 2009.

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9. On March, 13, 2009, pursuant to Article 63(1) of the American Convention, the representatives submitted before a public notary (affidavits) by Mrs. María Eugenia de Usón, María José Usón, Marta Colomina, Rocío San Miguel and Patricia Poleo Brito, as well as by Messrs. Antonio Rosich Sacan, Enrique Prieto Silva and Pedro González Caro. The representatives did not submit the affidavit by Mr. Roberto Carretón, which had been required by the President of the Tribunal through the Order of February 23, 2009. On that same day, the Commission sent the experts' reports to Messrs. Federico Andreu and Nicolás Espejo Yaksic. On March 25, 2009, the Commission informed that the Commission did not have any observations to make about the affidavits presented by the representatives. The State and the representatives did not present any observations to the affidavits submitted by the other parties.

10. On March 30, 2009, the Court received a writ of amicus curiae from the Civil Rights Association (ADC). [FN7] It was alleged therein that the "criminal judgment imposed on Mr. Usón Ramírez by the [Venezuelan] judicial authorities was against his right to be tried on the basis of existing "law" at the time and his right to freedom of expression, set forth in Articles 9 and 13, respectively, of the American Convention."

[FN7] Alejandor Carrio, presented said brief in his capacity as President of the Association of Civil Rights (ADC), with the "legal sponsorship" of Hernán Gullco and Alejandro E. Segarra..

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11. On April 1, 2009, a public hearing was held within the framework of the XXXVIII Extraordinary Sessions Period of the Court, in Santo Domingo, Dominican Republic. [FN8]

[FN8] The following people were present in the public hearing: a) from the Inter-American Commission: the Commissioner Paolo Carozza, as a representative, and the special rapporteur for Freedom of Expression in the Americas, Mrs. Catalina Botero, as well as Mrs. Lilly Ching Soto and Mr. Juan Pablo Alban and Carlos Zelada, as advisors; b) for the representatives: Mr. Héctor Faúndez Ledesma, Claudio Grossman, and Mrs. Agustina of Campo, and c) for the State: Mr. German Saltrón Negretti, Agent, and Mr. Gilberto Venere Vásquez.

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12. On May 11, 2009, the Commission and the State submitted their respective final allegations, and on May 14, 2009, the representatives did the same.

13. On August 13, 2009, the President of the Court requested the representatives submit any receipts and evidence of the expenses incurred in the processing of the present case. On August 20, 2009, the representatives submitted the evidence requested by the President. On September 17, 2009, the Commission indicated that it did not have any observations to make on the alleged expenses incurred by the representatives in the processing of this case. On the date of this Judgment, the State had not submitted any observations thereof.

III. PRELIMINARY OBJECTION

14. In its answer to the application, the State challenged the admissibility of the application on the basis that the alleged "victim [had] not filed and exhausted the motions under its domestic legislation, before resorting to the Inter-American system for protection." Specifically, the State argued that the alleged victim "at no time had used the possibility or requested the Court grant the power enshrined in Article 304 of the Organic Code of Criminal Procedural, namely, the motion to review the grounds expressed by the prosecutor to enact the reservation [in the brief] and ask for its conclusion." Likewise, the State alleged that the alleged victim had not exhausted the domestic remedies before filing a petition with the Commission on May 20, 2005, since at that time there was still an opportunity to submit a motion to review the guilty verdict, "according to Articles 470, 471, and 477 of the Criminal Procedure Rule." The State highlighted that Mr. Usón filed the appeal for reconsideration on April 17, 2006, (with similar content to the original petition before the Commission), a month after the Commission declared, in its admissibility report, that Mr. Usón had complied with the requirement of exhausting the domestic remedies. Therefore, since the domestic remedies had not been exhausted before applying to the Inter-American system, the State alleged that the Court was not competent to render a judgment in this case.

15. The State also alleged that it filed the preliminary objection of an alleged lack of exhaustion of domestic remedies in a timely manner at the opportune procedural moment. The State pointed out that on September 13, 2005, before the Commission issued its admissibility report on March 15, 2006, the State had already informed that Mr. Usón had not informed the First Military Tribunal for the Execution of Judgments about his "difficulties, problems, situations, or alleged violations of his rights (including his wish for review of the judgment)," a tribunal which, under law, was qualified to receive such complaints during the visits made to the detention center where Mr. Usón was detained.

16. Lastly, the State pointed out that "[i]n the alleged case that the Court […] considers the allegations by the State before the Commission are not sufficient […] to comply with the formal requirement of the objection of prior exhaustion of domestic remedies, which must be submitted during the admissibility stage of the proceedings before the Inter-American Commission, justice should not be sacrificed because of the omission of non-essential formalities." In this regard, the State pointed out that "establishing that the requirement of prior exhaustion of domestic remedies may 'even be waived tacitly' implicates that the subsidiary, contributory, or supplementary nature of the Inter-American system may be waived", to which the State requested the Court to review this criterion.

17. The Commission pointed out that the preliminary objection must be rejected since it was not presented in a timely manner in the petition proceedings before such Commission. The Commission highlighted that the State must allege a preliminary objection for lack of exhaustion of domestic remedies during the early stages of the proceedings before the Commission and point out the domestic remedies to be exhausted. Likewise, taking into account its fitness, the State must show that such remedies are adequate and effective. However, the Commission highlighted that in this case the State submitted such objection extemporaneously; therefore, it is understood that it waived its right to such defense. Similarly, the Commission pointed out that the State did not allege or showed before the Commission that there were valid remedies at domestic level. The Commission indicated that the references to other possible remedies or actions available at domestic level have been made by the State before the Court for the first time, so they are extemporaneous. Lastly, the Commission pointed out that it had already adopted an express decision on the admissibility of the petition in its report of March 15, 2006.

18. In turn, the representatives only pointed out that they hold "to the reiterated jurisprudence of the [Court] and, on that basis, they request[ed] the rejection of the [preliminary objection]."

19. This Tribunal, [FN9] similar to the European Court of Human Rights, [FN10] has affirmed consistently that an objection to the exercise of the Court's jurisdiction based on the alleged lack of exhaustion of domestic remedies must be submitted in a timely manner from the procedural standpoint; otherwise, the State shall have missed the possibility to submit such defense before this Tribunal. Additionally the State submitting such objection must specify the domestic remedies that have not yet been exhausted, as well as show that such remedies were available and adequate, suitable and effective. [FN11]

[FN9] Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections. Judgment of June 26, 1987. Series C No. 1, para. 88; Case of DaCosta Cadogan v. Barbados. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 24, 2009. Series C No. 204, para. 18, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") v. Peru. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 1, 2009. Series C No. 198, para. 20.

[FN10] Cf. ECHR, De Wilde, Ooms and Versyp Cases ("Vagrancy") v. Belgium, judgment of 18 June 1971, § 55, Series A no. 12; ECHR, Foti et al. v. Italy, judgment of 10 December 1982, §

46, Series A no. 56, and Case of Bitiyeva and X v. Russia, (merits and just satisfaction), no. 57953/00; 37392/03, §. 90, § 91, ECHR 2007-I.
[FN11] Cf. Case of Velásquez Rodríguez, supra note 9, para. 91; Case of Garibaldi v. Brasil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September, 23, 2009. Series C No. 203, para. 46, and Case of Escher et al. v. Brazil. Preliminary Objections, Merits, Reparations, and Costs. Judgment of July 6, 2009. Series C No. 199, para. 28.
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20. As regards the timely presentation of this defense, the Tribunal remarks that the State pointed out the following in its writ of September 13, 2005, before the Commission issued its admissibility report on March 15, 2006:

The First Military Tribunal for the Execution of Judgments, a court competent in this case, proceeding according to the rules that govern such Tribunal, visits the corresponding prisons as frequently as set forth by the law to hear first hand any particular problems that the prisoners may have, giving the prisoners an opportunity to have a personal meeting with the Judge and inform the Judge of whatever they may deem necessary[.] This being the case, notice is given that petitioner Francisco Usón has not made any statements to said tribunal.

21. Although the State stated in a timely fashion from the procedural standpoint that Mr. Usón Ramírez had not, as a prisoner, indicated "any particular problems" to the First Military Tribunal to Execute Judgments, the State does not indicate clearly how such alleged remedy was adequate, suitable and effective. Furthermore, the writ of September 13, 2005, submitted during the process before the Commission does not make reference to the lack of exhaustion of the extraordinary remedy to review the judgment to which the State makes reference for the first time in its answer to the application. Likewise, it does not result that in the writ of September 13, 2005, the State pointed out, as it has done in the answer to the application before this Court, the other remedies available or whether such remedies were adequate, suitable, and effective.

22. The Court points out that, as it has done before, [FN12] the State is trying to make the Tribunal change its constant jurisprudence where it states that if the objection of not exhausting domestic remedies is not filed in a timely manner the possibility of so doing is missed. To that end, the Tribunal reiterates that the interpretation of Article 46(1)(a) of the Convention for over 20 years is in agreement with International Law [FN13] and that according to its jurisprudence [FN14] and international jurisprudence, [FN15] it is not the Court's or the Commission's task to identify ex officio the domestic remedies to be exhausted; on the contrary, it is the State which shall point out the domestic remedies to be exhausted and their effectiveness. It is also not up to the international bodies to overcome the lack of precision in the States allegations. [FN16]

[FN12] Cf. Case of Velásquez Rodríguez, supra note 9, para. 88; Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 9, para. 20, and Case of Reverón Trujillo v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs. Judgment of June 30, 2009. Series C No. 197, paras. 20 to 23.
[FN13] Cf. Case of Reverón Trujillo, supra note 12, para. 22.

[FN14] Cf. Case of Velásquez Rodríguez, supra note 9, para. 88; Case of Reverón Trujillo, supra note 12, para. 23, and Case of Perozo et al.v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 28, 2009. Series C No. 195, para. 42.
[FN15] Cf. ECHR, Deweer v. Belgium, judgment of 27 February 1980, § 26, Series A no. 35, para. 26; ECHR, Foti et al., supra note 10, § 48, and ECHR, De Jong, Baljet and van den Brink v. the Netherlands, judgment of 22 May 1984, § 36, Series A no. 77.
[FN16] Cf. ECHR, Bozano v. France, judgment of 18 December 1986, § 46, Series A no. 111. See also Case of Reverón Trujillo, supra note 12, para. 23.

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23. Therefore, the lack of specificity in a timely procedural manner before the Commission, by the State, regarding the domestic remedies that had not allegedly been submitted, as well as the lack of grounds about their availability, suitability, and effectiveness, make this argument presented before this Court extemporaneous. Consequently, in light of the Tribunal's jurisprudence regarding this subject, [FN17] the Court dismisses the preliminary objection of the State.

[FN17] Cf. Case of Velásquez Rodríguez, supra note 9, para. 88; Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller")), supra note 9, para. 20, and Case of Reverón Trujillo, supra note 12, paras. 20 to 23.

IV. COMPETENCE

24. The Inter-American Court is competent, pursuant to Article 62(3) of the Convention, to see this case, since Venezuela has been a State Party to the American Convention since August 9, 1977 and it recognized the contentious jurisdiction of the Court on June 24, 1981.

V. EVIDENCE

25. Following Articles 44 and 45 of the Rules of Procedure, as well as the Tribunal's jurisprudence regarding the evidence and its assessment, [FN18] the Court shall examine and assess the evidence in this file.

[FN18] Cf. Case of the "White Van" (Paniagua-Morales et al) v. Guatemala. Merits. Judgment of March 8, 1998. Series C No. 37, para. 76; Case of DaCosta Cadogan, supra note 9, para. 32, and Case of Garibaldi, supra note 11, para 53.

A) EVIDENCE, WITNESS AND EXPERT WITNESS

26. At the President's request [FN19], the Tribunal received the affidavits of the following persons:

a) Marta Colomina and Patricia Poleo Brito, a journalist whose affidavit was proposed by the representatives. She referred to the context in which the television interview called "La Entrevista" [The Interview] was made. It was broadcast on April 16, 2004, and Mr. Francisco Usón Ramírez took part in it. The journalist also made reference to the public interest that such facts allegedly produced, and to the content and scope of the statements by Francisco Usón Ramírez in such program that brought forth the military criminal process against him;
b) Antonio Rosich Saccani, a lawyer whose affidavit was proposed by the representatives. He referred to the alleged public interest produced by this case, and to the characteristics of the trial against Francisco Usón Ramírez in the military jurisdiction;
c) Pedro González Caro, a Captain (presently retired) whose affidavit was proposed by the representatives. He referred to the alleged effect of the statements by Francisco Usón Ramírez on the Armed Forces;
d) María Eugenia Borges de Usón y Maria Jose Usón Borges, Mr. Francisco Usón Ramírez's wife and daughter, whose affidavit was proposed by the representatives. She referred to the alleged effect of the facts on the living conditions of her family, her social and professional relations, and the health and mood of her family members;
e) Federico Andreu, a lawyer and expert witness proposed by the Commission. He referred to the compulsory retirement as a disciplinary sanction in the Armed Forces and its effects regarding the military jurisdiction; the military jurisdiction in Venezuela and the trial against Mr. Francisco Usón Ramírez in such jurisdiction; the crime of "slander to the armed forces" and the sanction for such crime, and the protection of the honor or reputation of the State and its institutions under criminal law;
f) Nicolás Espejo Yaksic, a lawyer whose expert witness testimony was proposed by the Commission. He referred to the crime of "slander to the armed forces" and the sanction for such a crime, and the protection of the honor or reputation of the State and its institutions under criminal law;
g) Enrique Prieto Silva, a retired General, a lawyer, and an expert in military legislation, an expert witness proposed by the Commission. He referred to military justice and its limits in a democratic society; the independence and impartiality of military tribunals, and the vilification or insult to the Armed Forces as a crime in which the military tribunals are competent; and
h) Rocío San Miguel, a lawyer, a university professor, and an expert in military legislation, whose expert testimony was proposed by the representatives. She referred to military justice and its limits in a democratic society; the independence and impartiality of military tribunals, and the vilification or slander to the Armed Forces as a crime and the respective competence of military tribunals.

[FN19] Cf. Order of the President of the Court, supra note 6.
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27. During the public hearing, the following affidavits and expert depositions were received from the following persons by the Court: [FN20]

a) Francisco Usón Ramírez, the alleged victim whose deposition was proposed by the Commission. He referred to the content and scope of his statements in the Television interview called "La Entrevista" [The Interview] on April 16, 2004, and to the context in which such

statements were made; the trial and the judgment depriving him of his liberty set by the Venezuelan military court due to his statements, and the consequences of the facts of this case to his personal and professional life;

b) Gonzalo Himiob Santomé, a lawyer whose deposition was proposed by the representatives. He referred to the public interest that this case produced, and the characteristics of the trial against Francisco Usón Ramírez in the military jurisdiction, and

c) Ángel Alberto Bellorín, a retired Venezuelan colonel and expert in military legislation, proposed as an expert witness by the State. He referred to the military legislation and to the Venezuelan criminal trial.

[FN20] The State did not present the expert witness testimony of Mr. Jesús Eduardo Cabrera Romero, whom the President of the Tribunal had requested in the Order of February 23, 2009, supra note 6.

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28. Apart from the aforementioned depositions and expert witnesses, the Commission, the representatives, and the State submitted items of evidence at various procedural stages, wherein the parties were able to make observations (supra paras 8, 9, 12 and 13).

B) ASSESSMENT OF THE EVIDENCE

29. In this case, as in others, [FN21] following Article 44 of the Rules of Procedure, the Tribunal admits the value of the evidence in the documents submitted by the parties at the appropriate time, which were not challenged or rejected nor their authenticity questioned (supra paras. 9 and 13).

[FN21] Cf. Case of Velásquez Rodríguez, supra note 9, para. 88; Case of DaCosta Cadogan, supra note 9, para. 34, and Case of Garibaldi, supra note 11, para. 62.

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30. As regards the statements and expert witness reports that were not challenged by the parties, the Court considers them pertinent insofar as they refer to the objective defined by the President in her Resolution (supra para. 8) and admits them to be assessed following the rules of competent analysis and in conjunction with items of evidence in the trial. This Tribunal considers that the deposition made by the alleged victim cannot be assessed in isolation since the alleged victim is directly interested in this case; therefore, it shall be assessed within the group of evidence provided and in accordance with the rules of competent analysis.

31. On June 5, 2009, the representatives submitted a “list of maintenance expenses incurred during the imprisonment of Francisco Vicente Usón Ramírez from May 22, 2004, to December 24, 2007,” as an addendum to their final allegation. Such expenses total US $ 131,279.00 (one hundred and thirty-one thousand two hundred and seventy-nine U.S. dollars). The State challenged such document pointing out that “it is not certain” that the center where Mr. Usón Ramírez was detained “did not have adequate hygiene conditions or was unable to provide

enough food for its inmates." Likewise, the State pointed out that it is uncertain that "the medical service of such center did not have an adequate supply of medicine." Therefore, the State indicated that "it reject[ed] the indemnity requested by General Usón" in such document. In turn, the Commission pointed out that it had no observations to make about this matter.

32. Likewise, on May 27, 2009, the State presented several "items of evidence" together with its brief of final allegations. Some of these items were already included in the evidence of the case, [FN22] which was previously declared admissible (supra para. 29). However, regarding the other items of evidence not submitted prior, the representatives challenged their admissibility "as being extemporaneous and irrelevant. Furthermore, [the representatives pointed out that] such documentation did not refer to supervening facts justifying their presentation after the procedural terms set forth by the […] Court had elapsed." In turn, the Commission pointed out that it had no observations to make about this matter.

[FN22] Cf. inter alia, Condemnatory judgment of the First Military Tribunal of Judgment of Caracas on November 8, 2004 (case file of attachments to the petition, tomo II, attachment 64 fs. 1420 to 1492 and case file of appendices to the petition, appendix 3, , fs. 397 and 398); Judgment of June 2, 2005 in the Criminal Court of Appeals of the Supreme Tribunal of Justice, wherein the appeal was rejected (case file of anexxes to the petition, tomo II, attachment 65, fs. 1493 to 1557); Order to transfer from the First Military Tribunal of First Instance of Guaira on May 23, 2004 (case file of de attachments to the petition, tomo II, attachment 66, fs. 1558 to 1559); decision by the First Military Tribunal of First Instance of Guaira on May 23, 2004 and the letter of notification to the Martial Court regarding the rejection of competence of the First Military Tribunal of Guaira on May 23, 200 (case file of attachments to the petition, tomo II, attachment 67, fs. 1560 to 1567); decision of the Martial Court on May 24, 2004 (case file of attachments to the petition, tomo II, attachment 68, fs. 1568 to 1572); Order of the Second Military Court of First Instance of Caracas on July 29, 2004 (case file of attachments to the petition, tomo III, attachment 73, fs. 1610 to 1613); decision of the First Military Tribunal of Judgment on October 4, 2004 (case file of attachments to the petition, tomo III, attachment 74, fs. 1614 to 1620); order of the Second Military Court of First Instance of Caracas on August 16, 2004 (case file of attachments to the petition, tomo III, attachment 75, fs. 1621 to 1659); appeal remedy against the condemnatory judgment of November 8, 2004 before the Martial Court acting as Appeals Court of the Criminal Military Circuit of the Metropolitan Area of Caracas presented on November 23, 2004 (case file of attachments to the petition, tomo III, attachment 81, fs. 1736 to 1847); Judgment of the Martial Court of the Criminal Military Circuit of Caracas on January 27, 2005, in relation with the appeal remedy (case file of attachments to the petition, tomo III, attachment 82, fs. 1848 to 1905); appeals remedy against the judgment of January 27, 2005 of the Martial Court of the Military Criminal Circuit of Caracas on February 28, 2005 (case file of attachments to the petition, tomo III, attachment 83, fs. 1906 to 2149); remedy for special review of decision No. 303 of the Criminal Appeals Court on June 2, 2006 and September 17, 2006 (case file of attachments to the petition, tomo III, attachment 84, fs. 2150 to 2214), and order of execution emitted by the First Military Tribunal for the Execution of Judgments of Caracas on July 4, 2005 (case file of attachments to the petition, tomo III, attachment 85, fs. 2215 to 2219).

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33. The Court observed that the evidence submitted by the representatives (supra para. 31) and the State (supra para. 32) together with their respective briefs of final allegations were presented extemporaneously in the proceedings before the Court and not related to the supervening facts. The representatives and the State did not allege any force majeure or serious impediment that would make this Tribunal admit such evidence at a different procedural moment in accordance with the provisions of Article 44 of the Rules of Procedure. Therefore, the Court considers that such evidence is inadmissible.

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34. Having examined the items of evidence which make up the file, the Court shall proceed to analyze the alleged violations to the American Convention, in the light of the facts that the Court considers proven, as well as the allegations of the parties therein. In doing so, the Tribunal shall assess them on the basis of rules of competent analysis, within the framework of the applicable law. [FN23]

[FN23] Cf. Case of the "White Van" (Paniagua-Morales et al) supra note 18, para. 76; Case of DaCosta Cadogan, supra note 9, para. 32, and Case of Garibaldi, supra note 11, para. 53

VI. VIOLATION OF ARTICLE 13(1) AND 13(2) (FREEDOM OF THOUGHT AND EXPRESSION) [FN24] AND ARTICLE 9 (FREEDOM FROM EX POST FACTO LAWS) [FN25] OF THE CONVENTION, IN RELATION WITH ARTICLES 1(1) (OBLIGATION TO RESPECT RIGHTS) [FN26] AND 2 (DUTY TO ADOPT PROVISIONS OF DOMESTIC LAW) [FN27] OF THE SAME CONVENTION

[FN24] Article 9 of the American Convention establishes that:
No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.
[FN25] Article 13 of the Convention signals the following:
1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in the case file, in print, in the form of art, or through any other medium of one's choice.
2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
a) respect for the rights or reputations of others; or
b) the protection of national security, public order, or public health or morals.
c) […].
[FN26] Article 1(1) of the Convention establishes that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
[FN27] Article 2 of the Convention establishes that:
Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.
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35. In this chapter the Court shall analyze whether the State is liable for the violation of the right to freedom of expression of Mr. Usón Ramírez. Before considering the corresponding allegations by the parties thereof, the proven facts involved in the dispute shall be determined.

36. Mr. Usón Ramírez, who was Brigadier General of the Armed Forces, had held various public positions, including being Minister of Finance. He resigned to such position after the events of April 11, 2002, since he disagreed with the government and with the members of the High Military Command. In 2003, Mr. Usón Ramírez retired. [FN28]

[FN28] Cf. Order No. DG-21141 of the Ministry of Defense on May 30, 2003 (case file of attachments of the petition, tomo I, attachment 21, f. 994) and Judgment No. 01574 of October 15, 2003 of the Political Administrative Court of the Supreme Tribunal of Justice regarding the remedy of nullity in tangent with the remedy of constitutional review and motion for suspension of effects of the order No. DG-21141 of May 30, 2003 (case file of attachments to the petition, tomo I, attachment 22, f. 996)..
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37. On April 16 and May 10, 2004, Mr. Usón Ramírez was invited to take part in a TV program called “La Entrevista” [The Interview]. On several occasions the subject of the program was the hypothesis stated in several press Articles written by the other invited guest on the program, a journalist, about the alleged use of a “flamethrower” as a means of punishment against some soldiers in Fuerte Mara, where a cell caught fire on March 30, 2004. To that end, Mr. Usón Ramírez was presented as an “excellent analyst of military and political subjects.” He also indicated that he was an expert on the subject when he identified himself as an “Engineering Officer.” In the program, Mr. Usón Ramírez explained how flamethrowers worked and the procedures required in the Armed Forces to use them. He also pointed out that “the functioning and the way the equipment is set up evidences that there [was] premeditation.” [FN29] Then he added that such situation “would be very-very serious if […] it were true.” [FN30]

[FN29] Transcription of the program “The Interview,” on April 16, 2004 (case file of attachments to the petition, tomo I, attachment 29, f. 1084).
[FN30] Transcription of the program “The Interview,” supra note 29, f. 1085

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38. As a consequence of the statements made in said television interview, Mr. Usón Ramírez was tried and judgmentd to five years and six months in jail for the crime of "slander against the National Armed Forces," [FN31] following a criminal statute set forth in Article 505 of the Organic Code of Military Justice whereby "whoever slanders, offends, or disparages the National Armed Forces or any of its units shall be subject to three to eight years in prison." [FN32]

[FN31] Judgment of the First Military Tribunal of Judgment on November 8, 2004, supra note 22, fs. 397 and 398.
[FN32] Article 505 of Organic Code of Military Justice.

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39. According to the judgment issued on November 8, 2004, by the First Military Tribunal of Caracas against Mr. Usón Ramírez, "the facts, object of the trial," which gave rise to the cause are summed up as follows:

On April 16, 2004, Retired Brigadier General Francisco Vicente Usón Ramírez was a special guest together with citizen Patricia Poleo at the television interview called "La Entrevista" broadcast at 05:50 a.m. by Channel 10 (Televen), moderated by journalist Marta Colomina. Such citizens were interviewed in the program to discuss "flamethrowers," in relation with the events that had recently occurred at Fuerte Mara […] specifically in a cell […], where some [soldiers] were burnt. Patricia Poleo started the discussion by showing that such soldiers had been burnt with a flamethrower. The Brigadier General agreed and reinforced what such journalist had said. Then he explained the creation, components and use of that type of arm, indicating the procedure to take them out of the corresponding warehouses […]. He also agreed that on the basis of the soldiers' burns, there had been premeditation and made other comments, not as an expert but in his personal opinion. [FN33]

[FN33] Judgment of the First Military Tribunal of Judgment on November 8, 2004, supra note 22, f. 331.

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40. Based on these facts, the First Military Tribunal declared the following:

Brigadier General (EJ) FRANCISCO VICENTE USÓN RAMIREZ used abusive comments which slander and offend the National Armed Forces since they are against the internal and external social life. He has given an opinion and affirmed matters involving the military disagreeing with reality, using audiovisual means, in this case, the Television interview "La Entrevista" in Televen Channel, on April 16, 2004. [FN34]

[FN34] Judgment of the First Military Tribunal of Judgment on November 8, 2004, supra note 22, f. 396.

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41. Likewise, in such verdict of guilt, when assessing the punishment to be imposed on Mr. Usón Ramírez, the First Military Tribunal pointed out that "the crime committed by the accused goes against national security." [FN35]

[FN35] Judgment of the First Military Tribunal of Judgment on November 8, 2004, supra note 22, f. 397.

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42. In the appeal judgment of January 31, 2005, the court of appeals dismissed the motion for appeal submitted by Mr. Usón Ramírez and confirmed the guilty verdict, pointing out that the First Military Tribunal concluded that "the facts that occurred at Fuerte Mara were contrary to what Retired Brigadier General (EJ) FRANCISO VICENTE USÓN RAMIREZ had expressed; therefore, he committed slander against the National Armed Forces for having affirmed a false event." [FN36]

[FN36] Judgment of the Martial Court of the Criminal Military Court of Caracas on January 27, 2005, supra note 22, f. 1884

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43. On June 2, 2005, the Criminal Court of Appeals of the High Court of Justice dismissed the appeal "since the appeal submitted by counsel for the defense of the accused was groundless;" [FN37] therefore, finalizing the judgment and charge imposed.

[FN37] Judgment of June 2, 2005 emitted by the Court of Criminal Appeals of the Supreme Tribunal of Justice, supra note 22, f. 1555.

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44. The parties thereto submitted various allegations about these facts that may be divided into two types: 1) the alleged need to verify whether the codification met the requirements of exhaustion and precision, (infra paras. 45 to 88) and 2) the alleged need to ensure the protection of national security and public order by determining any further liabilities to the exercise of the right to freedom of expression (infra paras. 89 to 94). The Court shall proceed to analyze these matters in the order mentioned above. Additionally, the Tribunal shall refer to the allegations by the parties in regards to the conditions imposed on Mr. Usón Ramírez when granting him the benefit of parole, insofar as such conditions affected his right to freedom of thought and expression (infra paras. 95 to 100). Lastly, reference shall be made to the allegations by the representatives which reference disciplinary sanctions imposed on Mr. Usón Ramírez, while in prison, "for having sent a letter to the directors and employees of Radio Caracas Television,

showing solidarity with them for the announced termination of the concession to broadcast with open signal" (infra paras. 101 and 102).

A) On the alleged need to ensure the protection of the right to the honor and reputation of the Armed Forces by determining any further liabilities to the exercise of the right to freedom of expression

45. Before analyzing the content and scope of the right to freedom of expression and the right to protection of the honor, it must be clarified that Article 1(2) of the Convention sets forth that the right recognized in such instrument correspond to persons, i.e. to human beings and not to institutions such as the Armed Forces. Therefore, when analyzing the alleged conflict of rights in this case, it is not the intention of this Tribunal to determine the scope of the rights that the institution of the Armed Forces could have, since this would be beyond the scope of its competence. However, the Tribunal shall determine whether the rights of Mr. Usón Ramírez as an individual have been violated. Since the justification provided by the State to restrain the right to freedom of Mr. Usón Ramírez was the alleged need to protect the honor and reputation of the Armed Forces, an analysis of the conflict between the individual right of Mr. Usón Ramírez to the freedom of expression, on the one hand, and the alleged right to honor established by the regulations of the Armed Force, on the other hand, shall be made.

46. The right to protection of honor and dignity, under Article 11 of the Convention, involves limits to the interference of private individuals and the State. Therefore, it is legitimate that whoever considers his or her honor affected can resort to judicial means that the State provides for his or her protection. [FN38]

[FN38] Cf. Case of Ricardo Canese v. Paraguay. Merits, Reparations, and Costs. Judgment of August 31, 2004. Series C No. 111, para. 101; Case of Tristán Donoso v. Panamá. Preliminary Objections, Merits, Reparations, and Costs. Judgment of January 27, 2009. Series C No. 193, para. 134, and Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations, and Costs. Judgment of November 27, 2008. Series C No. 192, para. 196.

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47. The freedom of expression, particularly in matters of public interest, "is a cornerstone of the survival of a democratic society" and the Court refers to its jurisprudence established in numerous cases. [FN39]

[FN39] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism(Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 November 13, 1985. Series A No. 5, para. 70. See also, Case of Case of "The Last Temptation of Christ" (Olmedo-Bustos et al.) v. Chile. Merits, Reparations, and Costs. Judgment of February 5, 2001. Series C No. 73, paras. 64 a 68 y Case of Perozo et al., supra note 14, para. 116.

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48. The freedom of expression may be subject to restrictions, [FN40] particularly when it interferes with other rights guaranteed by the Convention. [FN41] Article 13(2) of the Convention, prohibiting any prior censorship, also establishes the possibility to require further liabilities for the abusive use of this right. The Court has stated the conditions that the State Parties shall fulfill in order to be able to restrict or limit the right to freedom of expression by determining further responsibilities with exceptions, warning that such right shall not be limited beyond any strictly necessary limits. [FN42]

[FN40] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism(Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85, supra note 39, para. 36. See also, Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations, and Costs. Judgment July 2, 2004. Series C No. 107, para. 120, and Case of Perozo et al., supra note 14, para. 117.

[FN41] Cf. Case of Kimel v. Argentina. Merits, Reparations, and Costs. Judgment of May 2, 2008. Series C No. 177, para. 56 and Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objections, Merits, Reparations, and Costs. Judgment of August 5, 2008. Series C No. 182, para. 131.

[FN42] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism(Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85, supra note 39, para. 46. See also, Case of Herrera Ulloa, supra note 40, para. 120; Case of Tristán Donoso, supra note 38, para. 110, and Case of Kimel, supra note 41, para. 54.

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49. Taking into account the above, in order to resolve this specific case, the Court shall 1) verify whether the codification of the crime of slander against the Armed Forces affected the strict legality to be observed when restraining the freedom of expression in a criminal forum; 2) study whether the protection of the reputation of the Armed Forces is a legitimate end under the Convention and determine, if the case may be, the applicability of a criminal sanction to achieve such end; 3) assess the need for such measure, and 4) analyze the strict proportional criteria of the measure, i.e., whether the sanction imposed on Mr. Usón Ramírez guaranteed the right to reputation of the Armed Forces in a broad manner, without annulling his right to express his opinion.

a.1) Strict formulation of the rule about limitations or restrictions (criminal legality)

50. The Commission alleged "the three guiding verbs of Article 505 [of the Organic Code of the Military Justice] are so large in scope that any expression(oral, written, figurative, or symbolic) of a critical or negative thought about the Armed Forces, that could offend any of their members, could give rise to a criminal judgment of 3 to 8 years. In the criminal process, not only is the conduct ambigous, but so are the passive subjects, the active subjects, and even the legal benefits that are protected. The only clear element of this rule is the sanction to be set."

51. As regards Article 505 of the Organic Code of Military Justice, the representatives indicated in their final allegations that "the broad definition of criminal behavior, […] does not take into account the taxative and accurate requirements established by [the] [Inter-American]

Court for the State to abide by the principle of legality of Article 9 of the American Convention and the right to freedom of expression in Article 13 of the American Convention, since the restriction would be broader than what is expressly permitted."

52. The State stressed that "the facts giving rise to the criminal trial against Mr. Usón are typified and penalized under a Law of the Republic, which complied with the procedure to establish the laws as required by Articles 162 through 177 of the revoked Constitution of the Republic of Venezuela, published in the Official Gazette No. 662 of January 23, 1961, in force at the time the Organic Code of Military Justice was passed, which agrees with the concept of the laws established in the Inter-American System." The State pointed out that "the crime of slander is a formal crime, as it is a behavior which is able to offend and harm the honor or credit of another person, according to the circumstances, quality, and culture of the subjects." Quoting the previous jurisprudence of the High Court of Justice of Venezuela regarding Article 505 of the Military Justice Code, the State indicated that "[the] nomen juris […] 'Offend' […] means to insult, affront, outrage or despise. The action in this crime is indicated by [such] verbs […] used alternatively. The active subject of this crime may be any person, i.e. a civilian or a military, while the passive subject is the National Armed Forces or any of its units, understanding that the National Armed Forces, under Article 328 of the Constitution of the Bolivarian Republic of Venezuela, is "an essentially professional Institution", formed by "the Army, the Navy, the Aviation and the National Guard.' […] The juridical good that is protected is the honor, the reputation, the respect of the Armed Forces (the Navy, the Army, the Aviation and the National Guard, commands, troops, and elements of the various arms, services, and land corps)[and the] means to commit such crime may, as pointed out in the rule, be any adequate means to offend. This crime requires generic fraud, i.e. to be aware and willing to offend."

53. This Court has the competence – based upon the American Convention and grounded in the iura novit curia principle, which is solidly supported in international law – to analyze the possible violation of Convention provisions that have not been alleged in the pleadings submitted to it, "in the sense that the judge has the authority and even the obligation to apply the pertinent legal provisions in a case, even when the parties do not invoke them expressly," in the understanding that the parties have had the opportunity to express their respective positions with regard to the relevant facts. [FN43]

[FN43] Cf. Case of Godínez Cruz v. Honduras. Merits. Judgment of January 20, 1989. Series C No. 5, para. 172; Case of Garibaldi, supra note 11, para. 33, and Case of Bayarri v. Argentina. Preliminary Objections, Merits, Reparations, and Costs. Judgment of October 30, 2008. Series C No. 187, para. 94.

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54. In the present case the Commission and the representatives did not specifically allege the violation of Article 9 of the American Convention, which enshrines the principle of legality, and recently did so in their final written arguments. However, the Court finds that the alleged involvement of the principle of legality was treated both in the proceedings before the Commission, according to the report on the merits, as well as in the application and the written brief containing pleadings and motions, from the perspective of the legality required by Article

13(2) of the Convention. Therefore, the State has had the opportunity to express its position on the matter, as it has done regarding the legality under which Mr. Usón Ramirez was convicted. Furthermore, the facts of this case, those which the parties have had ample opportunity to refer to, demonstrate the effect had on this principle in the terms set out below.

55. The Court has pointed out that "it is the law which shall establish the restrictions to the freedom of information." [FN44] To that end, any limitation or restriction to such freedom shall be established by the law, both from the formal and from the material standpoint. If such restriction or limitations are under criminal law, it is important to observe the strict requirements characteristic of the criminal codification to satisfy the principle of legality. [FN45] In effect, the Court has declared in its previous jurisprudence that when preparing the criminal codification, it is necessary to use strict and unequivocal terms, clearly restricting any punishable behaviors, giving meaning to the principle of criminal legality. [FN46] This involves a clear definition of the incriminatory behavior, setting its elements, and defining the behaviors that are not punishable or the illicit behaviors that can be punishable with non-criminal measures. In particular, as regards military criminal rules, this Tribunal has established through its jurisprudence that such rules shall establish clearly and without ambiguities, inter alia, any typical criminal behaviors particular to the military forum and shall determine the nature of any illicit behavior by describing the damage or how it jeopardizes the military juridical benefits that have been seriously attacked, so that the exercise of a military punitive power is justified, as well as specifying the corresponding sanction. [FN47] Thus, the codification of a crime shall be stated expressly, accurately, taxatively and previously, even more so when criminal law is the most restrictive and severe means to establish liabilities for illicit behavior, taking into account that the legal framework shall provide juridical certainty to its citizens. [FN48]

[FN44] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85, supra note 39, para. 40. See also, Case of Tristán Donoso, supra note 38, para. 77; Case of Kimel, supra note 41, para. 63, and Case of Claude Reyes et al. v. Chile. Merits, Reparations, and Costs. Judgment September 19, 2006. Series C No. 151, para. 89.
[FN45] Cf. Case of Kimel, supra note 41, para. 63.
[FN46] Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations, and Costs. Judgment de 30 de mayo de 1999. Series C No. 52, para. 121; Case of Yvon Neptune v. Haití. Merits, Reparations, and Costs. Judgment of May 6, 2008. Series C No. 180, para. 125, and Case of Kimel, supra note 41, para. 63.
[FN47] Cf. Case of Palamara Iribarne v. Chile. Merits, Reparations, and Costs. Judgment of November 22 2005. Series C No. 135, para. 126.
[FN48] Cf. Case of Kimel, supra note 41, para. 63.

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56. In this case, the Court observes that the criminal codification of Article 505 of the Organic Code of Military Justice, [FN49] does not establish the elements that may offend, slander, or disparage, and it does not specify whether it is important that the active subject attribute facts that damage the honor or whether it suffices simply to give an offensive or disparaging opinion, without attributing any illicit acts, for example, for the imputation of the

crime. The rule does not establish whether an injury-causing, offensive, or disparaging statement may be made before the passive subject or third parties. Namely, this Article responds to a description that is vague and ambiguous and it does not specify clearly the typical forum for a criminal behavior, which could lead to broad interpretations, allowing the determined behaviors to be penalized incorrectly by using the criminal codification. [FN50] The ambiguity in the text of this criminal codification raises doubts and opens possibilities for the abuse of discretion by the authority, particularly undesirable when the criminal liabilities of individuals shall be established and it is penalized in a manner that seriously affects fundamental goods such as freedom. This article is limited to foreseeing the sanction, without taking into account the specific injury of causing discredit, damaging the good reputation or prestige, or causing damage to the detriment of the passive subject. Since it does not specify the injury required, such law allows that the subjectivity of the offended party determine the existence of crime, even when the active subject did not have the intent to injure, offend, or disparage the passive subject. This text is particularly forceful when, according to the statements by the expert proposed by the State in the public hearing of this case, "there is no legal definition of military honor" in Venezuela. [FN51]

[FN49] Said Article states that "[h]e who slanders, offends, or disparages the National Armed Forces or one of its entities will incur the sanction of 3 to 8 years of prison" (supra para. 38).
[FN50] Cf. Case of Palamara Iribarne, supra note 47, para. 92.
[FN51] Expert testimony of Ángel Alberto Bellorín given at the Inter-American Court in a public hearing celebrated on April 1, 2009.

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57. It results from the above mentioned, that Article 505 of the Organic Code of Military Justice does not strictly limit the elements of the criminal behavior, nor does it consider the existence of injury, resulting in a codification that is too vague and ambiguous in its formulation to comply with the legality requirements of Article 9 of the Convention and the provisions of Article 13(2) of the Convention regarding the imposition of further liabilities.

58. In view of the above, the Court considers that the criminal codification, Article 505 of the Organic Code of Military Justice, violates Articles 9, 13(1) and 13(2) of the Convention, in relation to Articles 1(1) and 2 of the Convention.

a.2) Purpose of the restriction and suitability of the criminal way

59. The Commission pointed out that "[i]n this case, further liabilities were applied to Mr. Usón Ramírez [for exercising his freedom of thought and expression] with a purpose that cannot be considered legitimate, since any further liabilities under the Convention allow for the protection of the honor and reputation of a civil servant or any other person, but it is not allowed to protect the honor and reputation of legal entities, subjects which are not protected under the American Convention."

60. The representatives also alleged that in this case there had not been a lawful purpose to justify any further liabilities imposed on the alleged victim, highlighting that "we should not lose

sight that the American Convention […] protects the rights of persons; i.e. the rights of human beings, and not the rights or corporations, civil associations, or State institutions." Thus, the representatives stated that "[t]he object of the analysis of this case is not about the right to honor, as a very personal right of a third party, but in any case, the right to his or her reputation, a term generally reserved for legal entities whose support does not lie with the protection of their dignity but with other types of interests, such as interests that are commercial, social, etc.".

61. The State pointed out that the lawful purpose justifying the imposition of further criminal liabilities goes "beyond the honor or reputation of a certain military personnel, but rather is limited to the defense of the public legitimacy of the military institution and hence, the protection of national security." Therefore, the State pointed out that "any expressions against public order [or national security] may entail liabilities for those issuing such expressions; such liabilities may be civil, criminal, administrative, etc.".

62. As pointed out above (supra para. 49), the Tribunal shall determine whether the protection of the reputation of the Armed Forces serves a lawful purpose that justifies a restriction of the freedom of expression and, as the case may be, whether a criminal sanction is suitable to achieve such purpose.

63. To that end, the Court notes that Venezuelan domestic law recognizes that the Armed Forces may, as a State institution or legal entity, be covered by the protection of the right to honor or reputation. Likewise, Article 13(2)(a) of the Convention establishes that the "reputation of others" may be a reason to set further liabilities for exercising the freedom of expression. Although the subject of the right to honor or reputation is the Armed Forces in this case, not a natural person, and hence it is not protect by the Convention, the protection of the right to honor or reputation is considered in the Convention as one of the lawful purposes to justify the restriction of the right to freedom of expression. To that end, the Tribunal reiterates that when analyzing the legitimacy of the purpose in this case (the protection of the right to honor of the Armed Forces) the idea is not to determine whether the Armed Forces have an effective "right" to honor or reputation; the analysis is to determine if such purpose would be legitimate for the purpose of restricting the right to freedom of expression of Mr. Usón Ramírez.

64. Likewise, the Convention does not establish that the only restrictions to individual rights that may be legitimate are the restrictions to protect other individual rights. On the contrary, the Convention also establishes that any restrictions whose purpose is another reason not related to the exercise of individual rights recognized in the Convention are lawful.

65. The European Court of Human Rights has had the opportunity to pronounce judgment about this matter and it has considered that the protection of the right to the reputation of companies, not only of individuals, may be a legitimate purpose to restrict the right to the freedom of expression. In the case of Steel and Morris v. the United Kingdom [FN52], for example, the European Court made an analysis in relation to the "need to protect the right to freedom of expression of the plaintiffs and the need to protect the reputation and the rights of [a company]". [FN53] Likewise, in the case of Kuliś and Różycki v. Poland [FN54] the European Court pointed out that the protection of the right to reputation of a company was a "lawful purpose" according to Article 10(2) of the European Convention.

[FN52] Steel and Morris v. the United Kingdom, no.68416/01, ECHR 2005-II.
[FN53] Steel and Morris v. the United Kingdom, supra note 52, § 95.
[FN54] Cf. Kuliś and Różycki v. Poland, no.27209/03, § 34, § 35, ECHR 2009.
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66. Therefore, the Tribunal considers that the purpose in this case is legitimate since it tries to protect a right that the Venezuelan domestic legislation recognizes to the Armed Forces and, in general, such right is set forth in the American Convention regarding natural persons. However, it is relevant to clarify that the legitimacy of the purpose is only one of the elements in this analysis of proportionality and it does not necessarily mean that such restriction has been legal (this has already been analyzed by the Tribunal supra paras. 50 to 58), using the most suitable, necessary, or proportional means (which the Tribunal shall analyze infra paras. 67 to 68).

67. As regards the suitability of the criminal action to achieve the sought-after purpose, the Court has warned previously, and reiterates in this case, that although a criminal instrument may be suitable to restrict the abusive exercise of certain rights, provided this serves the purpose of safeguarding the juridical good to be protected, [FN55] the above does not mean that the use of the criminal forum to impose further liabilities for exercising the freedom of expression shall be necessary or proportional in all cases (infra paras. 69 to 88).

[FN55] Cf. Case of Kimel, supra note 41, para. 76, and Case of Tristán Donoso, supra note 38, para. 118.
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68. In this case, the Court has already declared that the military criminal legislation that determined further liabilities for Mr. Usón Ramírez exercising his freedom of expression is not compatible with the Convention since it is excessively vague and ambiguous (supra para. ***). Consequently, the Court considers that in this case the criminal way was not suitable.

a.3) Need for the measure used

69. The Commission pointed out that "the criminal sanctions and their seriousness should never be used as a resource to suffocate any public debate on questions of general interest, nor to limit criticism of officials in the exercise their functions, the State, or its institutions." Furthermore, the Commission indicated that "[i]n a democratic society the punitive power is only exercised insofar as it is strictly necessary to protect the fundamental juridical goods from serious attacks damaging or jeopardizing them[;] otherwise it would lead to an abusive exercise of the punitive power of the State."

70. In this regard, the representatives alleged that "the criminal sanction applied to [Mr.] Usón was not necessary to protect a reputation that had not been attacked." For the representatives "nothing that Usón [Ramírez] said could be construed as insultous or offensive; there was no purpose to denigrate the military institution, where he was trained and which he

served for over two decades." "There was a judgmental assessment on a hypothetical[,to which] Mr. Usón used the conditional tense, clearly showing that his comment was merely technical, and that he could not confirm [the truth or falseness] of that hypothetical."

71. According to the State, "this was the opinion issued by a member of the National Armed Forces who, to make matters more severe, had held important positions at military level and beyond, which thus illustrates more discredit and comtempt of the National Armed Forces. The burdensome consequences of his act are much more serious." Independent of this, the way Mr. Usón Ramírez proceeded, in view of the State, "showed there was animus injuriando, which is nothing but the awareness and will to dishonor and discredit the Armed Forces." The State pointed out that "it results from the excerpts of the transcribed interview that Mr. Usón [Ramírez] made use of his freedom of expression[,] but even making an apology of crime." According to the State, "the analysis of the statements made by each one of the participants, within the context of the [TV] program, evidences that the participation of [Mr. Usón Ramírez] was quite far from a technical statement on a specific topic, but it was a truly insulting remark against the National Armed Forces.

72. When analyzing this topic, as on other occasions, [FN56] the Court shall examine the existing alternatives to reach the lawful purpose and state clearly their injurious nature.

[FN56] Cf. Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs. Judgment November 21, 2007. Series C No. 170, para. 93; Case of Castañeda Gutman v. México. Preliminary Objections, Merits, Reparations, and Costs. Judgment August 6, 2008. Series C No. 184, para. 196, and Case of Kimel, supra note 41, para. 74.

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73. The Court has pointed out that Criminal Law is the most restrictive and severe means to establish liabilities for illicit behavior [FN57], particularly when sanctions involve deprivation of liberty. Therefore, the use of the criminal way shall respond to the principle of minimum intervention, due to the nature of criminal law as ultima ratio. This means that in a democratic society the punitive power shall only be exercised insofar as it is strictly necessary to protect the fundamental juridical goods from the most serious attacks that damage or jeopardize it. The opposite would lead to the abusive exercise of the punitive power of the State [FN58].

[FN57] Cf. Case of Ricardo Canese, supra note 38, para. 104; Case of Kimel, supra note 41, para. 76, and Case of Palamara Iribarne, supra note 47, para. 79.
[FN58] Cf. Case of Kimel, supra note 41, para. 76.

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74. The need to use the criminal forum to impose further liabilities for exercising the right to freedom of expression shall be analyzed particularly with caution and shall depend on the peculiarities of each case. To that end, the good to be protected, the extreme seriousness of the behavior of the issuer, the fraud used, the characteristics of the unfairly caused damage, the

characteristics of the person whose honor or reputation is to be safeguarded, the means used to cause damages and any other data that shows the absolute need to use criminal measures in a truly exceptional manner, shall be considered. At all times the burden of the proof shall be with the accusing party. [FN59]

[FN59] Cf. Case of Kimel, supra note 41, para. 78. See also Mamère v. France, no. 12697/03, § 27, ECHR 2006; ECHR, Castells v. Spain. judgment of 23 of April 1992, § 42, § 46. Series A no. 236, and Cumpana and Mazare v. Romania [GC], no. 33348/96, § 115, ECHR 2004-XI.

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75. To that end, the Tribunal has considered on previous occasions that the exercise of the punitive power of the State has been abusive and unnecessary to protect the right to honor, when the criminal statute in question does not establish clearly what behaviors involve serious damage to such right. [FN60] That is what occurred in the case of Mr. Usón Ramirez.

[FN60] Cf. Case of Kimel, supra note 41, para. 76 ("The broad codification of crimes of slander and insult can result contrary to the principle of minimal intervention and of ultima ratio of criminal law.")

A.4) Strict proportionality of the measure

76. The Commission indicated that "the application of Article 505 of the Organic Code of Military Justice, in this specific case, was openly disproportionate." Accoding to the Commission, "the comments made by Mr. Usón Ramírez about the events […] that occurred in the punishment cells in Fuerte Mara represented the exercise of his right to have his own thoughts about a event of public interest, to express such thought by issuing an opinion and making comments on certain technical aspects related to one of the versions in the media about the possible origin of the fire in the punishment cell." Therefore, "the opinions given [by Mr. Usón Ramírez] regarding [those] facts that had move[d] society [should be] protected to a higher degree."

77. In turn, the representatives alleged that "[t]he comments by [Mr. Usón Ramírez], made in the Television interview 'La Entrevista' were limited to making comments on information of public interest, in relation to the soldiers who were injured or dead in military installations while they were in a punishment cell under State custody. According to the representatives, "the society had the right to know why those soldiers were punished, what instance decided their sanction, which were their detention conditions, how a cell could catch fire when no flammable material was allowed in, or why the cell caught fire so quickly and could not be controlled." Likewise, the representatives alleged that "[when] resorting to a criminal sanction as severe as the sanction imposed on [Mr.] Usón [Ramírez] (five years and six months in prison), there being other alternative measures such as the right to correct the falsity or reply, or monetary penalties, it is clearly disproportionate and may be qualified as a serious affront to freedom of expression,"

particularly because “given the public interest at stake, the importance of the satisfaction of the good could not be imposed on the freedom of expression, which is of a preferential nature.”

78. The State pointed out “it is clear that [Mr.] Usón Ramírez made a judgmental assessment and attributed liabilities to the National Armed Forces in a specific punishable fact which was the object of a criminal investigation in the common jurisdiction; his opinions questioned the honorableness of the Armed Forces, creating a negative impact on the society in general of the image, prestige, and credibility of the military institution; this alters the harmonious relationship that must prevail between the Armed Forces and civil society to achieve and keep public order and security in the country.” “Due to that, it may be fully affirmed that the restriction applied in this case is proportional to the interest justifying it.”

79. At this stage of the analysis, whether the restriction is strictly proportional must be considered so that the inherent sacrifice of such restriction is not exaggerated or disproportionate to the advantages obtained through such limitation. [FN61] The Court has adopted this method when pointing out the following:

• For restrictions to be compatible with the Convention, such restrictions shall be justified on the basis of collective objectives which shall, due to their importance, clearly prevail on the social need to be fully entitled to the right that Article 13 of the Convention guarantees and do not set any limits to the right established in such Article beyond what is strictly necessary. This means that the restriction shall be proportional to the interest that justifies it and shall be closely adjusted to the achievement of such legitimate objective, interfering as little as possible with the effective exercise of the right to freedom of expression. [FN62]

[FN61] Cf. Case of Chaparro Álvarez and Lapo Íñiguez, supra note 56, para. 93; Case of Kimel, supra note 41, para. 83, and Case of Yvon Neptune, supra note 46, para. 98. See also, Case of the “Juvenile Reeducation Institute” v. Paraguay. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 2, 2004. Series C No. 112, para. 228.

[FN62] Cf. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85, supra note 39, para. 46; Case of Kimel, supra note 41, para. 83, and Case of Palamara Iribarne, supra note 47, para. 85.

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80. In this case, the restriction would have to achieve an important satisfaction of the right to honor or reputation which the domestic right recognizes belongs to the Armed Forces without making the right to free criticism non-existent against their performance as representative instances of the State. The following shall be analyzed: i) the degree of impact to one of the goods at stake, determining whether the intensity of such impact was serious, intermediate, or moderate; ii) the importance of the satisfaction of the opposite good, and iii) whether its satisfaction justifies the restriction of the other one. In some cases, the balance shall tip in favor of the freedom of expression and in other cases to safeguard the right to honor and reputation. [FN63]

[FN63] Cf. Case of Kimel, supra note 41, para. 84.

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81. As regards the affectation of the freedom of expression, the Court considers that the consequences of being subjected to trial in a military court (infra paras. 107 to 116); the criminal trial itself; the preventive deprivation of freedom imposed on him; the sanction depriving him of liberty for five years and six months to which he was judgmentd; including him in the criminal record; the loss of revenues during the time he was in prison; the affectation of the exercise of the rights that are restricted due to the sanction imposed; being far away from his family and loved ones; the latent risk of losing his personal liberty, and the stigmatizing effect of the criminal sanction imposed on Mr. Usón Ramírez show that the further liabilities established in this case were truly very serious. [FN64]

[FN64] Cf. Case of Kimel, supra note 41, para. 85.

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82. As regards the importance of the right to honor or reputation that the domestic law recognizes to the Armed Forces, the Tribunal indicated in this Judgment that determining whether the Armed Forces have a right to honor or reputation (supra para. 45) is not within its scope. However, in an analogous manner, the Tribunal has pointed out before that it is extremely important to satisfy the honor or reputation of whoever has been offended, particularly in the case of a serious crime regarding an individual. Nevertheless, the satisfaction of such good does not necessarily justify the restriction of the right to freedom of expression in any case.

83. To that end, it shall be reiterated that in the test of proportionality it should be taken into account that the expressions about the exercise of the functions of the State Institutions have a greater protection, in the sense that they can promote a democratic debate in society. [FN65] That is the case because it is supposed that in a democratic society the state institutions or entities [FN66] as such are exposed to public scrutiny and criticism, and their activities are inserted in the domain of public debate [FN67]. This threshold is not based on the quality of the subject but on the public interest of the activities carried out [FN68]. Hence larger tolerance should face the affirmations and considerations made by citizens when exercising their democratic right. [FN69] Such are the demands for pluralism of a truly democratic society, [FN70] requiring a more significant circulation of reports and opinions about matters of public interest. [FN71]

[FN65] Cf. Case of Herrera Ulloa, supra note 40, para. 128; Case of Kimel, supra note 41, para. 86, and Case of Ricardo Canese, supra note 38, para. 98.
[FN66] Cf. ECHR, Case Castells, supra note 59, § 42 and 46.
[FN67] Cf. Case of Herrera Ulloa, supra note 40, para. 129; Case of Kimel, supra note 41, para. 86, and Case of Ricardo Canese, supra note 38, para. 103..
[FN68] Cf. Case of Herrera Ulloa, supra note 40, para. 129; Case of Kimel, supra note 41, para. 86, and Case of Palamara Iribarne, supra note 47, para. 84.

[FN69] Cf. Case of Claude Reyes et al., supra note 44, para. 87; Case of Kimel, supra note 41, para. 86, and Case of Palamara Iribarne, supra note 47, para. 83.
[FN70] Cf. Case of Ivcher Bronstein v. Peru. Merits, Reparations, and Costs. Judgment on February 6, 2001. Series C No. 74, para. 152; Case of Kimel, supra note 41, para. 87, and Case of Ricardo Canese, supra note 38, para. 83.
[FN71] Cf. Case of Herrera Ulloa, supra note 40, para. 113; Case of Kimel, supra note 41, para. 87, and Case of Claude Reyes et al., supra note 44, para. 81.
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84. In this case, the remarks made by Mr. Usón Ramírez were related to matters that were clearly of public interest. Despite the existence of public interest regarding the events in Fuerte Mara, to which the Armed Forces depende, Mr. Usón Ramírez was tried and judgmentd without taking into account the requirements of the American Convention regarding the larger tolerance required regarding any affirmations and considerations expressed by citizens exercising their democratic right.

85. On the other hand, the Tribunal observes that in the process before this Court the State underscored that Mr. Usón Ramírez made several statements that were not related to the subject of public interest regarding the use of flamethrowers, but that could be understood as insult, offense and contempt of the Armed Forces. However, as pointed about above (supra paras. 37 and 38), the national tribunals based the judgment of Mr. Usón Ramírez on the facts related to the alleged imputation to the authorities of Fuerte Mara of "premeditation" in the use of a flamethrower. [FN72] The other statements by Mr. Usón Ramírez in such Television interview do not form part of the reasons for the judgment, as indicated by the Venezuelan domestic jurisdiction that determined that facts on whose basis Mr. Usón Ramírez was tried; therefore, the Court shall not refer to them.

[FN72] According to the judgment against him, Mr. Usón Ramírez was condemned "for having given his opinion and made false assertions involving military personal." Cf. Judgment of the First Military Tribunal of Judgment on November 8, 2004, supra note 22, f. 396. Similarly, according to the appeals tribunal, Mr. Usón Ramírez was charged because "what he expressed constitutes Slander against the National Armed Forces, by having affirmed a false fact." Cf. Judgment of January 27, 2005 of the Martial Court of Military Criminal Circuit of Caracas, in relation to the appeal remedy, supra note 22, f. 1884.
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86. To that end, the Court observes that, on the one hand, the national tribunal considered that Mr. Usón Ramírez had issued an opinion, not only made an affirmation and, on the other hand, that such opinion was affirming a fact that was not true (supra paras. 40 and 42). The Court has already pointed out that opinions cannot be considered true or false. As such, an opinion cannot be the object of any sanction, [FN73] even more so when such opinion is conditioned by evidencing facts on which it is based. In this case, when conditioning his opinion in such a way, it is clear that Mr. Usón Ramírez was not stating that a premeditated crime had been committed, but that in his opinion such a crime seemed to have been committed in case the hypothesis about the use of the flamethrower was true. An opinion conditioned in such a way cannot be subjected

elements which question veracity. [FN74] Furthermore, the above shows that Mr. Usón Ramírez lacked any specific intention to insult, offend, or disparage since if he had had the intent to do so, he would not have conditioned his opinion in such a way. A contrary reasoning, i.e., establishing disproportionate sanctions for giving opinions on an alleged illicit fact of public interest that involved military institutions and their members, thus providing a larger and automatic protection to their honor or reputation, without considering the larger protection of freedom of expression in a democratic society, is incompatible with Article 13 of the American Convention. [FN75]

[FN73] Cf. Case of Kimel, supra nota 41, para. 93. See also, ECHR, Lingens v. Austria, judgment of 8 July 1986, § 46, Series A No. 103.
[FN74] Cf. Case of Kimel, supra note 41, para. 93. See also, ECHR, Lingens, supra note 73..
[FN75] Cf. Case of Palamara Iribarne, supra note 47, para. 93.

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87. Lastly, as pointed out above, [FN76] even when the Inter-American Court cannot and does not mean to replace the national authority in individualizing the sanctions for any crime under its domestic law, the Tribunal is concerned about the lack of proportionality between the response of the State to the expressions by Mr. Usón Ramírez and the juridical benefit affected – here, the honor or reputation of the Armed Forces. To that end, the Tribunal reiterates that both rationality and proportionality shall guide the behavior of the State when exercising its punitive power, thus avoiding the leniency which is characteristic of impunity such as abuse of discretion regarding the determination of criminal penalties.

[FN76] Cf. Case of Vargas Areco v. Paraguay. Merits, Reparations, and Costs. Judgment of September 26, 2006. Series C No. 155, para. 108.

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88. Taking into account all the above, the Court concludes that imposition of liabilities on Mr. Usón Ramírez for the crime of slander against the Armed Forces violated his right to freedom of expression, since the requirements of legality, necessity, and proportionality were not respected when restricting such right. As a consequence, the State violated the principle of legality and right to freedom of expression set forth in the Articles 9 and 13(1) and 13(2) of the American Convention, in relation with the general obligation of respecting and guaranteeing the rights and freedoms established in Article 1(1) of such Convention, prejudicing Mr. Usón Ramírez, due to the restrictions in his exercise of this right.

B) On the alleged need to ensure the protection of national security and public order by determining any further liabilities for the exercise of the right to freedom of expression

89. The Commission pointed out that “although the State can impose further liabilities based on “national security”, such liabilities can only be legitimate provided “their genuine purpose

and demonstrable effect is to protect the existence of the country against the use or threat of force, to protect its territorial integrity against the use or threat of force, to protect its capacity to react to the use or threat of force, or to protect the personal security of the main governmental officials." Consequently, it does not suffice to specualte on the possible impact of the order or on hypothetical circumstances resulting from interpretations made by the authorities regarding facts that do not clearly involve a reasonable risk of serious disturbance ("anarchic violence'). A broader or more indeterminate interpretation would open up an inadmissible road to arbitrariness and would clearly restrict freedom of expression that forms an integral part of the public order protected by the American Convention."

90. The representatives alleged that in this case there was no lawful purpose justifying any further liabilities imposed on the alleged victim, since "the criminal sanction applied to [Mr.] Usón [Ramírez] was not necessary to protect […] the national security that was never threatened." According to the representatives, "the comments by [Mr.] Usón [Ramírez] were not a threat to national security, their purpose was not to attack any of the elements of which make up the crime, and objectively, they were not enough to threaten the existence of the State or any elements that form the State. Furthermore, they pointed out that the subject matter of the case "was not a confidential or secret matter, whose disclosure would become a threat for national security."

91. The State pointed out that "General [now retired] Usón [Ramírez] attributed liabilities to the National Armed Forces in his judgmental assessment in a specific punishable event that was the object of criminal investigation under common jurisdiction; such opiniones put into question the honor of the Armed Forces, influencing its image negatively, prestige and credibility of the military institution vis-à-vis society in general; this alters the harmonious relation that shall prevail between the Armed Forces and the civil society to achieve and keep public order and national security." To that end, the State highlighted that "there is a close relation between safeguarding the honor and reputation of the institution of the National Armed Forces […] and keeping national security." "The mission of the National Armed Forces consists of protecting and ensuring protection to the national community; therefore fullfilling this mission justifies setting limits to freedom of expression." Thus, it pointed out that "it is not by chance that the crime of slander against the Armed Forces is set forth in chapter IV of the Military Justice Organic Code as a "Crimes against Order and Security of the Armed Forces." To sum up, the State indicated that "any remarks whose purpose is to undermine the credibility of the military institution in the eyes of the population and the trust of the members in their superiors, directly affects the security of the country and requires effective condemnation by the State."

92. In this case, the parties have referred to the alleged restriction of freedom of expression under Article 13(2)(b) of the Convention, imposed in an alleged need to protect both the "national security" and "public order." Although Article 13(2)(b) of the Convention establishes that the exercise of freedom of expression may be subject to further liabilities, provided such restriction is set under the law and it is necessary to ensure, inter alia, the national security and public order, it does not result from the file that Mr. Usón Ramírez has been judgmentd with the purpose of ensuring the protection of the national security or public order. On the contrary, as pointed out above, Mr. Usón Ramírez was judgmentd and found guilty for having committed the crime of slander against the Armed Forces pursuant to Article 505 of the Organic Code of

Military Justice. The good that such rule tries to protect is the honor or reputation. Affecting the national security or public order is not in the criminal statute under which Mr. Usón Ramírez was judgmentd.

93. The Tribunal observes that the sole reference to the issue of national security is that which the First Military Tribunal made in the verdict of guilt when it assessed the sanction to be imposed on Mr. Usón Ramírez, pointing out that "the crime committed by the accused attacks the security of the country." [FN77] However, such assessment does not form part of the grounds for the criminal liabilities of Mr. Usón Ramírez for the crime of slander against the Armed Forces, which had already been declared in the above paragraphs of said judgment. Such reference to national security is found in the chapter "Of Sanctions to be Imposed" in the verdict of guilt, when assessing the corresponding aggravating and mitigating factors to determine the punishment, but not to determine the guilt. On the other hand, the domestic tribunal did not make any considerations regarding the public order to determine the criminal liabilities of Mr. Usón Ramírez.

[FN77] Judgment of the First Military Tribunal of Judgment on November 8, 2004, supra note 22, f. 360.

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94. Therefore, given the fact that the crime for which Mr. Usón Ramírez was judgmentd is not explicitly related to the protection of national security or public order, and taking into account that both national security and public order are concepts included in other Articles of the Venezuelan criminal legislation for which Mr. Usón Ramírez was not judgmentd, this Tribunal considers that it is unnecessary to analyze whether the State violated Article 13(2)(b) of the American Convention in this case.

C) On the restriction of freedom of expression in relation with the order of parole

95. "[T]he Commission stressed that the order of parole by the First Military Tribunal for the Execution of Judgments of Caracas of December 24, 2007 includes, inter alia, prohibitions to make statements in the media and to attend demonstrations." "The prohibition to make statements about matters directly affecting and in direct relation with the way in which the Venezuelan authorities have led this case, as well as the prohibiton to exercise the right of expression, violates Article 13 of the Convention and may allow for the continued penalization of the victim for his expressions, preventing the victim from participating in matters of public debate."

96. To that end, for the representatives said, "restriction of their freedom of expression, in addition to being unlawful and arbitrary, is unacceptable in a democratic society. It constitutes censoring in the m[ost] traditional sense possible. […] Article 505 of the Organic Code of Military Justice points out that whoever insults the Armed Forces 'shall be subject to three to five years in prison,' but it does not state that apart from prison the individual shall remain silent or that, during the period of his judgment, the individual shall not be allowed to make any comments about the nature of the accusation made against him, the nexus of the tribunal with

other instances of the Public Power, the behavior of the tribunal during his trial, the evidence that was not received or assessed by the tribunal, or the consistency of the arguments in the judgment with the evidence provided by the parties therein.

97. The State did not refer to this issue as part of its allegations.

98. The Tribunal observes that, as mentioned in the file, on December 24, 2007 the First Tribunal to Execute Judgments of Caracas issued a resolution, [FN78] through which Mr. Usón Ramírez was granted the benefit of parole, with a series of conditions and prohibitions. [FN79]

[FN78] Cf. Order of the First Military Tribunal of Execution of Judgments on December 24, 2007 (case file of attachments to the answer of the petition, tomo X, fs. 8020 a 8031).

[FN79] The Order of December 24, 2007 of the First Military Tribunal of Execution of Judgments of Caracas contained the following conditions: 1) "[p]rohibited exit from the territorial jurisdiction of [said] First Military Tribunal of Execution of Judgments, which means, District Capital, State of Miranda and State of Vargas without authorization of the same;" 2) "[n]o change without authorization of address where allegedly residing […];" 3) "[a]bstain from going near dangers places such as whore houses, bars or places where one consumes stupefacients or alcoholic beverages"; 4) "[p]rohibited from attending manifestations, walks, marches, mass gatherings, reunions, among others, of a political nature in relation to the charge contained in Article 407 Ordinal 1° of the Organic Code of Military Justice: Political Immobilization for the period of the crime"; 5) "[n]o conferring with questionable character and reputation or mess with punishable facts."; 6) "[p]rohibited to give declarations to the various means of social communication (prints, radio broadcasts, audio visuals, among others) of the case involved in the present cause;" 7) "[d]o a study at a Educational Center regarding his possibilities or maintain a stable job and periodically present proof of study or work if that is the case, to the Judicial Office," and 8) "[c]ome before this Military Tribunal the fifteenth (15) and last day of the month and if these days fall on a weekend or holiday, he should come the prior working days. Similarly, the failure to comply with any of this conditions is sufficient to revoke the benefit given hereby," supra note 78.

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99. Within the framework of the public hearing held in this case, Mr. Usón Ramírez affirmed "that he exercised severe self-censorship in order to express himself within the limits in which he was allowed to express himself." [FN80]

[FN80] Declaration of Mr. Francisco Usón Ramírez given at the Inter-American Court at the public hearing held during the XXXVIII Extraordinary Period of Sessions, celebrated on April 1, 2009, in Santo Domingo, Dominican Republic.

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100. In view of the claim by the Commission and the representatives that this Court should declare that these facts –particularly operative paragraphs four and six of the stated resolution (supra para. 98) – are an additional violation of the right to freedom of expression of Mr. Usón

Ramírez, the State did not submit any allegations in its defense. Under these circumstances, the Tribunal deems it pertinent to apply the provisions of Article 38(2) of the Rules of Procedure, as done before, [FN81] which establishes that "the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested" by the State. Therefore, the Tribunal concludes that the State is responsible for violation of Article 13(1) and 13(2) of the Convention, in relation to Article 1(1) of this Convention, to the detriment of Mr. Usón Ramírez, insofar as the prohibitions are abusive restrictions to the right to freedom of expression with no legitimate aim and they are not necessary or proportional in a democratic society.

[FN81] Cf. Case of Valle Jaramillo et al., supra note 38, para. 130.

D) The alleged disciplinary sanction against Mr. Usón Ramírez while he was in prison

101. In the representatives' writ of pleadings and motions, the representatives added that "[w]hile serving his judgment in prison, [Mr.] Usón Ramírez received a disciplinary sanction and his right to receive visits was suspended, since he had sent a letter to the directors and employees of Radio Caracas Televisión, showing his solidarity with them for the announced termination of their grant to an open air broadcast. This disciplinary measure was adopted without any procedure or prior notice to the accused and was the object of appeals by [Mr.] Usón and his counsel. Although the disciplinary sanction was then declared null by the competent Tribunal, such nullity was declared after Mr. Usón Ramírez had completely satisfied the requirements of the sanction imposed upon him."

102. In relation to said claim by the representatives, the Tribunal reiterates what it has reiterated in its constant jurisprudence, that "the alleged victim, his relatives or his representatives may resort to other rights than those in the application of the Commission, on the basis of the facts submitted by the latter." [FN82] The facts on which this claim by the representatives is based do not form part of the factual framework submitted to the Court by the Inter-American Commission and are not supervening nor do they explain, clarify or dismiss the facts that have been mentioned by the former (supra para. 33). Therefore, the Tribunal shall not pronounce on this alleged violation.

[FN82] Cf. Case of the "Five Pensioners" v. Peru. Merits, Reparations, and Costs. Judgment of February 28, 2003. Series C No. 98, para. 155; Case of Escher et al., supra note 11, para. 191, and Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller"), supra note 9, para. 97.

VII. VIOLATION OF ARTICLES 8(1) (RIGHT TO A FAIR TRIAL) [FN83] AND 25(1) (JUDICIAL PROTECTION), [FN84] IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) [FN85] AND 2 (DOMESTIC LEGAL EFFECTS) [FN86] OF THE AMERICAN CONVENTION

[FN83] Article 8(1) of the Convention establishes that:
Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
[FN84] Article 25(1) of the Convention establishes :
Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
[FN85] Article 1(1) of the Convention establishes that :
The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.
[FN86] Article 2 of the Convention states that:
Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

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103. In this chapter, the Court shall examine alleged violations in relation to the following matters: a) the right to be tried by a competent and impartial judge or court; b) other procedural issues recognized in Article 8 of the Convention, and c) the right to an effective judicial remedy.

A) Right to be tried by a competent and impartial judge or court

104. The Commission alleged that because Mr. Usón had the status of "[a] retired member of the military, [he should have been] considered a civilian" for the purpose of determining the competent judge. The Commission highlighted that the norms that define the criminal military jurisdiction in Venezuela allow "that civilians are tried by military tribunals and that the crimes subject to the criminal military jurisdiction "reach conduct beyond the military sphere and are even found, in a more precise manner, in ordinary criminal legislation." On the other hand, the Commission alleged that the lack of impartiality and independence of the tribunals that tried Mr. Usón´s case is evidenced by the following facts: a) "the tribunal that processed Mr. Usón Ramírez belonged to the [A]rmed [F]orces, the institution that considered itself aggrieved by the crime of [severe insult] with which he was charged. For that reason, those who were to decide his case had a direct interest therein; b) "[the] Minister of War that ordered the investigation of Mr. Usón [Ramírez] was part of the Court of Cassation at the time that it resolved recourse filed by the accused."

105. The representatives also alleged a violation of Mr. Usón Ramírez's right of to be tried by a competent tribunal, for the same reasons cited by the Commission. Additionally, they stressed that the tribunals that heard Mr. Usón Ramírez's case lacked impartiality and independence, given that: a) "they had a direct interest in the controversy"; b) "the same Military Prosecutor that ordered the investigation against [Mr. Usón Usón Ramírez] knew of the filing for a remedy in the face of a conviction" as a magistrate of the Supreme Tribunal of Justice; and c) " the Military Prosecutor in the case [was designated by] the Minister of Defense, by order of the President of the Republic."

106. The State alleged that the jurisdiction that was "appropriate to hear the case of General Francisco Usón[, a general now reitred] is the […] military and not the civil forum." In that regard, it indicated that "when a service member retires, he is no longer providing an active service to the Armed Forces," but that does not imply "that he is no longer a service member and becomes a civilian." Instead, according to Venezuelan law, retirement " is one of the possible relationships with the Armed Forces, which does not break the juridical and administrative links that a person has with the institution." Similarly, the State indicated that "if the legislators did not include the National Armed Forces in the crime [of slander] set forth in the Criminal Code, […] it was because they delegated hearing such a crime to the criminal military jurisdiction." It alleged, as well, that "saying […] that because the Armed Forces was the institution which was offended and the judges […] are part of the Armed Forces, then they have an interest and are not independent, is the same as [saying] that if he offends the Judicial Branch, then there exists no judge which could try the case because such judge is part of the Judicial Branch."

107. When analyzing this matter, the Court shall deal with the issue of the competence of the military court, and then the allegations regarding the impartiality of the military tribunals in Venezuela. However, it is relevant to make some general considerations about the competence of the military criminal jurisdiction.

108. The Court has established that the military criminal jurisdiction in democratic States, in times of peace, has tended to be reduced and even disappear; therefore, in the case of a State that conserves it, its use should be minimal, as strictly necessary, and shall be inspired by the principles and guarantees governing modern criminal law. [FN87] In a democratic State the military criminal jurisdiction shall have a restrictive and exceptional scope and shall be channeled to protect special juridical interests, related to the functions of the military forces under the law. Hence, the Tribunal has already pointed out that military courts shall only hear cases of crime or faults by the military that attack, due to their nature, the juridical goods of the military order. [FN88]

[FN87] Cf. Case of Palamara Iribarne, supra note 47, para. 132.

[FN88] Cf. Case of Durand y Ugarte v. Peru. Merits. Judgment of August 16, 2000. Series A No. 68, para. 117; Case of Tiu Tojín v. Guatemala. Merits, Reparations, and Costs. Judgment November 26, 2008. Series C No. 190, para. 118, and Case of Zambrano Vélez et al. v. Ecuador. Merits, Reparations, and Costs. Judgment July 4, 2007. Series C No. 166, para. 66.

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109. Likewise, the Court has considered that the right to be tried by an ordinary court of justice pursuant to the proceedings legally set forth is a basic principle due process. [FN89] Consequently, the Tribunal has pointed out that "when the military justice takes up competition in a matter that should be heard by ordinary justice, the right of the natural court is affected and, a fortiori, the due process", which in turn is closely linked to the right of access to justice [FN90].

[FN89] Cf. Case of Castillo Petruzzi et al., supra note 46, para. 129; Case of Palamara Iribarne, supra note 47, para. 125, and Case of Lori Berenson Mejía v. Peru. Merits, Reparations, and Costs. Judgment of November 25, 2004. Series C No. 119, para. 143.
[FN90] Cf. Case of Castillo Petruzzi et al., supra note 46, para. 128; Case of Tiu Tojín, supra note 88, para. 118, and Case of Zambrano Vélez et al., supra note 88, para. 66.

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110. To that end, in order to respect the right of the natural judge, the Tribunal has pointed out that it is not enough for the law to establish previously which tribunal shall hear the cause and grant it competence. [FN91] Such law shall, when granting competence to a military court and determining the military criminal rules applicable in such court, establish clearly and without ambiguity: a) who is a service member, the only active subjects of military crimes; b) which are the typical criminal behaviors particular to the military forum; c) the unlawful conduct as demonstrated by the injury or how the military juridical goods have been seriously jeopardized, thus justifying the exercise of the military punitive power, and d) the corresponding punishment, taking into account the principle of proportionality. The authorities exercising their functions in the military criminal jurisdiction, when applying military criminal rules and accusing a military member of a crime shall also be governed by the principle of legality and, inter alia, shall confirm the existence of all the elements involved in the military criminal codification, as well as the existence or non-existence of the exclusion causes of the crime. [FN92]

[FN91] Cf. Case of Palamara Iribarne, supra note 47, para. 125.
[FN92] Cf. Case of Palamara Iribarne, supra note 47, para. 126.

A.1) Competence

111. The Tribunal has pointed out that the application of military justice shall be strictly reserved to members of the active military. Hence, the Court has been constant in stating that civilians and "retired military cannot [be] judged by military courts." [FN93]

[FN93] Cf. Case of Cesti Hurtado v. Perú. Merits. Judgment of September 29, 1999. Series C No. 56, para. 151, and Case of Palamara Iribarne, supra note 47, para. 139.

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112. In this case, there is no controversy regarding whether Mr. Usón Ramírez was a Brigadier General of the Venezuelan Armed Forces and that at the time of the facts in this case he was retired (supra para. 36). Also, the Tribunal observes that the trial against Mr. Usón Ramírez in the military forum was based on the following domestic law: 1) the Organic Law of the National Armed Forces of February 22, 1995 (hereinafter the "Organic Law") and 2) the Organic Code of Military Justice of September 17, 1998 (hereinafter the "Organic Code" or "COJM").

113. As regards the legislation governing the jurisdiction of military courts, Article 212 of such Organic Law points out that "all the active members of the National Armed Forces shall be subjected to the military jurisdiction as set forth under the Law." However, Article 124 of the Organic Code subjects officers [FN94] to the military jurisdiction "independent […] of the status they may have." In addition, the Court observes that numeral 3 of Article 123 of the Organic Code establishes, inter alia, that the criminal military jurisdiction includes "[t]he military infractions committed by military officials or civilians together or separately." From the aforementioned, it is not clear that the domestic legislation allows for a retired military member to be subjected to the military jurisdiction. Nevertheless, in the case of Mr. Usón, this matter was decided by military jurisdictional instances which declared differently from what this Tribunal has decided on other occasions (supra para. 108), namely that, military courts were competent to try a retired military member. [FN95]

[FN94] Article 211 of the Organic Code establishes that "[t]he military personnel are classified in Officials [and other categories]." The Generals of Brigades, according to Article 111 of the same instrument, pertain to the category of "Official Generals."

[FN95] Cf. Transcript of Hearing of the Second Military Court of First Instance of Caracas on May 24, 2004 (case file of attachments to the petition, tomo II, attachment 53, fs. 1247 a 1252); order of May 27, 2004 of the Second Military Court of First Instance of Caracas, in relation to the request to amplify the measures of preventive deprivation of liberty (case file of attachments to the petition, tomo II, attachment 59, fs. 1352 a 1361), and judgment of the Court of Criminal Appeals of the Supreme Tribunal of Justice on June 2, 2005, supra note 22, fs. 1494 a 1557.

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114. As pointed out above, the codification of the crime under Article 505 of the COJM whereby Mr. Usón Ramírez was judgmentd does not limit the active subject to those in active military duty, rather, it includes any individual, either civilians or retired military members, to be subjected to the military jurisdiction (supra para. 38).

115. It is evident from the foregoing that, contrary to the requirements of the American Convention and the jurisprudence of this Court, the domestic legislation applicable to this case extends its jurisdiction to active military service members, but also extends it to civilians and to retired service members. Additionally, the Tribunal observes that even though the State has alleged that, in accordance with domestic law on the matter, retired service members do not cease to be active service members, the State also indicated that retirees "cease to render active service" to the Armed Forces. [FN96] Thus, retired service members in Venezuela do not exercise particular functions of defense or national security [FN97] that would permit them to be tried in the State´s military forum, and the Tribunal finds no reason to depart from its previous

jurisprudence that determined that retired service members should not be tried by a military court.

[FN96] In this regard, Article 240 of the Organic Code establishes that "[r]etirement is the time where Officials […] who stop lending their services to the National Armed Forces because of [among other reasons]: […] g) [d]isciplinary measures."
[FN97] Cf. Case of Palamara Iribarne, supra note 47, para. 132.

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116. Consequently, Mr. Usón Ramírez –who was not an active service member or exercising any particular function of defense or national security- was tried by a court that was not competent to do so. Thus, following the jurisprudence of this Tribunal in such respect, the Court considers that the State violated the right of Mr. Usón Ramírez to be tried by a competent judge or court, pursuant to Article 8(1) of the American Convention, in relation Articles 1(1) and 2 thereof.

A.2) Impartiality

117. The right to be tried by an impartial judge or tribunal is a fundamental guarantee of due process. That is, it shall be guaranteed that the judge or the tribunal exercise maximum objectivity in the trial. [FN98] In this respect, this Tribunal has established that impartiality requires that the judge in a private conflict is closer to the facts of the cause with no subjective prejudice and, similarly, offers sufficient guarantees from the objective standpoint so that it is beyond all doubt that there is full impartiality. [FN99] The impartiality of the tribunal means that its members should not have any vested interest, a premeditated decision, preference for any of the parties involved, and that they are not involved in the dispute. [FN100] Personal or subjective impartiality is assumed unless there is evidence to the contrary. In turn, the so-called objective evidence consists of determining whether the questioned judge can provide convincing elements to eradicate any legitimate fears or well-grounded suspicions of partiality regarding his person. [FN101]

[FN98] Cf. Case of Herrera Ulloa, supra note 40, para. 171 y Case of Palamara Iribarne, supra note 47, para. 145.
[FN99] Cf. Case of Apitz Barbera et al. ("First Court of Administrative Disputes"), supra note 41, para. 56.
[FN100] Cf. Case of Palamara Iribarne, supra note 47, para. 146.
[FN101] Cf. Case of Apitz Barbera et al.("First Court of Administrative Disputes"), supra note 41, para. 56.

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118. Consequently, this Court has declared previously that judges must separate themselves from a cause brought to their attention when doubt or other motives goes against the integrity of the tribunal as an impartial body. In order to safeguard the administration of justice, it must be

assured that a judge is free from any prejudice and there is no fear at all raising any doubts about the exercise of his jurisdictional functions. [FN102]

[FN102] Cf. Case of Palamara Iribarne, supra note 47, para. 147.

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119. In this case, it has been shown that one of the magistrates, Mr. Eladio Ramon Aponte Aponte, in the Criminal Court of Appeals of the Supreme Tribunal of Justice who heard the appeal filed by Mr. Usón Ramírez, was the person who ordered the investigation in his capacity as Military Attorney. [FN103]However, such magistrate/attorney was not banned from hearing the cause nor did he accept the challenge against him. [FN104] His participation in the trial against Mr. Usón Ramírez, first as an accuser and then as a judge, raises serious doubts about his impartiality, not yet addressed by the State in a convincing manner (supra para. 106). Therefore, the Tribunal considers that the State violated the right of Mr. Usón Ramírez to be tried by an impartial tribunal, which is thus a violation of Article 8(1) of the Convention, in relation to Article 1(1) of said Convention.

[FN103] Cf. Order No. MD-SG-2004/222 of the Ministry of Defense on May 10, 2004 (case file of attachments to the petition, tomo II, attachment 31, f. 1099); judgment of the Court of Criminal Appeals of the Supreme Tribunal of Justice on June 2, 2005, supra note 22, fs. 1494 to 1557, and cause No. CJPM-TM1ES-CCS-1734/06 of the First Military Tribunal of Execution of Judgments (case file of attachments to the answer of the petition, tomo II, attachment C, f. 5280).
[FN104] Cf. Case file of appeal against the Magistrate Eladio Ramón Aponte Aponte on March 28, 2005 (case file de attachments to the answer of the petition, tomo VIII, fs. 7397 to 7402) and brief No. 122 of March 29, 2005, signed by Mr. Eladio Ramón Aponte Aponte in his official capacity as President of the Court of Criminal Appeals of the Supreme Tribunal of Justice (case file of attachments to the answer of the demand, tomo VIII, fs. 7404 a 7408).

B) Other arguments of the parties on the violation of Article 8 of the Convention.

120. This Court has indicated in its previous jurisprudence that, in cases regarding an incompetent judge or tribunal, it is unnecessary to rule on other aspects of the criminal proceeding that allegedly violate Article 8 of the Convention. [FN105] However, despite the fact that in the present case the military tribunals that tried Mr. Usón Ramírez were incompetent (supra para. 116), the Court observes that the Commission and the representatives referred to other aspects of the criminal proceedings that also violated Article 8(2) of the same instrument.

[FN105] Cf. Case of Cantoral Benavides v. Peru. Merits. Judgment August 18, 2000. Series C No. 69, para. 115; Case of Escué Zapata v. Colombia. Merits, Reparations, and Costs. Judgment of July 4, 2007. Series C No. 165, para. 106, and Case of La Cantuta v. Peru. Merits, Reparations, and Costs. Judgment of November 29, 2006. Series C No. 162, para. 145.

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121. In this sense, the Commission alleged that "from May 22, 2004, to June 22, 2004, Mr. Usón and his attorneys were not able to access the case file of the investigation against him because it was decided that they should be 'kept totally confidential' so that […] they may not be 'denatured, left unrecognizable, or distorted' by [Mr. Usón Ramírez,] given that publicity would hinder the investigation and the purpose of the proceeding.'" Additionally, the Commission indicated that "the public hearings [in that proceeding] of October 6, 7, 8, and 11, 2004, were held behind closed doors," despite that "Mr. Usón was being judged [for] comments made during a televized program […] regarding an event of public knowledge [and debate.] That is, for events "unrelated to confidential information of the Armed Forces." Moreover, the Commission alleged that the lack of independence of the tribunals that saw Mr. Usón 's case, was evinced by: a) "Military Prosecutors are designated by the President of the Republic," and, in accordance with the Organic Code of Military Justice, the members of the lower instances of the military jurisdiction are chosen by the higher instances thereof, and, in the case of the Martial Court and the Supreme Court of Justice, from a list submitted by the Minister of Defense, making the military forum a "service or dependency of the executive branch"; b) "the judge in charge of the Military Control Tribunal of la Guaria that declared himself incompetent to hear [Mr. Usón´s case on the day of his detention] was dismissed from his charge that same day [without] any sort of proceeding and c) "the judges that made up the Trial Court were active service members of a lower rank than some of the officials prosecuting the case."

122. The representatives alleged that "both the final judgment and the judicial resolutions regarding Francisco Usón´s preventive detention where not sufficiently reasoned." Additionally, the representatives alleged that the State "violated the principle of equality of arms, providing the accusing party resources denied to the defense[, given that] while the Military Prosector violated legal deadlines for the presentation of documents, the oral and documentary evidence offered by the defense was rejected." They alleged, furthermore, that Mr. Usón Ramírez "did not have access to all of the available evidence, […] and was not able to a defend himself adequately." Moreover, the representatives argued that "the proceeding [against Mr. Usón Ramírez] was held behind closed doors," "with the pretext that the facts object of the case consituted a grave threat to [national] security, without adequatley starting the grounds in the convicting judgment. Finally, the State argued that the Tribunals that tried the case lacked independence because: a) "they were made up of active service members [subject to military discipline and subordination], that did not necessarily have to be attorneys, or attorneys with military assimilation"; b) "both the Military Prosecutor and the president of the Martial Court reported periodically and directly to the Minister of Defense, [who had ordered the investigation], on the state thereof"[FN106] c) "the day after he declared himself incompetent, the military judge of control in La Guaria was dismissed"; d) "during the proceeding, and particularly on the day that the judgment was to be rendered, the Minsiter of Defense visited the seat of the military tribunals."

[FN106] Cf. Brief No. 039.04 of May 11, 2004, submitted by the Military Prosecutor, Tennant (EJ) Jesús Arnoldo Rosales Castro, to the Commander of Military Garrison of Caracas, General of Division (EJ) Carlos Enrique Acosta Pérez (case file of attachments to the petition, tomo IV, attachment 89.1, f. 2241); the brief CM-No. 085-04 May 21, 2004, submitted by the Magistrate President of the Martial Court, General of the Brigades (EJ) Damián Adolfo Nieto Carrillo, to

the Ministry of Defense, General in Chief (EJ) Jorge Luis García Carneiro (case file of attachments to the petition, tomo IV, attachment 89.1, f. 2384), and the brief CJPM-CM-No. 028-05 of January 27, 2005, submitted by the President of the Martial Court and the Military Criminal Circuit, General of the Brigades Daniel Adolfo Nieto Carrillo, to the Ministry of Defense, General in Chief (EJ) Jorge Luis García Carneiro (case file of attachments to the petition, tomo VIII, attachment 89.5, f. 3910).

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123. In turn, the State alleged that "each and every pleading by the parties […] was resolved […] in a reasoned manner and was replied to." Also, as regards access to the file, the State indicated that Mr. Usón Ramírez and his "counsel had the necessary time and means to prepare his defense," and that "there is enough evidence in the file of the acts and statements by his counsel to confirm that they had full access to the file before June 22, 2004." Moreover, the State indicated that the Second Permanent Military Court of First Instance of Caracas "reviewed the grounds of the decision by the Military Prosecutor with respect to the confidentiality of the investigation [by means] of a reasoned response," in which it referred to "the preservation of the proceedings during the preliminary investigation [that could] be damaged or disturbed by publicity." According to the State, "the judges trying General Usón established the need to prevent the entrance of the general public to the courtroom in the file, pursuant to the Criminal Procedural Code, as clarified in the judgment of the High Court of Justice". Furthermore, the State declared that "the tribunal ordered the doors to be closed [to the public], not at the beginning of the trial, but when the persons related to the Fuerte Mara case testified. At the time, the Fuerte Mara case was under investigation, started with their statements and [therefore,] the proceedings of an investigation and [thus] reserved to third parties." Moreover, with regards to the independence of the military tribunals that saw Mr. Usón 's case, it stressed that "Article 25 of the Constitution, [...] one can not order principles of obedience, subordination and discipline in a Military Tribunal [therefore] there is no due obedience nor subordination." Finally, the State argued that the Judge of the Court of First Instance in La Guaira was dismissed "for lack of competence and professional ability," for declining jurisdiction in obedience to a rule which had been repealed by the Supreme Court, and subsequently he "got the annulment" of this decision.

124. With respect to the allegations of the parties, the Court considers that, having already declared that Mr. Usón Ramirez was tried and convicted by courts lacking competence and impartiality (supra paras. 116 and 119), he stands in a proceeding, flawed from its beginning, which thus implies that Mr. Usón had no access to judicial guarantees, and as such, the Tribunal deems it unnecessary to refer to other alleged violations in relation to the guarantees established in Article 8(2) of the Convention.

C) Right to an effective remedy (Article 25(1))

125. The Commission alleged that the State violated Article 25.1 of the Convention, "when trying Mr. Usón Ramírez in a jurisdiction that was incompetent […]. This circumstance [according to the Commission] brought about the fact that all recourses submitted by him against the military decisions against him and affecting his rights were resolved by military tribunals which did not offer the guarantees of independence and impartiality, so the State violated the right to a simple and prompt recourse or to any other effective recourse before competent courts

or tribunals. In fact, [according to the Commission], this situation was repeated in each of the instances where the military tribunals rejected the recourses submitted by the counsel for the defense, keeping their competence, instead of presenting the cause to the competent jurisdiction, that is, the ordinary criminal jurisdiction".

126. The representatives alleged that "[b]eing subjected to the military jurisdiction, depriving him of an ordinary judge, [Mr. Usón Ramírez] was deprived of any possibility of having effective judicial recourses, exercised before independent and impartial tribunals, with the guarantees of the due process, and that could protect him against the violations of the rights mentioned herein."

127. The State alleged that General Usón Ramírez "was guaranteed an effective judicial protection system." According to the State, the Commission and the representatives "tried […] to make believe that since the pleadings of the [alleged] victim's representatives were rejected in the domestic juridical order, then there was no effective and efficient recourse." The State emphasized "that the judicial protection and guarantee does not involve the right to be right, but a fair and efficient trial."

128. This Tribunal has established that the safeguard of the person vis-à-vis the arbitrary exercise of any public power is the main objective of the international protection of human rights. [FN107] To that end, Article 25(1) of the Convention sets forth the obligation of the State Parties to guarantee, to all persons under their jurisdiction, an effective judicial recourse against acts that violate their fundamental rights. [FN108] In turn, these recourses shall be followed pursuant to the rules of the due process (Article 8(1)), all of which is under the general obligation, by the States, to guarantee free and full exercise of the rights set forth in the Convention to all persons under their jurisdiction (Article 1(1)). [FN109]This guarantee "is one of the basic pillars, not only of the American Convention, but also the rule of law in a democratic society in the sense of the Convention." [FN110]Otherwise, that is to say, the existence of such effective recourses places the person in a status of lack of defense, [FN111] particularly when facing the punitive power of the State.

[FN107] Cf. Case of Baena Ricardo et al.v. Panamá. Competence. Judgment of November 28, 2003. Series C No. 104, para. 78; Case of Palamara Iribarne, supra note 47, para. 183, and Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 7, 2004. Series C No. 114, para. 130.

[FN108] Cf. Case of Velásquez Rodríguez, supra note 9, para. 91; Case of Acevedo Buendía et al.("Discharged and Retired Employees of the Office of the Comptroller"), supra note 9, para. 69, and Case of Kawas Fernández v. Honduras. Merits, Reparations, and Costs. Judgment of April 3, 2009 Series C No. 196, para. 110.

[FN109] Cf. Case of Velásquez Rodríguez, supra note 9, para. 91; Case of Anzualdo Castro v. Peru. Preliminary Objections, Merits, Reparations, and Costs. Judgment of September 22, 2009. Series C No. 202, para. 122, and Case of Yvon Neptune, supra note 46, para. 77.

[FN110] Cf. Case of Castillo Páez v. Peru. Merits. Judgment November 3, 1997. Series C No. 34, para. 82; Case of Reverón Trujillo, supra note 12, para. 59, and Case of Castañeda Gutman, supra note 56, para. 78.

[FN111] Cf. Case of Palamara Iribarne, supra note 47, para. 183.

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129. Likewise, the Court has pointed out that for the State to comply with the provisions of Article 25 of the Convention, it is not enough for the recourses to exist formally, but such recourses must be effective in the terms of such provision. [FN112] Such effectiveness involves, apart from the formal existence of the recourses, that it give results or answers to the violations of the rights set forth in Convention, in the Constitution or under the law. [FN113] The Court has reiterated that such obligation involves that the recourses shall be suitable to attack the violation and that its application by the competent authority shall be effective. [FN114] To that end, the recourses that are deceptive, due to the general conditions of the country or even due to the particular circumstances of a given case, shall not be considered effective [FN115]. For example, this may happen when practice or any other situation denying justice has shown that they are not useful. [FN116]

[FN112] Cf. Case of Ximenes Lopes v. Brasil. Preliminary Objections. Judgment of November 30, 2005. Series C No. 139, para. 4; Case of Escher et al., supra note 11, para. 196, and Case of Castañeda Gutman, supra note 56, para. 78.

[FN113] Cf. Case of the Constitutional Court v. Peru. Merits, Reparations, and Costs. Judgment of January 31, 2001. Series C No. 71, para. 90; Case of Acevedo Buendía et al.(“(“Discharged and Retired Employees of the Office of the Comptroller), supra note 9, para. 69, and Case of Bayarri, supra note 43, para. 102.

[FN114] Cf. Case of Acosta Calderón v. Ecuador. Merits, Reparations, and Costs. Judgment on June 24, 2005. Series C No. 129, para. 93; Case of Escher et al., supra note 11, para. 196, and Case of Claude Reyes et al., supra note 44, para. 131.

[FN115] Cf. Judicial Guarantees in States of Emergency (Arts. 27(2), 25, and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24; Case of Acevedo Buendía et al.(“(“Discharged and Retired Employees of the Office of the Comptroller), supra note 9, para. 69, and Case of Reverón Trujillo, supra note 12, para. 61.

[FN116] Cf. Case of Ivcher Bronstein, supra note 70, para. 137; Case of Acevedo Buendía et al.(“Discharged and Retired Employees of the Office of the Comptroller”), supra note 9, para. 69, and Case of Acevedo Jaramillo et al.v. Peru. Preliminary Objections, Merits, Reparations, and Costs. Judgment of February 7, 2006. Series C No. 144, para. 213.

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130. Likewise, Article 25 is closely linked to the general obligation under Articles 1(1) and 2 of the Convention, attributing functions of protection to the domestic law of the State Parties, which results from the fact that the State is responsible for designing and providing an effective recourse, as well as to ensure the due application of such recourse by the judicial authorities. [FN117] In that sense, according to Article 25 of the Convention, the domestic legislation shall assure due application of effective recourses before the competent authorities in order to protect all persons under its jurisdiction against any acts violating their fundamental rights or involving the determination of their rights and obligations. [FN118] In turn, the general duty of the State to adapt its domestic law to the provisions of the Convention in order to guarantee the rights therein, pursuant to Article 2, includes passing rules and developing practices to observe the

rights and liberties included therein in an effective manner, as well as adopting measures to eliminate any rules and practices of any nature whatsoever involving a violation of the guarantees set forth in the Convention. [FN119]

[FN117] Cf. Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Merits. Judgment of November 19, 1999. Series C No. 63, para. 237; Case of Reverón Trujillo, supra note 12, para. 60, and Case of the Yakye Axa Indigenous Community v. Paraguay. Merits, Reparations, and Costs. Judgment of June 17, 2005. Series C No. 125, para. 99.
[FN118] Cf. Case of Suárez Rosero v. Ecuador. Merits. Judgment of November 12, 1997. Series C No. 35, para. 65; Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller), supra note 9, para. 72, and Case of Claude Reyes et al., supra note 44, para. 130.
[FN119] Cf. Case of Castillo Petruzzi et al., supra note 46, para. 207; Case of Reverón Trujillo, supra note 12, para. 60, and Case of Castañeda Gutman, supra note 56, para. 79.
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131. In the present case, the Tribunal has pointed out that the State did not guarantee Mr. Usón Ramírez his right to be tried by competent, independent, and impartial tribunals(supra para. 116 and 119). The victim filed for remedies before military [FN120] and the ordinary [FN121] courts. In particular, the Court notes the filing of an appeals remedy before the ordinary jurisdiction, specifically with the Criminal Appellate Division of the Supreme Tribunal of Justice, wherein he refered, inter alia, to the military jurisdiction's lack of competence. [FN122] That action was "rejected as manifestly unfounded". [FN123] Subsequently, an appeal for review was brought before the Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela. [FN124] The filing of these remedies implies that Mr. Usón tried to have "effective remedies before judges or courts with competence, which protects him from acts violating his fundamental rights," as stated in Article 25 of the Convention. In the end, Mr. Usón Ramírez did not count on a remedy that guaranteed he was judged by a competent and imparcial tribunal.

[FN120] Cf. Transcript of hearings of the Second Military Court of First Instance of Caracas on May 24, 2004, supra note 95, fs. 1247 to 1252; order of May 27, 2004 of the Second Military Court of First Instance of Caracas, supra note 95, fs. 1352 a 1361; transcript of hearing of Second Military Court of First Instance of Caracas of June 22, 2004 (case file of attachments to the petition, tomo II, attachment 56, fs. 1329 a 1331); decision of the Martial Court on June 15, 2004 (case file of attachments to the petition, tomo II, attachment 61, fs. 1368 a 1391); order of the Second Military Court of First Instance of Caracas on June 23, 2004 (case file of attachments to the petition, tomo II, attachment 60, fs. 1363 a 1366), and decision of the Martial Court of the Military Criminal Circuit on January 27, 2005, supra note 22, fs. 1849 to 1905.
[FN121] Cf. Judgment of the Court of Criminal Appeals of the Supreme Tribunal of Justice on June 2, 2005, supra note 22, fs. 1494 to 1557 and motion for special review presented on September 17, 2006 before the Constitutional Court of the Supreme Tribunal of Justice of the Bolivarian Republic of Venezuela, supra note 22, fs. 2151 a 2214.
[FN122] Cf. Judgment of the Court of Criminal Appeals of the Supreme Tribunal of Justice on June 2, 2005, supra note 22, fs. 1499 a 1500.

[FN123] Cf. Judgment of the Court of Criminal Appeals of the Supreme Tribunal of Justice on June 2, 2005, supra note 22, f. 1555.
[FN124] Cf. Judgment of the Court of Criminal Appeals of the Supreme Tribunal of Justice on June 2, 2005, supra note 22, fs. 1494 to 1557.

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132. As such, the State violated Article 25(1) of the American Convention, in relation to Articles 1(1) of the Convention, to the detriment of Mr. Usón Ramírez.

VIII. VIOLATION OF ARTICLE 7(1) (PERSONAL LIBERTY) [FN125] OF THE AMERICAN CONVENTION, IN RELATION TO ARTICLE 1(1) (OBLIGATION TO RESPECT RIGHTS) THEREOF

[FN125] Article 7(1) of the American Convention states that:
Every person has the right to personal liberty and security.

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133. In this chapter, the Tribunal will analyze the allegations of the parties in relation to the violation of the right to personal liberty recognized in Article 7 of the Convention.

134. The Commission alleged that "the judgment of 5 years and 6 months in prison imposed on Mr. Usón Ramírez for exercising his right to freedom of thought and expression, […] violated his right to personal liberty established in Articles 7(1) and 7(3) of the American Convention." Additionally, the Commission indicated "that at the moment of his detention on May 22, 2004, […] Mr. Usón was not informed of the reasons [of the same]. It also alleged that "in the order of May 21, 2004, which gave rise to [Mr. Usón´s preventive detention], the [t]ribunal limited itself to mentioning 'the existence of flight risk,' without a single reference to the elements that domestic law required so that Mr. Usón´s deprivation of liberty would be admissible, and without duly explaining the reasons for the alleged flight risk. […] This situation repeated itself, for example, in the decisions of May 24, 2004, May 27, 2004, and June 15, 2004." According to the Commission, this occurred even though "Mr. Usón´s defense submitted documents to the [t]ribunal with the purpose of proving the existence of circumstances that, according to the law, would excuse Mr. Usón from the imposition of that measure."

135. The representatives alleged that "[in this case, Article 7] of the Convention was violated in all its parts". In this regard, they indicated that the "presumption [of innocence] was not duly respected when the burden of the proof was inverted, placing an excessive burden on the accused to show that there was no danger of escape and, therefore, he could be tried in liberty." According to the representatives, "the position taken by the Attorney and the military tribunals participating in this case, since they lacked the necessary impartiality, or did not offer any guarantees[,] as well as the lack of motivation of the resolutions denying Francisco Usón's liberty [and] the lack of decision by the tribunal vis-à-vis some pleadings submitted by the defense […] suggest lack of impartiality from the judge, who considered him guilty right from the beginning, violating the principle of presumption of innocence". As regards unlawfulness, they pointed out that "[although] [Article 250] of the Organic Code of Criminal Procedure

exceptionally allows for the deprivation of liberty of the person who has been charged with a crime, exercising such power is subject to the occurrence of several operational circumstances that did not occur in this case and whose absence made Francisco Usón's detention illegal." Furthermore, the representatives alleged that his detention was arbitrary because: i) the purpose of his detention was to persecute and punish him as a political opponent to the Government ii) the "arbitrary nature of his detention is shown in the writ by the Military Attorney requesting the detention [of Mr. Usón], where he is not telling the truth when affirming that Francisco Usón seems to have pointed out that the soldiers of Fuerte Mara 'were burnt by the flamethrower'"; iii) the Military Control Court of La Guaira declared its incompetence to hear in any criminal investigation against Francisco Usón[and, however] such court did not decide [his] liberty […], as would have been logical if such tribunal was not competent to hear in this case".

136. In turn, the State pointed out that the deprivation of liberty of Mr. Usón Ramírez took place strictly in accordance with the domestic legislation which, on the one hand, allows for preventive imprisonment in the cases where the court deems it pertinent, and on the other hand, typifies as crime insulting against the Armed Forces and considers a punishment of three to eight years in prison. In addition, the State observed "that the decision of May 24 and 27, 2004[, as well as the decision of June 15, 2004 where Mr. Usón's liberty was declared inapplicable] were motivated not only by an element of presumed danger of escape, but also on the grounds of constitutional and jurisprudential order". In addition, the State alleged that "the preventive detention [of Mr. Uson Ramirez] up to his final judgment did not even reach half of the minimum sanction of three years set forth in article 505 of the Organic Code of Military Justice." Likewise, the State alleged that "in his detention, presentation, and decision on the preventive measures of deprivation of liberty there were no undue delays". Specifically, the State indicated that "a situation of procedural prerogative as in the case of General Francisco Usón Ramírez was resolved in two days in a motivated manner[…]; General Usón had a Pre-trial Merit which meant, in any case, a special protection that is not given to all Venezuelan citizens". Therefore, according to the State, his deprivation of liberty was neither illegal nor arbitrary.

137. Taking into account the proof alleged, this Tribunal considers it has been demonstrated that on May 10, 2004 the Minister of Defense ordered, "to start a Military Criminal Investigation, in accordance with article 55 of the Military Justice Organic Code […] [FN126] in relation to the alleged Punishable Facts of a Military Nature, on the occasion of the statements made by [Mr. Usón Ramírez]." [FN127] The next day, the Higher Military Attorney in the Jurisdiction of the Permanent War Council of Caracas agreed "to start the investigation" in relation to Article 505 COJM. [FN128]

[FN126] Article 55 of the Organic Code of Military Justice indicates the following: [[t]hey are attributions of the Minister of Defense, as an agent of Military Justice: 1º - [t]o give the order to proceed with military trials not attributed by this Code to another judicial agent […]."

[FN127] Cf. Order No. MD-SG-2004/222 of the Ministry of Defense on May 10, 2004, supra note 103.

[FN128] Cf. transcript No. FM-005-2004 of May 11, 2004 of the Military Prosecutor Superior in the jurisdiction of Consejo de Guerra of Caracas (case file of attachments to the petition, tomo II, attachment 32, f. 1101).

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138. On May 21, 2004 the Military Attorney submitted a brief to the First Military Tribunal of Permanent First Instance of La Guaira, whereby the Military Attorney requested a provisional remedy of deprivation of liberty against Mr. Usón Ramírez, Then, the First Military Court of First Instance issued an Order of Arrest against Mr. Usón Ramírez and decreed his preventive detention "on the basis of the assumption of having committed a crime established in article 505 of the Military Justice Organic Code and because there is evidence of the danger of escape, based on the provisions of article 49 of the Constitution of the Bolivarian Republic of Venezuela, in agreement with article 250 of the Organic Code of Criminal Procedural." [FN129] In this regard, the police record indicates that when detained, Mr. Usón Ramírez was informed of "his legal situation related to the order of arrest" [FN130] which, if it did refer to the authority which made the order, it did not make reference to facts of the cause, rather it only referred to the "commission of the crime establishe din Article 505 of the Organic Code of Military Justice." (supra para. 137).

[FN129] Order of Arrest of May 21, 2004 of Military Court of First Instance of la Guaira. (case file of attachments to the petition, tomo II, attachment 34, f. 1110). Article 250 of the Organic Criminal, as applied in the present case, a judicial order of preventive detention may proceed when three conditions are established: "1) [a] punishable fact that deserves the deprivation of liberty; 2) [w]ell grounded conviction elements to consider that the accused has been the author or has participated in a punishable fact[, and] 3) [a] reasonable presumption, upon consideration of the circumstances of a particular case, of danger of escape or hindrance in the search for truth regarding a specific investigation […]

[FN130] Police file of May 21, 2004 of the National Guard of Venezuela (case file of attachments to the petition, tomo II, attachment 36, f. 1119).

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139. On May 24, 2004, at 11 a.m., Mr. Usón Ramírez was taken before the Military Tribunal of Permanent First Instance of La Guaira, as a control tribunal, in order to carry out the hearing of pleadings to apply the measure of deprivation of liberty. [FN131] Such tribunal was declared incompetent "to hear in the cause or incidence in which the alleged accused has the rank of General Officer", so it ordered that the proceedings should be forwarded to the Martial Court to decide as applicable. [FN132] The Martial Court received the proceedings on May 24, 2004 and ordered the Second Military Court of Permanent First Instance of Caracas to continue with the case, considering that a retired General, like Mr. Usón Ramírez, did not have the prerogative of a merit pre-trial before the Martial Court. [FN133] Said Court decreed the pleadings for the judicial preventive deprivation of liberty of Mr. Usón Ramírez, in accordance "with the provisions of articles 250 and 251 of the Organic Code of Criminal Procedural." [FN134]

[FN131] Cf. Transcript of the hearing of May 23, 2004 of First Military Court of First Instance of la Guaira, in relation to the request for the application of amplified measures regarding preventive detention (case file of attachments to the petition, tomo II, attachment 50, fs. 1229 a 1236).

[FN132] Cf. Transcript of the hearing of May 23, 2004 of the First Military Court of First Instance of la Guaira, supra note 131, f. 1236.
[FN133] Cf. Order of May 27, 2004 of the Second Military Court of First Instance of Caracas, supra note 95, f. 1354
[FN134] Citation Ticket of May 24, 2004 of the Second Military Court of First Instance of Caracas , supra note 95, f. 1252. Article 251 of the Organic Criminal Procedure Code establishes that in order to claim there exists the danger of escape, the following must be taken into account: "1) [d]eep roots in the country, as determined by the domicile, usual place of residence for the family, business or work and possibility to abandon the country definitely or remain hidden; 2) [t]he sanction that could be set in the case; 3) [t]he scope of the damages caused; 4) "[t]he behavior of the accused during trial, or in any other trial, insofar as such behavior indicates his will to be subjected to criminal proceedings; 5) "[t]he pre-criminal behavior of the accused. The danger of escape is presumed in cases of facts punished by deprivation of liberty, whose maximum term is equal to or higher than ten years." Regarding all of the above, article 247 of the Criminal Procedural Organic Code ("COPP") points out that "all the provisions restricting the liberty of the accused […] shall be construed restrictively".
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140. The grounds for preventive imprisonment of Mr. Usón Ramírez motivated by the decision of May 24, 2004 by the Judge of the Second Military Court of First Instance of Caracas, [FN135] based on the decision of May 27, 2004, whereby it was pointed out that the "the judge has the exclusive power to determine when there is a reasonable presumption of danger of escape, i.e. the judge has an eminently discretional power." [FN136] To that end, the national judge found that "there was evidence of the alleged military crime of Insult against the Armed Forces […] and there were well grounded elements of conviction to estimate that the accused has been the author of such crime." [FN137]

[FN135] The First Military Court of First Instance declared itself incompetent to judge the case during the hearing celebrated on May 23, 2004, and the Martial Court of the Criminal Military Circuit took over the record. The Martial Court received the case record on May 24, 2004 and ordered the Second Military Court of First Instance of Caracas to continue the case, which it did, supra note 95, f. 1360 and note 131, f. 1236. Order of May 27, 2004 of the Second Military Court of First Instance of Caracas, supra note 95, f. 1356.
[FN136] Cf. Order of June 15, 2004 of the Martial Court of the Military Criminal Circuit, in relation to the review of the order of May 27, 2004 of the Second Military Court of First Instance of Caracas , supra note 120, f. 1375.
[FN137] Order of May 27, 2004 of the Second Military Court of First Instance of Caracas, supra note 95, fs. 1355 y 1359.
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141. Subsequently, on June 15, 2004, the Martial Court pointed out, after taking into account the pleadings for revision of the preventive detention order, that such order was founded on a presumption of flight and not on the alleged danger of hindering the trial. [FN138]

[FN138] Cf. Order of June 15, 2004 of the Martial Court of the Military Criminal Circuit, supra note 120, f. 1388.

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142. Lastly, as a result of this proceeding, Mr. Usón Ramírez was finally judgmentd to 5 years and a half of prison on the basis of the sanction established in Article 505 of the Organic Code of Military Justice (supra para. 38).

143. In regard to the facts alleged by the parties, this Tribunal notes that Article 7 of the Convention involves two types of very different regulations: one general and one specific. The general regulation is described in the first paragraph: "[e]very person has the right to personal liberty and security." The specific regulation is a series of guarantees protecting the right not to be deprived of liberty (Art. 7(2)) or arbitrarily (Art. 7(3)), to be notified of the reasons for his detention and the charges against him (Art. 7(4)), to judicial control of the deprivation of liberty and reasonable nature of the term of preventive imprisonment (Art. 7(5)), to challenge the lawfulness of his detention (Art. 7(6)). Any violation of paragraphs 2 to 7 of Article 7 of the Convention shall necessarily entail the violation of Article 7(1) of such Convention. [FN139]

[FN139] Cf. Case of Chaparro Álvarez and Lapo Íñiguez, supra note 56, paras. 51 y 54, and Case of Yvon Neptune, supra note 46, para. 89.

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144. This Tribunal has established that, since preventive imprisonment is a provisional remedy and not a punitive one, there is a state obligation not to restrict the liberty of detainees beyond the strictly necessary limits that ensure that they shall not hinder the proceedings or obstruct justice. [FN140] In this sense, preventive imprisonment shall not be imposed unless there are sufficient pieces of circumstantial evidence allowing for a reasonable inference that the individual in trial is guilty. [FN141] Thus, for the presumption of innocence to be respected when ordering restrictive measures to liberty, the State shall support and provide evidence of the existence of the requirements established in the Convention in a clear and motivated manner in each specific case. [FN142] Otherwise it would be equivalent to anticipating the punishment, which is against the general legal principles which are broadly recognized, ¬inter alia, the principle of the presumption of innocence. [FN143]

[FN140] Cf. Case of Suárez Rosero, supra note 118, para. 77; Case of Bayarri, supra note 43, para. 110, and Case of Chaparro Álvarez y Lapo Íñiguez, supra note 56, para. 69.
[FN141] Cf. Case of Acosta Calderón, supra note 114, para. 74; Case of Bayarri, supra note 43, para. 69, and Case of Yvon Neptune, supra note 46, para. 107.
[FN142] Cf. Case of Palamara Iribarne, supra note 47, para. 198; Case of Servellón García et al.v. Honduras. Merits, Reparations, and Costs. Judgment of September 21, 2006. Series C No. 152, para. 90, and Case of López Álvarez v. Honduras. Merits, Reparations, and Costs. Judgment of February 1, 2006. Series C No. 141, para. 69.
[FN143] Cf. Case of Suárez Rosero, supra note 118, para. 77; Case of Bayarri, supra note 43, para. 110, and Case of Chaparro Álvarez and Lapo Íñiguez, supra note 56, para. 146.

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145. Paragraph 2 of article 7 sets forth the primary guarantee of the right to physical liberty: the law establishes that it is only under the law that the right to personal liberty may be affected. To that end, this Court has established that the reserve of law shall forcefully be accompanied by the principle of codification, obliging the States to established, as specifically as possible and "beforehand", the "causes" and "conditions" of the deprivation of physical liberty. Thus, article 7(2) of the Convention automatically refers to the domestic legislation. Hence, any requirement established under the domestic law that is not fulfilled when depriving a person of his liberty shall make such deprivation unlawful and against the American Convention. [FN144]

[FN144] Cf. Case of Chaparro Álvarez and Lapo Íñiguez, supra note 56, para. 57; Case of Bayarri, supra note 43, para. 54, and Case of Yvon Neptune, supra note 46, para. 96.

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146. With respect to Article 7(3) of the Convention, the Court has previously established that no one shall be detained or encarcerated for reasons or by means – which though they may be legal – could be construed as being incompatible with fundamental human rights, thus being, inter alia, unreasonable, unforseeable, and unproportional. [FN145]

[FN145] Cf. Case of Gangaram Panday v. Suriname. Merits, Reparations, and Costs. Judgment of January 21, 1994. Series C No. 16, para. 47; Case of Yvon Neptune, supra note 46, para. 97, and Case of Chaparro Álvarez and Lapo Íñiguez, supra note 56, para. 90.

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147. To that end, this Court has established that, in the light of article 7(4) of the American Convention, the information about the motives and reasons" for detention shall be provided "once it occurs," which "is a mechanism to avoid unlawful or arbitrary detentions from the very moment that the person is deprived of his liberty and, in turn, iensures the right to defense of the individual." [FN146] Moreover, this Court has pointed out that, "there is noncompliance with article 7(4) of the Convention if only the legal basis is mentioned." [FN147]

[FN146] Case of Juan Humberto Sánchez v. Honduras. Preliminary Objections, Merits, Reparations, and Costs. Judgment of June 7, 2003. Series C No. 99, para. 82; Case of Yvon Neptune, supra note 46, para. 105, and Case of Chaparro Álvarez and Lapo Íñiguez, supra note 56, para 70.
[FN147] Case of Yvon Neptune, supra note 46, para. 106 and Case of Chaparro Álvarez and Lapo Íñiguez, supra note 56, para. 71.

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148. In the preceding chapter, this Court concluded that the tribunal that tried Mr. Usón Ramírez lacked jurisdiction and impartiality, essential prerequisites to due process. The effects of this situation are projected to all of the proceeding, rendering it defective from the beginning,

and to the consequences derived from it. In that regard, any act of a tribunal that manifestly lacks competence that results in a restriction or deprivation of personal liberty, such as those that occurred in the present case to the detriment of Mr. Usón Ramírez, lead to the consequent violation of Article 7(1) of the American Convention

149. As a consequence, the Court considers that in the present case, and distinct from its considerations in other cases that have come before it, an analysis regarding the Convention's parameters of legality, no arbitrariness, motivation, possibility to challenge the decision, reasonable time, or those issues regarding respect to the presumption of innocence in relation to preventive detention, is unnecessary.

150. Therefore, the Court concludes that the State violated article 7(1) of the Convention in relation to article 1(1) of the same, to the detriment of Mr. Usón Ramírez.

IX. NON-COMPLIANCE WITH ARTICLE 2 [FN148] (DUTY TO ADOPT PROVISIONS OF DOMESTIC LAW) OF THE AMERICAN CONVENTION

[FN148] Article 2 of the Convention states:
Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

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151. The Commission alleged that "the State shall abolish the rules of disobedience in such a way that it does not affect the free expression of criticism about the performance of public entities and their members." According to the Commission, "the military justice system has been used to repress criticism, opinions and reports on the performance of its officers and any crime that they have committed. To that end, the military justice has used the crime of Insult against the Armed Forces and Insult to Superiors in particular." In this regard, the Commission alleged that "the mere existence [of such laws] discourages people from giving their critical opinions about the performance of the authorities, given the threat of criminal sanctions depriving them of liberty for up to 8 years." As such, the Commission noted "that despite the consensus of the American States about the need to repeal the laws of contempt, the State of Venezuela in recent years has amended its criminal law to aggravate the crime and extend to subjects and other public officials who previously were not specifically protected under the Penal Code."

197. The representatives, although they did not submit specific allegations about the crime of insult, they alleged that "when violating Article 13, 7, 8, [9, and] 25 of the Convention, the Venezuelan State has additionally violated the general obligations mentioned in Articles 1(1) and 2 of the Convention." The representatives added that "according to such provisions, the Venezuelan State had the obligation to adopt any legislative measures and any other measures necessary to make such rights and freedoms effective. That did not occur and, therefore, the Venezuelan State violated the provisions of Article 1(1) and 2 of the Convention."

198. The State indicated that "reality prevents it from abolishing the 'laws on disobedience' which, in some way, are an obstacle in view of the abuse and lack of respect of the freedom of expression and in view of a situation that jeopardizes the State, and could even influence on the independence of the country." The State made reference to the judgment of the High Court of Justice of the Constitutional Room of July 15, 2003 regarding an action of unconstitutionality in relation to several Articles of the Criminal Code about the "laws on disobedience", dismissing the claim on unconstitutionality of Articles 141, 148, 149, 150, 151, 152, 227, 444, 445, 446, 447, 450 of the Criminal Code and partially annulling Articles 223, 224, 225, and 226 of the Criminal Code.

199. Article 2 forces the State Parties to adopt, pursuant to their constitutional procedures and the provisions of the Convention, any legislative measures or other types of measures necessary to make effective the rights and freedoms protected by the Convention. However, the Tribunal reiterates that "the purpose of the contentious competence of the Court is not to review the national legislations in abstract but to resolve specific cases where it is alleged that an act by the State, against certain persons, is against the Convention." [FN149]

[FN149] Case of Gangaram Panday v. Suriname. Preliminary Objections. Judgment of December 4, 1991. Series C No. 12, para. 50 and Case of Reverón Trujillo, supra note 12, para. 130, footnote 158. See also, International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 48.

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200. The Court considers that the claims of the Commission regarding the alleged incompatibility between the "rules of disobedience" in Venezuela and Article 2 of the American Convention exceed the specific scope of this case. The Commission has defined the laws of disobedience as "a type of legislation penalizing the expression that offends, insults or threatens a civil servant in performing his official duties". [FN150] Nevertheless, in this case, Mr. Usón Ramírez was accused and judgmentd for committing the crime in Article 505 of the COJM and not under any other "rules of disobedience" under Venezuelan law. Therefore, it is not pertinent to analyze whether such other rules are compatible with the Convention. However, this Tribunal has already considered in this Judgment that the specific crime of insult against the Armed Forces for which Mr. Usón Ramírez was judgmentd, typified in Article 505 of the COJM, does not strictly describe criminal behavior, the protected good or the passive subject, nor does it consider the existence of fraud, thus being a broad, vague and ambiguous codification (supra para. 57). Therefore, the Tribunal considers that such criminal statute is against Articles 9, 13(1) and 13(2) of the Convention, in relation to Articles 1(1) and 2 of such Convention (supra para. 58).

[FN150] Report on the Compatibility of Desacato Laws and the American Convention on Human Rights, OEA/Ser.L/V/11.88. Doc 9. rev, February 17, 1995.

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201. Likewise, the Tribunal has already considered the allegations of the parties thereto in relation to the exercise of military justice to judgment Mr. Usón Ramírez. To that end, the Court observed that the application of military justice shall be strictly reserved to active military and the domestic legislation applicable to this case did not reserve strictly the competence of the military jurisdiction for active military but it extended it to civilians and to retired military. Due to that, the Court considered that the State violated the right of Mr. Usón Ramírez to be tried by a competent court or tribunal, pursuant to Article 8(1) of the American Convention, in relation to the general obligations to guarantee rights, according to Article 1(1) of the Convention, as well as in relation to the general duty of adopting any necessary provisions under domestic law to make such right effective, pursuant to Article 2 of such instrument (supra paras. 116 and 119).

202. Furthermore, the Court considers the State has violated Article 2 of the American Convention, in relation with Articles 9, 13(1), 13(2), and 8(1) of the same, in the terms of paragraph 57, 58, 88, 116, and 119 of this Judgment.

X. REPARATIONS (APPLICATION OF ARTICLE 63.1 OF THE AMERICAN CONVENTION) [FN151]

[FN151] Article 63(1) of the Convention states that:
If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

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203. There is a principle under International Law that any violation of an international obligation involving damages entails the obligation to repair such damages adequately. [FN152] Such obligation is governed by International Law. [FN153] The Court bases its decision on Article 63(1) of the American Convention.

[FN152] Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 25; Case of DaCosta Cadogan, supra note 9, para. 94, and Case of Garibaldi, supra note 11, para. 150.
[FN153] Cf. Case of Aloeboetoe et al.v. Suriname. Reparations and Costs. Judgment September 10, 1993. Series C No. 15, para. 44; Case of DaCosta Cadogan, supra note 9, para. 94, and Case of Garibaldi, supra note 11, para. 150.

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204. According to the considerations about the merits and violations of the Convention mentioned in the previous chapters, as well as in the light of the criteria set in the Tribunal's jurisprudence in relation to the nature and scope of the obligation to repair, [FN154] the Court shall analyze both the claims made by the Commission and the representatives and the arguments

of the State about the matter, in order to set measures for reparation of the damages caused to the victim.

[FN154] Cf. Case of Velásquez Rodríguez, supra note 152, paras. 25 a 27; Case of DaCosta Cadogan, supra note 9, para. 95, and Case of Garibaldi, supra note 11, para. 151.

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205. Before analyzing the reparations claimed, the Court observes that the State did not submit any specific allegations about the measures for reparation requested by the Commission or the representatives. However, it requested that, "each of the claims and reparations requested be dismissed."

A) Injured party

206. The Commission and the representatives agreed that the "injured party" was Mr. Usón Ramírez, his spouse, María Eugenia Borges de Usón, and his daughter, María José Usón Borges.

207. To that end, the Tribunal reiterates that an injured party is any person who has been declared a victim of violations of any right under the Convention. [FN155] The only person who has been declared a victim in this judgment has been Mr. Usón Ramírez. Therefore, this Tribunal considers that the only "injured party" is Mr. Francisco Usón Ramírez, as a victim of the violations that were declared against him, so Mr. Usón Ramírez shall receive the reparation measures ordered by the Tribunal

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[FN155] Cf. Case of the "White Van" (Paniagua-Morales et al) v. Guatemala. Reparations, and Costs. Judgment May 25, 2001. Series C No. 76, para. 82; Case of DaCosta Cadogan, supra note 9, para. 97, and Case of Garibaldi, supra note 11, para. 152.

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208. On the other hand, although evidence was submitted in this case regarding the alleged injuries suffered by Mrs. María Eugenia Borges de Usón as a consequence of the declared violations, [FN156] neither the Commission nor the representatives alleged that she or her daughter were victims of any violation of the rights under the American Convention. Due to the above, and taking into account the Tribunal's jurisprudence, [FN157] the Court does not consider that Mrs. María Eugenia Borges de Usón and Mrs. María José Usón Borges are "injured parties."

[FN156] Medical Report of Dr. Jairo Fernández dated October 20, 2008 (case file of attachments al written brief containing pleadings, motions, and evidence, attachment 10, fs. 4932 to 4934).
[FN157] Cf. Case of the "White Van" (Paniagua-Morales et al), supra note 155, para. 82; Case of DaCosta Cadogan, supra note 9, para. 97, and Case of Garibaldi, supra note 11, para. 152.

B) Measures of satisfaction and guarantees for non-repetition

209. In this section, the Tribunal shall determine the measures of satisfaction sought to repair the non-pecuniary damage whose nature is not pecuniary, and shall set measures of scope or public repercussion. [FN158]

[FN158] Cf. Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala. Reparations and Costs. Judgment of May 26, 2001. Series C No. 77, para. 84; Case of DaCosta Cadogan, supra note 9, para. 99, and Case of Garibaldi, supra note 11, para. 153.

B.1) Judgment as a form of reparation

210. First, the Court considers that this Judgment is per se a means of reparation; [FN159] it shall be understood as a measure intended to satisfy, and that recognizes that the rights of Mr. Usón Ramírez, the subject of this case, have been violated by the State.

[FN159] Cf. Case of Neira Alegría et al.v. Peru. Reparations and Costs. Judgment of September 19, 1996. Series C No. 29, para. 56; Case of DaCosta Cadogan, supra note 9, para. 100, and Case of Garibaldi, supra note 11, para. 193.

B.2) Leaving without effect the criminal trial in the military jurisdiction against Mr. Usón Ramírez

211. The Commission requested the Court to order the State to adopt "all judicial and administrative measures as well as any other type of measures to leave without effect the military criminal trial instituted against the victim, including its judgments[.] [Likewise, it requested] deleting the criminal record from the corresponding registry and any implications whatsoever. [To that end, the Commission indicated] that the State must take all the necessary measures so that Mr. Usón Ramírez can enjoy his personal liberty[, as soon as possible], without undue direct or indirect conditions" or restrictions and hindrances.

212. In turn, the representatives requested that "all the effects of the military criminal trial against Francisco Usón be annulled, eliminating said judgment from his criminal record." Similarly, the representatives requested that the following shall be returned to Mr. Usón: i) "his right to full exercise of his freedom of expression, without further restrictions other than the ones that the State may lawfully adopt pursuant to Article 13(2) of the Convention and under a general law;" ii) "full exercise of his personal liberty, without any restriction or conditions whatsoever," and iii) "all his political rights, including the right to demonstrate and the right to meet."

213. The Court has determined that the criminal trial carried out under the military criminal jurisdiction against Mr. Usón Ramírez did not offer the necessary judicial guarantees in a democratic State respecting the right of the natural judge and the due process and that criminal

action was not suitable or necessary in this case (supra paras. 68,75, and 86 to 88). Therefore, given the characteristics of this case, as done on previous occasions, [FN160] the Court considers that the State must, within a period of one year, adopt all the judicial and administrative measures and any other necessary measures to leave without effect the military criminal trial instituted against Mr. Usón Ramírez for the facts declared in this Judgment. To comply with this measure of reparation, the State must ensure, inter alia, that the guilty verdict is left without effect, that his criminal record is deleted from the corresponding public registry, and assure that Mr. Usón Ramírez can enjoy his personal liberty without the conditions that were imposed on him (supra paras. 98 to 100). Furthermore, Mr. Usón Ramírez shall not be the object of another trial, either civil, criminal, or administrative, for the facts in this case.

[FN160] Cf. Case of Suárez Rosero v. Ecuador. Reparations and Costs. Judgment of January 20, 1999. Series C No. 44, para. 76; Case of Tristán Donoso, supra note 38, para. 195, and Case of Bayarri, supra note 43, para. 180.

B.3) Adapting the domestic law to international standards regarding contempt and military criminal jurisdiction

214. The Commission also indicated that "the State has the obligation to prevent any recurrence of violations of human rights such as in [this case. C]onsequently, the Commission requested the Court to order the Venezuelan State to adapt its legislation to the rights set forth in Articles 13, 7, 8, and 25 of the American Convention."

215. The representatives also stated that "the Venezuelan State must adapt its national legislation" and requested the Court to order the State: i) "to reform its Organic Code of Military Justice, in order to ensure that military justice is applied exclusively to the military, in order to keep military discipline or when a crime is committed while performing military functions, in a manner compatible with [the Convention]"; ii) "to repeal criminal concepts that penalize contempt or slander against the State or State institutions, or the individuals performing public functions, in order to guarantee full enjoyment of the freedom of expression, in a compatible manner with the American Convention on Human Rights; and iii) to reform the Penitentiary Law and the Internal Regulations of the Departments for the Accused Military Members, in order to adapt the system of disciplinary punishment to the requirements of due process, and to avoid that sanctions may be applied to inmates for the exercise of a legitimate right."

216. As regards the need to adapt the domestic legislation to international standards regarding military criminal jurisdiction, this Tribunal observes that Decree No. 6,239 "Rank, Value and Force of the Organic Law of the Bolivarian National Armed Forces" of July 22, 2008, indicates the following:

The Organic Law of the National Armed Forces, published in the Official Gazette of the Republic of Venezuela No. 4,860 of February 22, 1995 is abolished; the Organic Law of the National Armed Forces published in the Official Gazette of the Bolivarian Republic of Venezuela No. 38,280 of September 26, 2005, and the other provisions contained in the

resolutions, guidelines, and regulatory instruments in disagreement with the provisions of [said] Decree [No. 6,239] with Rank, Value and Force of Organic Law are abolished. [FN161]

[FN161] Decree N° 6.239 "with Rank, Value, and Force of Organic Law of the Bolivarian National Armed Forces" of July 22, 2008, repeal provision. Official Gazette of the Bolivarian Republic of Venezuela Nº 5.891 Extraordinary of July 31, 208.

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217. In turn, Article 127 of Decree No. 6,239 sets forth that "all the active members of the Bolivarian National Armed Forces shall be subjected to the military criminal jurisdiction when they commit any military crime, as established under the law". The Court considers that such Article adheres to the standards of the American Convention and jurisprudence of this Tribunal (supra paras. 108 to 111). However, the Court deems it pertinent to order that the State abolish, by means of its legislation, limits to the competence of the military jurisdiction so that the provisions pertain only active military members or performing military functions. Likewise, the State must repeal all domestic legislation that is not in conformance with said Court jurisprudence (supra para. 111). The State must adopt the necessary modifications to its legislation within a reasonable time.

218. As regards Article 505 of the Organic Code of Military Justice on the basis of which Mr. Usón Ramírez was tried and judgmentd, this Tribunal considers that this norm does not strictly define the criminal behavior, the good protected, or the subject, inter alia, resulting in a broad, vague and ambiguous legal definition allowing for civilians to be tried in a military court (supra paras. 56, 57, 58, and 114). Therefore, the Court considers that the State shall adopt, within a reasonable time, all the necessary measures to abolish or amend such legislation, pursuant to Articles 2, 7, 8, 9, and 13 of the Convention, as well as to what has been said in this Judgment and in the jurisprudence of the Court. In any case, the State must allow for the people to exercise the democratic control over all state institutions and their civil servants by means of freely expressing their ideas and opinions about their performance, fearing no further repression.

219. Lastly, the Tribunal reiterates the above statements (supra para. 102), in the sense that the alleged application of the Penitentiary Regimen and the Internal Regulations of the Departments for the Accused Military Members to the case of Mr. Usón Ramírez does not form part of the controversy in the application of the Commission, which has not been analyzed in this Judgment. Therefore, this Tribunal shall not pronounce itself on this issue.

B.4) Publication of the Judgment

220. The representatives also "requested that the Court shall, as a reparation, order the publication of its judgment in the Official Gazette of Venezuela and in two nationwide newspapers."

221. As decided by this Tribunal in other cases [FN162], the State shall publish once paragraphs 2 to 5, 22, 23, 36 to 49, 55 to 58, 62 to 68, 72 to 75, 78 to 88, 92 to 94, 98 to 100, 103, 107 to 120, 124, 128 to 132, 137 to 150, 154 to 157, and 162 of this Judgment, including the

corresponding titles and subtitles, without the footnotes, and its operative paragraph in the Official Gazette and in another newspaper of broad national circulation. Additionally, as the Court has ordered in prior Judgments, [FN163] the present Judgment must be published in full, for at least one year, in an appropriate official State website, taking into account the characteristics of the publication ordered. To make the publications in the newspaper and Internet, the Court fixes terms of six and two months, respectively, as of the notification of the present Judgment.

[FN162] Cf. Case of Barrios Altos v. Peru. Reparations and Costs. Judgment of November 30, 2001. Series C No. 87, operative paragraph 5.d); Case of Garibaldi, supra note 11, para. 157, and Case of Anzualdo Castro, supra note 109, para. 194.

[FN163] Cf. Case of de las Hermanas Serrano Cruz v. El Salvador. Merits, Reparations, and Costs. Judgment of March 1, 2005. Series C No. 120, para. 195; Case of Garibaldi, supra note 11, para. 157, and Case of Escher et al., supra note 11, para. 239.

C) Indemnification

C.1) Pecuniary damages

222. The Court has developed the concept of pecuniary damages and the alleged basis to indemnify them. [FN164]

[FN164] This Tribunal has established that the pecuniary damage supposes "the loss or detriment caused of the income of the victims, the expenses incurred as demonstrated by the facts and the consequences of a pecuniary nature that have a causal link with the facts of the case." Case of Bámaca Velásquez v. Guatemala. Reparations, and Costs. Judgment February 22, 2002. Series C No. 91, para. 43; Case of Garibaldi, supra note 11, para. 182, and Case of Anzualdo Castro, supra note 109, para. 204.

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223. The Commission stated that "the Venezuelan State has the obligation to repair the pecuniary damages resulting from the violations to which Mr. Usón Ramírez was subjected." To that end, the Commission alleged that "the victim has had to make financial efforts in order to […] overcome the consequences that the facts in this case have caused him, among which, the loss of income due to his imprisonment."

224. The representatives indicated that "the pecuniary damages caused in this case, due to the change in his living conditions, are estimated at US $ 57(3)19[,00] [fifty-seven thousand three hundred and nineteen U.S. dollars], or its equivalent in national currency, since the victim was forced to keep two houses, they had to sell their paintings and other belongings to survive, and they got into debts with third parties. His family had to lower their standard of living, including adequate food, and they were deprived of many things to be able to provide for the food, medicine, and garments of Francisco Usón, while he was at Ramo Verde prison. During his

imprisonment, his family had to make additional expenses due to food, medicine, transportation, in order to provide him with the necessary elements for survival."

225. The Tribunal reiterates that the representatives founded the alleged pecuniary damages incurred by Mr. Usón Ramírez on the annexes of the writ of pleadings and allegations titled "[r]elation of expenses caused while Mr. Vicente Uson Ramirez was detained from May 22, 2004 to December 24, 2007." [FN165] In this regard, the Court considers that the "relation of expenses" contains only estimations of expenses that are not accompanied by valid receipts that accredit the expenses incurred by Mr. Uson Ramirez nor allows for the determination of amounts incurred. [FN166] As such, the Tribunal notes that the representatives presented along with their final allegatins a second document entitled "[r]elation of expenses caused while Mr. Vicente Uson Ramirez was detained from May 22, 2004 to December 24, 2007." Said document, which containes amounts larger than those indicated in the writ of pleadings and allegations, was submitted extemporaneously, so the Tribunal declared it inadmissible (supra paras. 31 and 33). Consequently, the Tribunal cannot accept the evidence that was submitted for such expenses. However, it is proven that Mr. Usón Ramírez was a retired General who had held various public positions, even as Minister of Finance. Therefore, although there is no verification of the revenues that Mr. Usón Ramírez did not receive due to the violations declared in this Judgment, the labor record of Mr. Usón Ramírez allows this Court to establish with sufficient certainty that during his time in prison, he could have been held a paying position. [FN167] Due to the above, the Court sets the amount of US$ 40,000.00 (forty thousand U.S. dollars) for pecuniary damages, since it considers such amount adequate in terms of equity, as it has done in other cases.

[FN165] Cf. "Expenses related to food and medicine of Francisco V. Usón Ramírez, incurred during his time in prison (prepared by him)" (case file of attachments of the written brief containing pleadings and motions, attachment 8, fs. 4816 y 4927 a 4929).
[FN166] Cf. Case of Vargas Areco, supra note 76, para. 167; Case of Valle Jaramillo et al., supra note 38, para. 244, and Case of Bayarri, supra note 43, para. 193..
[FN167] Cf. Case of Velásquez Rodríguez, supra note 152, para. 49; Case of Anzualdo Castro, supra note 109, para. 214, and Case of Valle Jaramillo et al., supra note 38, para. 216.

C.2) Non-pecuniary damages

226. The Court has developed the concept of non-pecuniary damages in its jurisprudence and the alleged basis to indemnify it. [FN168]

[FN168] This Court has indicated that inpecuniary damages "can consist of the suffering and harm caused directly to the victim and their alleged, infringing on what is of value, and all other perturbances which can not healed in a pecuniary sense." Case of the "Street Children" (Villagrán-Morales et al.), supra note 158, para. 84; Case of Garibaldi, supra note 11, para. 157, and Case of Escher et al., supra note 11, para. 229.

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227. The Commission alleged that "the Venezuelan State has the obligation to repair [the] non-pecuniary damages suffered by Mr. Usón Ramírez [due to] the violations which he was subjected." Furthermore, it pointed out that "the existence of moral damages is a necessary consequence of the nature of the violations against the victim who has been restrained, discredited, accused, judgmentd, and imprisoned as a consequence of the exercise of his freedom of expression. Likewise, although Mr. Usón Ramírez has recently recovered his liberty, such liberty is subject to conditions, among which, the prohibition to exercise his right to express himself. All this has personal and professional consequences for Mr. Usón [Ramírez]."

228. The representatives alleged that "the moral damages caused to [Mr. Usón Ramirez], as a direct victim in this case, is estimated cautiously at one hundred thousand U.S. dollars (US$ 100.000[,000]), or its equivalent in national currency". The above is due to the following facts: a) Mr. Usón Ramírez was detained arbitrarily by a command of the National Guard, at Puerto Ordaz airport, in front of many people who were present there"; b) Mr. Usón Ramírez was judgmentd unjustifably to five years and six months in prison, remaining effectively in prison for three years and seven months; during this time he was separated from his family and cut off from his activities"; c) [d]uring his time in prison […] Mr. Usón Ramírez had to be with other inmates, without privacy, in a hostile environment that did not meet the appropriate health conditions and that deteriorated considerably his health and his mental state; d) Mr. Usón Ramírez received threats addressed to him and, on many occasions, he felt his life was threatened" in prison; e) during his imprisonment[,] Mr. Usón Ramírez was refused the right to timely and adequate medical assistance, being the victim of medical malpractice at the Military Hospital, which could have cost him his life and caused him considerable anguish and suffering", and f) Mr. Usón Ramírez was subjected to public scorn by the highest Government officials, including the President of the Republic[and] the Vice President of the Republic then, José Vicente Rangel, [who] accused him of conspiring against the Government and announced he would be detained, a fact that really occurred four days later, although with an excuse different from what Rangel had stated." According to the representatives, "Mr. Usón [Ramirez was also] offended systematically by the then minister of Defense [and] by the Army Commander [...] who, on many occasions, took advantage of the situation to discredit him before the military personnel. Likewise, the military attorneys participating in the case also took advantage of every occasion to say he was a problem officer acting with mal intention."

229. Similarly, the representatives alleged that Mrs. María Eugenia Borges de Usón and Mrs. María José Usón Borges, Francisco Usón's wife and daughter respectively, were also "damaged due to the violations of human rights suffered by Mr. Usón Ramírez in this case, so they have requested the amount of "fifty thousand U.S. dollars (US $ 50.000[,00]), or its equivalent in national currency, for each one of them" as inpecuniary damages.

230. To that end, this Tribunal has already established that it shall not order any reparations on the basis of the alleged damages suffered by Mrs. María Eugenia Borges de Usón and Mrs. María José Usón Borges, since they are not considered as "injured parties" in this case (supra para. 163). Likewise, the Tribunal observes that the allegations of the representatives regarding the "conditions" of the place where Mr. Usón Ramírez was imprisoned, the alleged threats against him, the alleged "medical malpractice" suffered at the Military Hospital and the alleged "public scorn" by the highest officers in the government, are not based on facts within the

framework of the dispute presented by the Commission in its application. Consequently, the Tribunal shall pronounce on the alleged non-pecuniary damages suffered by Mr. Usón Ramírez which occurred, according to the representatives, due to these alleged facts. Hence, the Court shall determine whether the violations of the human rights of Mr. Usón Ramírez declared in this Judgment caused non-pecuniary damages to him.

231. Furthermore, the Court observes that, in view of the violations pronounced in this case, Mr. Usón Ramírez was subjected to an unnecessary preventive detention ordered by tribunals that lacked competence, independence and impartiality. Furthermore, Mr. Usón Ramírez was judgmentd to five years and six months imprisonment, having to remain in prison, separated from his family, for three years and seven months, and limited in exercising his freedom of expression due to the restrictions entailed in his parole (supra para. 98 to 100). It is clear that these deprivations, resulting from the violations of the Convention rights of Mr. Usón Ramírez pronounced in this Judgment, caused him fear, anguish and suffering; this determines non-pecuniary damages that can be repaired by a compensating indemnity, pursuant to equity.

232. Therefore, the Court sets in equity the amount of US$ 50.000,00 (fifty thousand U.S. dollars) for the benefit of Mr. Usón Ramírez as non-pecuniary damages. The State shall pay such amount directly to the beneficiary within the term of one year, as from the time of the notification of this Judgment is served.

D) Costs and Legal Fees

233. The Commission requested the Court to order the State to pay "the costs and legal fees incurred by the victim and his representatives in the proceedings of this case both at the national level and at the level of the Inter-American System." The Commission also indicated that the Court shall consider "the fees for legal assistance" to the victim as part of such expenses.

234. The representatives pointed out that "[i]n the various proceedings before the national and international instances, Mr. Usón Ramírez incurred costs and expenses which are estimated cautiously at thirty thousand U.S. dollars (US[$] 30.000[,00]), plus any legal fees. The representatives requested that the Court shall decide that such costs, expenses and legal fees shall be reimbursed.

235. The State did not present any observations related to the evidence on the costs and legal fees submitted by the representatives as has been required by this Tribunal (supra para. 13).

236. As pointed out by the Court on previous occasions, the costs and expenses are included in the concept of reparation established in Article 63(1) of the American Convention, since the activities carried out by the victims, their families or representatives to obtain justice, both at national and at international level, involves expenses that must be compensated when the international responsibility of the State is established by means of a condemning judgment. As regards their reimbursement, the Tribunal shall consider its scope prudently; it includes the expenses before the authorities of the domestic jurisdiction as well as the expenses during the course of the trial before the Inter-American System, taking into account the circumstances of the specific case and the nature of the international jurisdiction of the protection of human rights.

This may be made on the basis of the principle of equity taking into account the expenses described by the parties thereto, provided their quantum is reasonable. [FN169]

[FN169] Cf. Case of Garrido and Baigorria v. Argentina. Reparations, and Costs. Judgment of August 27, 1998. Series C No. 39, para. 82; Case of DaCosta Cadogan, supra note 9, para. 119, and Case of Acevedo Buendía et al.("Discharged and Retired Employees of the Office of the Comptroller"), supra note 9, para. 146.

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237. Therefore, the Tribunal observes that Mr. Usón Ramírez and his representatives provided evidence that Mr. Usón Ramírez paid the amount of Bs.F 55.900,00 strong bolivars (approximately US$ 26.546,00) to his legal representative before the Venezuelan tribunals, and that he still owes the amount of Bs.F 56.100,00 strong bolivars (approximately US$ 26.158,00). Likewise, the representatives verified that the Project for Strategic Conflict of the American University Washington College of Law incurred in expenses for US$ 2.386,55 (two thousand three hundred and eighty-six US dollars and fifty-five cents) in relation to the public hearing held in this case.

238. Consequently, taking into account the evidence provided and that the State did not present any observations in this regard, the Court sets in equity the amount of US$ 20.000,00 (twenty thousand U.S. dollars), for costs and legal fees. Such amount shall be transferred to Mr. Usón Ramírez within the term of one year as from the time of the notification of this Judgment. Mr. Usón Ramírez shall give his representatives the corresponding amounts. The amount set in this paragraph includes any future expenses which Mr. Usón Ramírez and his representatives may incur at the domestic level or during the supervision of compliance with this Judgment.

E) Compliance with payments ordered

239. Payment of the indemnities shall be made directly to the victim. Reimbursement of all costs and legal fees shall be made to Mr. Usón Ramírez, in the terms of paragraph 193 of this Judgment. In case Mr. Usón Ramírez dies before being delivered the corresponding indemnification, it shall be given to his rightful successors, according to the applicable domestic legislation. [FN170]

[FN170] Cf. Case of Garrido and Baigorria, supra note 168, para. 86; Case of Garibaldi, supra note 11, para. 200, and Case of Anzualdo Castro, supra note 109, para. 234.

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240. The State shall comply with its obligations by paying in U.S. dollars or its equivalent in Venezuelan currency, using the corresponding exchange rate in force in the international market on the day before payment.

241. If, due to causes that can be attributed to the beneficiary of the payments it is not possible for the beneficiary to receive such payments within the term indicated, the State shall deposit

such amounts in his favor in an account or certificate of deposit in a Venezuelan financial institution, in U.S. dollars and in the most favorable financial conditions under the legislation and banking practice. If after 10 years the indemnification has not been claimed, the amounts shall be returned to the State including all accrued interests.

242. The amounts set forth in this Judgment as indemnification and as reimbursement of the costs and legal fees shall be delivered to the beneficiary in full agreement with this Judgment, without any reductions resulting from any possible tax charges.

243. Should the State fall into arrears with its payments, Venezuelan banking default interest rates shall be paid on the amount owed.

X. OPERATIVE PARAGRAPHS

246. Therefore,

THE COURT

DECIDES,

unanimously,

1. To reject the preliminary objection submitted by the State, in accordance with paragraphs 23 of the present Judgment.

DECLARES,

unanimously, that:

2. The State violated, to the detriment of Francisco Usón Ramírez, the principle of legality and freedom of expression recognized in Articles 9, 13(1), and 13(2) of the American Convention, in relation to Articles 1(1) and 2 thereof, in accordance with paragraphs 57,58, 88, and 100 of the present Judgment.
3. The State violated, to the detriment of Francisco Usón Ramírez, the right to a fair trial and judicial protection recognized in Article 8 and 25 of the American Convention, in relation to Articles 1(1) and 2 thereof, in accordance with paragraphs 116, 119, 131, and 132 of the present Judgment.
4. The State violated, to the detriment of Francisco Usón Ramírez, the rights recognized in Article 7 of the American Convention, in relation to Article 1(1) thereof, in accordance with paragraphs 148, 149, and 150 of the present Judgment.
5. The State failed to comply with Article 2 of the American Convention, in relation to Articles 13(1), 13(2), 8(1), and 25(1) thereof, in terms of paragraphs 155, 156, and 157 of the present Judgment.

AND ORDERS,

unanimously, that:

6. This Judgment is per se a form of reparation.
7. The State must adopt, in a period of one year, all the judicial and administrative measures and any other measures necessary to leave without effect the military criminal trial instituted against Mr. Usón Ramírez for the facts in this Judgment, in accordance with paragraph 168 thereof.
8. The State must establish, in a reasonable time and through its legislation, limits on the competence of military tribunals, in such a way that the military jurisdiction will be used only with respect to those crimes relating to military functions, and under no circumstances will a civilian or a military official who is retired be subjected to the jurisdiction of the military tribunals, in accordance with paragraphs 172 of the Judgment.
9. The State must modify, in a reasonable time, Article 505 of the Organic Code of Military Justice, in accordance with paragraph 173 thereof.
10. The State shall publish once, in its Official Gazette and in another newspaper with widespread national circulation, the title page and paragraphs 2 to 5, 22, 23, 36 to 49, 55 to 58, 62 to 68, 72 to 75, 78 to 88, 92 to 94, 98 to 100, 103, 107 to 120, 124, 128 to 132, 137 to 150, 154 to 157, and 162 of the present Judgment, including the corresponding titles and subtitles, without footnotes, and its operative paragraphs. It shall also publish the entire judgment, for at least one year, on a State website that is appropriate considering the characteristics of the publication ordered. The newspaper and internet publications shall be carried out within six and two months, respectively, as of notification of this Judgment, in accordance with paragraphs 176 thereof.
11. The State must pay Mr. Francisco Usón Ramírez the amounts established in paragraphs 180 and 187 of the present Judgment for material and non-pecuniary damages, within a one year period as of notification of the Judgment, in the manner specified and in paragraphs 194 to 198 thereof.
12. The State must pay Francisco Usón Ramírez the amounts established in paragraphs 193 of the present Judgment for reimbursement of costs and expenses, within a one year period as of notification of the Judgment and in the manner specified in paragraphs 194 to 198 thereof.
13. The Court, in the exercise of its powers and in compliance with its duties under the American Convention, will monitor full compliance with this Judgment, and it will consider the case closed when the State has fully complied therewith. The State shall, within a term of one year as of notification of the Judgment, submit to the Court a report on the measures adopted in compliance therewith.

Judge Sergio Garcia Ramirez informed the Court of his opinion, which accompanies this Judgment.

Done in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica, on November 20, 2009.

Diego García-Sayán
President in Excercise

Sergio García Ramírez

Manuel E. Ventura Robles
Margarette May Macaulay
Rhadys Abreu Blondet

Pablo Saavedra Alessandri
Secretary

So ordered,

Diego García-Sayán
President in Excercise

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ IN RELATION TO THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF USÓN RAMÍREZ V. VENEZUELA, OF NOVEMBER 20, 2009

1. In this judgment, to which I agree with and cast my concurring opinion, the Inter-American Court defined a criterion, which it had profiled previously, but not developed in a timely fashion with its natural consequences. In different occasions I have maintained the relevance of adopting this criterion in the analysis and decision making of a case, from a due process standpoint, when the fundamental problem lies in lack of the information in the heading of Article 8 of the American Convention: the actions of a competent, independent, and impartial Tribunal, as a fundamental right of the defendant.

2. it is known ---and the Court has so stated-- that due process is about the concurrence of diverse elements, whose presence ensures access to justice, an individual's ample defense, effective representation, –all in all--- the protection of rights and freedoms through prosecution. In this sense, due process constitutes a condition, or an indispensable tool, for the protection of rights. Concurrence of diverse elements within the frame of due process does not mean however that they are of equal nature and that their absence or detriment will yield identical outcomes in the prosecution.

3. Most cases brought to the Inter-American Court include issues related to due process, in a broad sense, which for sure is not compacted to its main frame –article 8 of the American Convention—but it rather cites specific applications from other precepts, such as Article 4, regarding rights surrounding the death penalty; 5, regarding integrity; 7, regarding freedom, and 25, concerning procedural protections of fundamental rights, which is not necessarily absorbed, incorporated, or subsumed in Article 8.

4. It is important to distinguish –-as the Court is now doing-- between different issues encompassed under the title "Right to a Fair Trial" of Article 8 which can be associated, for this purpose, with the concept of due process. On the one hand, paragraph 1, refers to a broader right, of a very general reach, which comes to light in the procedural solution –definition of rights and

determination of obligations – in all kinds of controversies, regardless of subject matter and specialty stemming from it, of the jurisdictional authority who will adopt the final decision. I am referring to the right of every person to be heard by a judge or an independent and impartial tribunal, which is his or her competent tribunal, with observance of determined rights and within a reasonable timeframe.

5. On the other hand, paragraph 2 of the same Article, contains a list of rights addressing the criminal prosecution, those of which acquire a special meaning under the so called presumption -- or principle -- of innocence. The Court's jurisprudence has highlighted: a) that this catalogue constitutes a minimal relationship --as the very concept states --, clearly subject to a pro persona extension thru national or international codifications and also thru interpreted jurisprudence, and b) the rights listed in this paragraph can be applied to situations which are not of a criminal nature, to the extent that they are pertinent and based on the nature of the proceeding to which they are transferred. The progress of the Inter-American Court has leaned on this two way direction which has also revised –-another recent advance—the points of reference to evaluate the reasonableness inherent to the term mentioned on article 8(1)

6. In my view, there is a relevant difference between a right or guarantee (for the sake of the matter it is not necessary to distinguish between the two terms) to a competent tribunal as recognized in paragraph 1 and the various minimum guarantees stated in paragraph 2. The intervention of a competent, independent and impartial judge is of course an assumption of due process. If it is absent, there is no real process, but a mere appearance of one. It would only be a simple process, which would not fulfill the essential right of the accused. It is not possible to assume that he or she can be tried and to have the dispute resolved by any person or office lacking these attributes, and that the procedure by which they are subjected deserves to be ranked as a process and the resolution by which the process concludes, constitutes an true judgment.

7. The Inter-American Court has so understood or implied as it examines the process followed before a body that lacks subject-matter and personal jurisdiction necessary to hear and to judgment; for example, a military tribunal which resolves controversies beyond its scope or if it pronounces judgments on individuals who are not active members of the armed forces. On such cases, the Court has issued the invalidity of the procedure and cleared the door that leads to a true process. Therefore there is no infringement of Res Judicata –which was not produced – and neither of the double jeopardy prohibition for the same facts or the same crimes –because the first process was not an authentic procedure at mercy of the ne bis in idem formula.

8. If in a proceeding all the guarantees indicated in Article 8(2) of the American Convention had been observed, but not the guarantee of a competent tribunal encompassed in paragraph 1 of said Article, it would not be understood that due process existed nor would it be accepted that its culmination constituted a definitive judgment. The denial would stem from the fact that all the actions were carried out by a body that did not meet the conditions of Article 8(1), an irremediable defect. Lets say, for example, that the dependant boday, partial and incompetent permits the defendant the time and means to prepare his defense. Having done this does not then give this body the capacity to resolve the controversy nor doe it dismerit the violation to Article 8(1). To briefly state, the defendant was not heard by he who was designated to hear him.

9. The same would not result, if in turn, the points of paragaph 1 of the cited concepts are satisfied, but the guarantees encompassed in paragraph 2 are then placed in a vulnerable position. If that were to occur, replacement of acts and stages of the proceeding would be admissible, perhaps before the same jurisdictional authority which saw the case, with a condition that the cause is transmitted with strict adherence to the guarantees originally unattended, in the means that this be legally necessary or possible. Lets suppose, for example, that the defendant was not afforded the opportunity and the means for a defense. Its possible, in principle, that the all or part of the proceedings be repeated in order to satisfy the defendants right to a defense. Also, to briefly state, the defendant may have been heard, but not in the way he should have been heard, this would imply a need to rectify the formula applied, not necessarily to do away with the tribunal.

10. This being the case, when a competent tribunal does not interfere, but rather the case is assumed by another organ which lacks the proper characteristics to handle the case, the Inter-American Court can declare that there was no due process, given a failure of an essential nature, and that no actions taken in such conditions could have produced the legal effects which were thrown out—namely, the efficiency it would have –if it had been met before a judge fully capable of reviewing the cause. As such, it is not necessary to declare the violation of other procedural guarantees. All the issues are dealt with from the start of the proceeding. In a sense –to use an expression evoked in evidentiary matters –the “fruits of a poisonous tree.”

11. This is what the Court has manifested in the judgment of Usón Ramírez, a decision which is similar –but not identical –to other cases which have been held similarly. It was different in the case of Castillo Petruzzi, a decade prior, wherein the Inter-American Court indicated that the tribunal which saw the case lacked subject-matter and personal jurisdiction, as well as independence and impartiality, and that it subsequently analyzed the facts constituting diverse violations to the guarantees recognized in Article 8(2). The detailed test of the characteristics encompassing each violation had significant relevance in the period in which the Tribunal was formulating extensive legal doctrine regarding due process in criminal matters.

12. I would like to emphasize that the opinion I am expressing in concurrences with the criterion adopted by the Inter-American Court in the case of Usón Ramírez, does not in the most minimum –I highlight with emphasis –that the Tribunal cannot or should not review, apart from the failure of a competent judge, the acts of violation that may have concurred with the case and analyzed the factors which accredit their incompatibility with the procedural obligations specified in Article 8(2).

13. It is perfectly possible, and most assuredly desirable in most cases, or perhaps in all cases, that the Tribunal indicate the violations committed and reiterate the interpretation of the terms encompassed in Article 8(2). It is in this sense that this jurisdiction acts, attending to its protective nature its jurisdictional mission, when it admits---or better yet, favors, with all the reason, as we have seen in many occasions—an ample exposition of facts and legal considerations, which inform the said judgment, including the cases wherein the State recognizes its responsibility, namely, when the confession of the facts and the admission of the claims concur---a situation which can be identified as a “search.” In other procedural orders, this recognition would evince a conclusory process, and without more, a stay of proceedings.

Fortunately, the new Inter-American Court Rules of Procedure have changed the regulation of these procedural acts and modified concepts which should have been suppressed.

Sergio García Ramírez
Judge

Pablo Saavedra Alessandri
Secretary