

**INTER-AMERICAN COURT OF HUMAN RIGHTS**

**CASE OF VALENZUELA ÁVILA V. GUATEMALA\***

**JUDGMENT OF OCTOBER 11, 2019**  
**(Merits, Reparations and Costs)**

In the case of *Valenzuela Ávila v. Guatemala*

the Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court,”) composed of the following judges:

Eduardo Ferrer Mac-Gregor Poisot, President  
Eduardo Vio Grossi, Judge, Vice President  
Humberto Antonio Sierra Porto, Judge  
Elizabeth Odio Benito, Judge  
Patricio Pazmiño Freire, Judge and  
Ricardo Pérez Manrique, Judge.

Also present,  
Pablo Saavedra Alessandri, Registrar.

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter “the American Convention” or “the Convention”) and Articles 31, 32, 65 and 67 of the Court’s Rules of Procedure (hereinafter “the Rules of Procedure”), delivers this judgment, structured as follow:

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\* Judge Eugenio Raúl Zaffaroni excused himself from participating in this case, pursuant to Article 21 of the Rules of Procedure, which was accepted by the Court Bench.

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## I

### INTRODUCTION TO THE CASE AND PURPOSE OF THE DISPUTE

1. *Proceedings before the Court.* On April 19, 2018, the Inter-American Commission on Human Rights (hereinafter also “the Inter-American Commission” or “the Commission”), in accordance with the provisions of Articles 51 and 61 of the American Convention and Article 35 of the Rules of Procedure, submitted the case named *Valenzuela Ávila v. Guatemala* (hereinafter also “the State” or “Guatemala”) to the jurisdiction of the Inter-American Court. The Commission indicated that the case is related to a series of violations of due process in the criminal proceedings against Tirso Román Valenzuela Ávila (hereinafter also “Mr. Valenzuela Ávila” or “Mr. Valenzuela” or “alleged victim”) for the crime of murder, which culminated in his being sentenced to the death penalty based on the concept of dangerousness, as well as torture perpetrated at the time of arrest, after being recaptured after his first escape from prison in June 1998, and again after being recaptured after his second escape from prison in June 2001, in addition to the alleged extrajudicial execution of Mr. Valenzuela.

2. *Proceedings before the Commission.* The proceedings before the Commission were as follows:

a) *Petition.* On October 5, 2001, the Commission received the petition filed by the Institute for Comparative Studies in Criminal Sciences (hereinafter also “IECCPG” due to its initials in Spanish or “petitioners”) and recorded it under number 723/01<sup>1</sup>, on behalf of Tirso Román Valenzuela Ávila.

b) *Admissibility Report.* On February 26, 2004, the Commission issued Admissibility Report No. 24/04<sup>2</sup>. Subsequently, the petitioners alleged, the violation of the alleged

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<sup>1</sup> Cf. Complaint filed with the Commission on October 3, 2001 (file of proceedings before the Commission, folios 2587 to 2598).

<sup>2</sup> The Commission declared the petition admissible with respect to possible violations of the rights enshrined in Articles 1(1), 5, 8, and 25 of the American Convention, and Articles 1, 8, and 9 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Mr. Tirso Román Valenzuela Ávila. It declared inadmissible the facts regarding Tirso Román Valenzuela’s conditions of detention due to failure to exhaust domestic remedies, in application of Article 47(a) of the American Convention. In the preliminary considerations, the Commission indicated that “[e]ven though the petitioners point out that the alleged torture was perpetrated to obtain a confession, at no time have violations of due process been alleged for this fact, despite the fact that said confession would have been used in the process in which the alleged victim was sentenced to death. In fact, the petitioners themselves indicate that in relation to this aspect, domestic remedies have not yet been exhausted” (file of proceedings before the Commission, fs. 3128 to 3137).

victim's right to life derived from his alleged extrajudicial execution, which occurred on December 8, 2006,<sup>3</sup> as a supervening fact. Given the above, on December 8, 2016, the Commission granted the State an additional period of four months to submit its observations on the admissibility and merits of the claim. On April 10, 2017, the State presented its additional observations

c) *Admissibility and Merits Report.* On October 25, 2017, the Commission issued Merits Report No. 132/17 (hereinafter "Admissibility and Merits Report" or "the Report"), in accordance with Article 50 of the American Convention, in which it reached a series of conclusions<sup>4</sup>, and made several recommendations to the State.

d) *Notification to the State.* The Commission notified the State of the Report in a communication dated April 19, 2018, granting it a period of two months to report on compliance with the recommendations. The State submitted a brief in which it rejected the conclusions and recommendations of Merits Report No. 132/17.

3. *Submission of the Case to the Court.* On April 19, 2018, the Commission submitted all the facts and alleged human rights violations described in the Admissibility and Merits Report to the Court.<sup>5</sup>

4. *Request of the Inter-American Commission.* Based on the above, the Commission asked the Court to conclude and declare Guatemala's international responsibility for the alleged violation of the rights indicated above in the conclusions of the Admissibility and Merits Report. Additionally, the Commission asked the Court to order the State to provide certain reparation measures that will be detailed and analyzed in the corresponding chapter.

## **II PROCEEDINGS BEFORE THE COURT**

5. *Notification of the case to the State and the representatives.* The submission of the case was notified to the representatives of the alleged victims on June 26, 2018, and to the State on June 7, 2018.

6. *Brief with pleadings, motions and evidence.* On August 27, 2018, the Institute of Comparative Studies in Criminal Sciences and the Institute of Public Criminal Defense (hereinafter also "IDPP") presented their brief of pleadings, motions and evidence (hereinafter also "pleadings brief"), in accordance with articles 25 and 40 of the Rules of Procedure. The representatives substantially agreed with the Commission's arguments and additionally

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<sup>3</sup> According to the brief of the then petitioners received by the Commission on March 30, 2007, in which they reported on the alleged extrajudicial execution of Mr. Valenzuela (file of proceedings before the Commission, fs. 2768 to 2778).

<sup>4</sup> The Commission concluded that Guatemala is responsible for the violation of the rights to life, personal integrity, judicial guarantees of a fair trial, the principle of legality and judicial protection established in articles 4(1), 4(2), 5(1), 5(2), 8(1), 8(2)(g), 8(2)(h), 8(3), 9, 11 and 25(1) of the American Convention, in relation to the obligations established in articles 1(1) and 2 of the same instrument, to the detriment of Tirso Román Valenzuela Ávila. The Commission also concluded that the State is responsible for the violation of the rights to personal integrity, a fair trial and judicial protection established in Articles 5(1), 8(1) and 25(1), in relation to the obligations established in Article 1(1) thereof, to the detriment of the relatives of Tirso Román Valenzuela Ávila. Finally, it concluded that Guatemala is responsible for the violation of articles 1, 6, 8 and 10 of the Inter-American Convention to Prevent and Punish Torture.

<sup>5</sup> The Commission appointed Mrs. Esmeralda Arosema de Troitiño, First Vice-President, and Mr. Paulo Abrão, Executive Secretary of the Commission, as its delegates for this case, and as advisors, Elizabeth Abi-Mershed, Deputy Executive Secretary, Silvia Serrano Guzmán, Lawyer, and Mr. Christian González Chacón, lawyer, from the Executive Secretariat of the Commission.

requested the Court to declare the international responsibility of the State for the violation of the rights enshrined in Articles 7(1) to 7(6), 8(2)(c), 8(2)(d), 8(2)(e), 17, 19, and 25(2) of the American Convention and article 7 of the Inter-American Convention for the Prevention and Punishment of Torture (hereinafter also "IACPPT"). Finally, the representatives requested various measures of reparation and reimbursement of costs and expenses. In addition, they applied to the Victims' Legal Assistance Fund.

7. *Answering brief.* – On December 17, 2018, the State submitted to the Court its brief answering the submission of the case by the Commission and its observations on the pleadings and motions brief<sup>6</sup> (hereinafter "answering brief") and made a partial acknowledgment of its international responsibility "for the lack of investigation of the alleged acts of torture suffered by Tirso Román Valenzuela Ávila during his capture and deprivation of liberty." In addition, the State opposed the other alleged violations and presented three preliminary objections.

8. *Victims' Legal Assistance Fund.* On January 11, 2019, the Secretariat of the Court, following instructions from the President, reported that the Court's Victims Legal Assistance Fund will be applied to cover the expenses of three declarants, either at hearing or by affidavit.

9. *Observations on the preliminary objections.* On January 18, 2019, the Commission and the representatives forwarded their observations on the preliminary objections, indicating that the objections presented should be dismissed. They also referred to the State's partial acknowledgment of international responsibility.

10. *Public Hearing.* On February 15, 2019, the President issued an order<sup>7</sup> by which he summoned the State, the representatives and the Inter-American Commission to hold a public hearing, regarding the preliminary objections and eventual merits, reparations and costs, to hear the final oral arguments of the parties and the final oral observations of the Commission regarding these issues. Additionally, by means of said order, it called five declarants, one witness and three experts, all proposed by the representatives, to give statements by notary public (affidavit). Additionally, by means of said order two declarants and one expert witness, all proposed by the representatives, were summoned to testify at the public hearing. The public hearing was held on March 7, 2019, during the Court's 130<sup>th</sup> Regular Session, held at the Court's headquarters.<sup>8</sup>

11. *Arguments and final written observations.* The State, on April 5, 2019, and the representatives, on April 8, 2019, forwarded their respective final written arguments together

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6 In its communication received on April 11, 2018, the State appointed Jorge Luis Borrayo Reyes, President of COPREDEH, and Felipe Sánchez González, Executive Director of COPREDEH, as agents in this case.

<sup>7</sup> Cf. *Case of Valenzuela Ávila v. Guatemala*. Order of the President of the Court of February 15, 2019. Available at: [http://www.corteidh.or.cr/docs/asuntos/valenzuela\\_avila\\_15\\_02\\_19.pdf](http://www.corteidh.or.cr/docs/asuntos/valenzuela_avila_15_02_19.pdf). On March 4, 2019, the President of the Court issued an order in which a request from the Commission regarding the change of modality of the joint expert opinion of Parvais Jabbar and Edward Fitzgerald was authorized. Said expert opinion was offered in the cases of *Girón and Castillo, Ruiz Fuentes and Martínez Coronado*, both against Guatemala, and it was ordered to be transferred to this case. Therefore, the term was extended to March 18, 2019, for its presentation by affidavit. On the last date the affidavit was presented. Available at:

[http://www.corteidh.or.cr/docs/asuntos/ruizfuentes\\_mart%C3%ADnezcoronado\\_qir%C3%B3nyotro\\_valenzuela%3%A1vila\\_rodr%C3%ADquezevolorioyotros\\_04\\_03\\_19.pdf](http://www.corteidh.or.cr/docs/asuntos/ruizfuentes_mart%C3%ADnezcoronado_qir%C3%B3nyotro_valenzuela%3%A1vila_rodr%C3%ADquezevolorioyotros_04_03_19.pdf).

<sup>8</sup> The following appeared at this hearing: a) for the Inter-American Commission: Luis Ernesto Vargas Silva, Commissioner; Silvia Serrano Guzmán and Christian González Chacón, lawyers from the Executive Secretariat of the Commission; b) for the representatives: Alejandro Rodríguez Barillas and Elvyn Leonel Díaz Sánchez from the ICCPG and Fidencia Orozco de Licardi from the IDPP; c) for the State: Jorge Luis Borrayo Reyes, President of COPREDEH; Felipe Sánchez González, Director of COPREDEH; Carla Gabriela Morales, Director of the Directorate of Mechanisms for Human Rights Defenders; and Steffany Rebeca Vásquez and Rafael Eduardo Bran, Advisors to the Directorate of Mechanisms for Human Rights Defenders, and Carlos Alberto De León Moreno, Public Prosecutor.

with various annexes, and on April 8, 2019, the Commission presented its final written observations.

12. *Observations on the annexes presented by the representatives together with the final arguments.* On April 26, 2019, the State forwarded its observations on the annexes to the representatives' final arguments. The Commission did not present observations.

13. *Expenditures in application of the Assistance Fund.* On July 11, 2019, the Secretariat of the Inter-American Court, following instructions from the President of the Court, sent information to the State on the disbursements made in application of the Fund in this case, and in accordance with the provisions of Article 5 of the Inter-American Court of Human Rights Rules of Procedure on the Operation of the Assistance Fund, granting a period to present the observations it deemed pertinent. The State submitted its observations on July 23, 2019.

14. *Deliberation of the case.* The Court began the deliberation of the judgment on October 10, 2019.

### **III JURISDICTION**

15. The Inter-American Court has jurisdiction to hear this case, pursuant to Article 62(3) of the American Convention, as Guatemala has been a State Party to the American Convention since May 25, 1978 and recognized the contentious jurisdiction of the Court on March 9, 1987.

### **IV PARTIAL ACKNOWLEDGEMENT OF RESPONSIBILITY**

16. The Court will examine, according to the State's partial acknowledgment of international responsibility, the following: (A) the alleged omission of the duty to investigate acts of torture, and (B) the need to amend article 201 bis of the Criminal Code of the Republic of Guatemala (hereinafter "Criminal Code") that defines the crime of torture.

17. Previously, the Court recalls that in accordance with Articles 62 and 64 of the Rules of Procedure, and in the exercise of its powers of international judicial protection of human rights as a matter of international public order, it is incumbent on this Court to ensure that acts of acknowledgment of responsibility are acceptable for the aims pursued by the inter-American system. This task is not limited to verifying, registering or taking note of the acknowledgment made or its formal conditions, but must confront them with the nature and seriousness of the alleged violations, the demands and interests of justice, the particular circumstances of the case in question, and the attitude and position of the parties,<sup>9</sup> in such a way that it can specify, as far as possible and in the exercise of its jurisdiction, the judicial truth of the events.<sup>10</sup> The Court warns that the recognition of single, specific facts and violations may have effects and

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<sup>9</sup> Cf. *Case of Kimel v. Argentina. Merits, Reparations and Costs.* Judgment of May 2, 2008. Series C No. 177, para. 24, and *Case of Órdenes Guerra et al. v. Chile. Merits, Reparations and Costs.* Judgment of November 29, 2018. Series C No. 372, para. 25.

<sup>10</sup> Cf. *Case of Manuel Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of May 26, 2010. Series C No. 213, para. 17, and *Case of Omeara Carrascal et al. v. Colombia. Merits, Reparations and Costs.* Judgment of November 21, 2018. Series C No. 368, para. 28.

consequences in the analysis that this Court makes of the other alleged facts and violations, to the extent that they all form part of the same set of circumstances.<sup>11</sup>

18. This Court considers that the partial acknowledgment of international responsibility constitutes a positive contribution to the development of this process and to the validity of the principles that inspire the Convention,<sup>12</sup> as well as to the victims' need for reparation.<sup>13</sup>

## **A. Partial acknowledgment of responsibility by the State regarding the alleged omission of the duty to investigate acts of torture**

### **A.1. Arguments of the State and observations by the Commission and the representatives**

19. In relation to the lack of investigation of the torture alleged by Mr. Valenzuela, the **State** partially recognized its responsibility only for the failure to investigate the acts of torture that were reported on several occasions by Mr. Valenzuela Ávila in violation of articles 8(1) and 25(1) of the Convention and article 8 of the IACPPT. Additionally, it stated that "through this act, the State [...] wishes to make a public apology to Tirso Román Valenzuela Ávila, through his representatives in [the] proceedings, for the impact that this omission could have had on the victim and Guatemalan society in general."

20. The **representatives** pointed out that the State has indicated that it has violated its duty of guarantee, since by accepting that it has violated Article 6 of the IACPPT, it has failed to comply with its duty to take effective measures to prevent and adequately punish acts of torture. Similarly, they indicated that the acknowledgment of responsibility extends to the failure to obtain an evaluation and medical assistance in favor of the alleged victim for the injuries caused by the torture. It would also include the refusal by the Court of Appeals to adopt the necessary measures so that medical assistance was provided. The representatives requested that all of this be clarified in the judgment. Lastly, they pointed out that as a natural consequence of accepting international responsibility, the State has implicitly recognized other facts and violations that derive directly from the generalized pattern of impunity that existed in the country due to its breach of the duty of guarantee.

21. The **Commission** assessed positively the State's acknowledgment of international responsibility and underlined that the dispute has ceased only with regard to the omission of the State to initiate investigations ex officio in a diligent, effective manner and within a reasonable time in response to the allegations of torture of the alleged victim.

### **A.2. Considerations of the Court**

22. Taking into account that the State partially acknowledged its international responsibility, the Court considers that the dispute has ceased regarding the State's omission of its duty to investigate the alleged acts of torture and cruel, inhuman and degrading treatment. Consequently, this Court understands that the State has accepted its international

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<sup>11</sup> Cf. *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 14, 2014. Series C No. 287, para. 27, and *Case of Women victims of sexual torture in Atenco v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 28, 2018. Series C No. 371, para. 40.

<sup>12</sup> Cf. *Case of Benavides Cevallos v. Ecuador. Merits, Reparations and Costs*. Judgment of June 19, 1998. Series C No. 38, para. 57, and *Case of Órdenes Guerra et al. v. Chile, supra*, para. 25.

<sup>13</sup> Cf. *Case of Manuel Cepeda Vargas v. Colombia, supra*, para. 18, and *Case of Órdenes Guerra et al. v. Chile, supra*, para. 25.

responsibility for the failure to investigate *ex officio* the alleged acts of torture and cruel, inhuman and degrading treatment, in violation of Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of the Convention, as well as Articles 1, 6 and 8 of the IACPPT, to the detriment of Mr. Valenzuela Ávila.

23. In consideration of the State's partial acknowledgment of international responsibility, and the observations of the Commission and the representatives, the Court considers that the dispute remains for the other aspects of fact and law alleged in this case, in relation to articles 1(1), 2, 4, 5, 7, 8, 9, 11, 17, 19 and 25 of the American Convention, and where relevant, the violation of Articles 7 and 10 of the IACPPT.

## **B. Partial acknowledgment of the responsibility of the State regarding the need to reform article 201 bis of the Criminal Code, which defines the crime of torture**

### ***B.1. Arguments of the State and observations of the Commission and the representatives***

24. The **State** recognized the need to reform article 201 bis of the Criminal Code, which punishes the crime of torture, because it does not conform to articles 1 and 6 of the IACPPT. It pointed out that this acknowledgment "was affirmed in the judgment of partial general unconstitutionality by omission pronounced by the Constitutional Court" on July 17, 2012, contained in file No. 1822-2011, in which said court declared the unconstitutionality of article 201 bis and the need to modify it by legislative action. It added that in legislation approved after the Criminal Code has collected the criteria that define the crime of torture according to international treaties on the matter, such as Decree No. 40-2010 of the Congress of the Republic "Law of the National Mechanism for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment".

25. The **representatives** pointed out that this acknowledgment by the State fully demonstrates that it has failed to comply with Article 6 of the IACPPT. In addition, they indicated that the State has not complied with the obligation to ensure that acts of torture are considered crimes under its criminal law.

26. The **Commission** assessed positively the State's acknowledgment of international responsibility.

### ***B.2. Considerations of the Court***

27. This Court notes that regarding the State's international acknowledgment of the need to reform Article 201 bis of the Criminal Code, it has been addressed by Guatemala, for the first time in the proceedings before this Court, in the answering brief. In their pleadings and motions brief, the representatives requested that the Court order the State to amend, as a matter of priority, provisions of the Criminal Code, in particular Article 201 bis of the Criminal Code. The Commission did not refer to this point in the Merits Report.

28. Regarding the adaptation of article 201 bis of the Criminal Code to international standards in relation to the classification of torture, the Court notes that, according to the representatives, the aforementioned article currently indicates the following:

Anyone who, acting on orders from or with the authorization, support or acquiescence of the State authorities, intentionally inflicts severe pain or suffering, whether physical or mental, on a person for the purpose of obtaining from him or from a third person information or a confession relating to an act which he has committed or is suspected of having committed or who seeks to intimidate a person or, by so doing, other persons ...

Any person or persons found guilty of the crime of torture shall be liable to between twenty-five and thirty years' imprisonment.

29. The Court warns that, effectively, this provision does not meet the minimum requirements established in Article 2 of the Inter-American Convention to Prevent and Punish Torture, which establishes that torture shall be understood as:

[a]ny act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

30. This lack of legislative alignment has also been highlighted by the Constitutional Court of Guatemala in its judgment of July 17, 2012, in which it expressly stated the following:

[...] in the classification of the crime of torture, contained in article 201 Bis of the Criminal Code, not all the elements described in the international treaties that regulate this unlawful conduct are included, since the following are omitted: punishment, discrimination and any other purpose as part of the criminal category, as well as the application of methods tending to annul the personality of the victim or to diminish his physical or mental capacity, even if they do not cause physical pain or mental anguish, for which reason those objective elements, would cause that in the provision, whose unconstitutionality is denounced, there has been an omission to classify acts highly harmful to the moral and physical integrity of individuals, necessary to complement the criminal type provided for in article 201 of the Penal Code, contravening Thus, Article 1 of the Inter-American Convention to [P]revent and [P]unish Torture [...] This Court considers that in order to comply with the necessary typification and in application of international human rights standards, the description of the behaviors that constitute "torture" must be specifically established, for which it is necessary to introduce by way of reform the penal norm contained in article 201 Bis of the Penal Code the phrases: "punishment", "any type of discrimination", "or for any other purpose", as purposes of the crime of torture, and expressly regulates that this crime also constitutes "the application on a person of methods tending to obliterate the personality of the victim or to diminish his physical or mental capacity, even if they do not cause physical pain or psychic anguish."<sup>14</sup>

31. The Constitutional Court concluded, therefore, that article 201 bis of the Criminal Code should be reformed through "legislative action with the additions from the provisions contained in the United Nations Convention against Torture and other Treatment or Cruel or Degrading Punishments and in the Inter-American Convention to Prevent and Punish Torture".<sup>15</sup>

32. Furthermore, the State argued that although article 201 bis of the Criminal Code has not yet been harmonized, the "Law of the National Mechanism for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment", Decree No. 40-2010 of October 6, 2010, has collected the criteria that define the crime of torture according to international treaties in Article 4, such as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for the purpose of obtaining information or a confession from them or a third party, punishing them for an act they have committed, or are suspected of having committed, or intimidating or coercing that person or others, or for any reason based on any kind of

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<sup>14</sup> Cf. Judgment of the Constitutional Court of the Republic of Guatemala, of July 17, 2012, file 1822-2011 <http://200.6.233.69/Sentencias/820216.1822-2011.pdf>, and pleadings and motions brief of July 27, August 2018 (Merits Valenzuela Ávila, fs. 349 to 350)

<sup>15</sup> Cf. Judgment of the Constitutional Court of the Republic of Guatemala, of July 17, 2012, *supra*.

discrimination, when said pain or suffering is inflicted by a public official or other person in the exercise of public office, at their instigation, or with their consent or acquiescence.<sup>16</sup>

33. Based on the acknowledgment made by the State and the body of evidence in this case, the Court notes that, as of the date of this judgment, said modification and legislative adaptation have not taken place. Consequently, the Court considers that although the dispute has ceased on this aspect, it will refer to this point in the corresponding section of the chapter on reparations.

### **C. Conclusion**

34. Once the scope of the State's acknowledgment of international responsibility has been determined, in consideration of the seriousness of the facts and of the alleged violations, as well as taking into account the powers that fall to this Court as an international body for the protection of human rights, the Court will proceed to determine the facts that occurred. The Court will also open the corresponding chapters to analyze and specify, as appropriate, the scope of the violations alleged by the Commission or the representatives, as well as the consequences that may arise in terms of reparations.

## **V**

### **PRELIMINARY CONSIDERATIONS**

35. The **State** raised three points in its answering brief that it designated preliminary objections.

36. This Court notes that the State's questions are aimed at determining the factual framework and the alleged victims. For this reason, the Court considers that the State's arguments do not correspond to a preliminary objection, since they do not challenge the admissibility of the case or the Court's jurisdiction to hear it, without prejudice to which the State's argument is resolved in this chapter, therefore these allegations will be treated as preliminary questions, and the questions will be analyzed in two sections.

#### **A. Regarding the allegation of the inclusion of new facts by the representatives in their pleadings and motions brief**

##### ***A.1. Arguments of the State and observations by the Commission and the representatives***

37. The **State** argued that the representatives presented an expanded account of the events that occurred before and after the multiple arrests of Mr. Valenzuela and within the different situations narrated in the pleadings and motions brief, several are absent in the Merits Report, and they cannot be considered as supervening facts. It added that the information on the new facts, under the pretext of dealing with context, should have been presented in a timely manner before the Commission to guarantee the right to defense and to the adversarial system, and it opposes its inclusion. It also requested that the discussions focus on the reported facts committed against Mr. Valenzuela Ávila after his capture and his trial for the crime of murder and that the new facts be excluded.

38. The **representatives** considered that the arguments of the State are not of a preliminary objection nature, but of substantive dispute. They added that the information on

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<sup>16</sup> Decree No. 40-2010 of October 6, 2010, the "Law of the National Mechanism for the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment". Available at: <http://www.mnp-opt.gob.gt/img/kcfinder/files/2010-Ley-del-MNP-Decreto-40.pdf>

the context is expressly recorded by the Commission in the Merits Report, and that their application was made within the parameters that the Court must use in order to accurately determine the magnitude and seriousness of the facts.

39. The **Commission** considered that the information provided by the representatives is not outside the factual framework of the Merits Report, since it explains and clarifies contextual aspects identified therein. The State referred to contextual elements that, in its opinion, are outside the framework of the Merits Report, which cover two aspects: the context of application of the death penalty and the context that caused the death of Mr. Valenzuela Ávila in the framework of the "Operation Gavilan" ("Operation Sparrowhawk"). In this regard, the Commission indicated that both aspects were referred to in the Merits Report, the first from paragraph 62 and the second from paragraph 79. Finally, it requested that said preliminary objection filed by the State be dismissed.

## **A.2. Considerations of the Court**

40. The Court recalls that the factual framework of the proceedings is made up of the facts contained in the Merits Report submitted for consideration. Therefore, it is not admissible for the parties to allege facts other than those contained in the Merits Report, without prejudice to putting forward those that allow explanation, clarification or dismissal of those that have been mentioned in it and have been submitted to the consideration of the Court. The exception to this principle are the facts classified as supervening and those facts with respect to which knowledge or access is subsequently obtained, provided that they are linked to the facts of the proceedings. All of the foregoing without prejudice to the fact that the presumed victims and their representatives may allege the violation of rights other than those indicated by the Commission in the Merits Report, as long as they abide by the facts contained in said document. Ultimately, it is up to the Court to decide in each case about the admissibility of arguments related to the factual framework in order to safeguard the procedural balance of the parties.<sup>17</sup>

41. In this regard, the State argued that the representatives in the pleadings and motions brief presented "an expanded account of the facts," that is, new facts that were allegedly not considered in the factual framework of the Merits Report, which it considers violates its right of defense.

42. Therefore, the State requested that the facts indicated by the representatives in relation to: (a) "the affirmation on the increase in cases of kidnapping; (b) the creation of the Anti-Kidnapping Command of the National Civil Police [which used...] illegal investigation methods for people sentenced to death for the crime of kidnapping to obtain information on other cases; (c) the organization of the Plan Cazador to capture and extrajudicially execute the escapees from "El Infiernito" Prison in 2001; (d) the corruption and penetration of organized crime in the apparatus of the State; (e) the political crisis generated by the murder of three Salvadoran deputies and the execution in a cell of the four police officers identified as perpetrators of their execution; (f) the contents of the wallet of Mr. Valenzuela Ávila's body; (g) the facts that give rise to the affirmation that Guatemala violated the right to the family of the alleged victim due to the harassment suffered by Mr. Valenzuela Ávila's wife and children; (h) regarding the ex officio revocation made by the Seventh Chamber of the Court of Appeals for the Criminal Branch based in Quetzaltenango, regarding the acquittal in first instance of Mr. JLM, and (i) all the statements and accounts made by the representatives

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<sup>17</sup> Cf. *Case of the "Mapiripán Massacre" v. Colombia. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C No. 134, para. 58, and *Case of Women victims of sexual torture in Atenco v. Mexico, supra*, para. 45.

regarding to the death of EMF and WBC, fugitives from "El Infiernito" prison and the content of the recapture of: 1. MTL, 2. LAS, 3. JGP and 4. ILC within the framework of "Operation Gavilán".

43. In effect, the Court notes that these facts argued by the representatives are not related to the facts mentioned in the Merits Report and the death of Mr. Valenzuela Ávila, therefore they will not be taken into account in the evidentiary analysis of this case.

44. The State also requested that the facts alleged by the representatives in the pleadings and motions brief related to the repressive criminal policy that includes the legal reform to include the death penalty for kidnapping cases be discarded; an organization that operated through an alleged "systematic pattern of extrajudicial executions"; the existence of groups dedicated to social cleansing in the National Civil Police (hereinafter also "PNC"); and the conclusions on "Operation Gavilán", in relation to the extrajudicial execution of other fugitives from "El Infiernito" prison. However, the Court notes that these facts alleged by the representatives do form part of the factual framework of the Commission's Merits Report.

45. Effectively, the Commission introduces a chapter in the Merits Report on the death of the alleged victim and the framework of "Operation Gavilán", in which it refers to: (a) the creation of "Operation Gavilán", for the search and recapture of the 19 people who escaped from "El Infiernito" maximum security prison; (b) that within said operation, nine of the fugitives were recaptured and seven of them "died due to circumstances that occurred during the operation"; (c) that the State carried out other investigations and issued judgments, in which it convicted state officials for the extrajudicial execution of a person who had escaped from that prison, as well as other people who had escaped from the *Pavón* and *Infiernito* prisons that occurred between 2005 and 2006; (d) that the International Commission against Impunity in Guatemala (*Comisión Internacional contra la Impunidad en Guatemala*, hereinafter also "CICIG") ruled on the interference of the authorities in the actions carried out for the extrajudicial execution of fugitives and the existence of a parallel structure to execute those who they considered "degenerates and enemies of society", and (e) the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (hereinafter "Special Rapporteur") in their report on their visit to Guatemala, reported the existence of groups dedicated to cleansing in the National Civil Police. Furthermore, in relation to the legal reform to include the death penalty for kidnapping cases alleged by the representatives, the Commission indicated that, despite the fact that the State has neither imposed nor applied the death penalty and the Criminal Chamber of The Supreme Court of Justice has been commuting it in recent years, the death penalty continues to be prescribed for the crime of kidnapping.

46. Consequently, the Court will consider those supplementary facts argued by the representatives that were taken into account by the Commission related to the context of the death of Tirso Román Valenzuela Ávila and "Operation Gavilán" (*infra* paras. 89 to 95) and it will discard those facts that are not related to the factual framework contemplated in the Merits Report of the Commission (*supra* para. 43).

**B. Regarding the determination of the alleged victims and possible beneficiaries of the reparation measures, and the lack of documentation on the link that accredits the inheritance of his mother, wife and partner**

***B.1. Arguments of the State and observations of the Commission and the representatives***

47. The **State** argued that there is a violation of the principle of legal certainty due to the lack of determination of the list of alleged victims. It requested that the Court establish precisely that the only victim is Tirso Román Valenzuela Ávila. Furthermore, the State argued that in accordance with article 1078 of the Civil Code of the State of Guatemala, in intestate successions, the children and the surviving spouse who have the right to "gain" are named first and will inherit in equal parts. It argued that the only ones entitled to succeed the alleged victim would be his sons Jorge, Luis and Tirso Valenzuela Ruíz, given that no document was presented to prove the status of his spouse, nor that of his cohabitant. Nor was it proven that Florinda López de López is Mr. Valenzuela's mother.

48. The **Commission** named Mr. Valenzuela Ávila as the alleged victim and mentioned his next of kin in the Merits Report without identifying them individually. In its brief with observations on the preliminary objections filed by the State, the Commission highlighted that "it did not know the names of the next of kin of the [alleged] victim" and that "complex circumstances concurred that made it difficult to include the names of the next of kin of Tirso Román Valenzuela Ávila," for which reason it argued that the exception contained in Article 35(2) of the Rules of Procedure could be applied, without prejudice "to the reparations that correspond to the next of kin of Valenzuela Ávila as legitimate heirs." The **Commission** did not refer to the State's allegations regarding legitimate heirs in intestate successions and only indicated that this cannot be considered a preliminary objection.

49. The **representatives** pointed out that the Commission maintained in its Merits Report that the presumed victims in this case are Tirso Román Valenzuela Ávila and his next of kin. They added that the next of kin of Mr. Valenzuela who should be considered as alleged victims are the following: Florinda López de López (mother)<sup>18</sup>, Ludim Azucena Ruiz López (wife), Luis Fernando Valenzuela Ruiz (son), Jorge Luis Valenzuela Ruiz (son) and Tirso Román Valenzuela Ruiz (son), and Rosa María Mendoza López, cohabitant of Mr. Valenzuela as beneficiary. They added that the Court in its case law has evaluated applying Article 35(2) of the Rules of Procedure based on the particular characteristics of each case, being flexible in the identification of alleged victims even when they have been alleged in the Commission's application as "survivors" of a massacre and "their next of kin" or when in subsequent briefs the representatives have presented additional information for their identification. In their final arguments they mentioned that the named persons should be recognized as direct victims and beneficiaries and, for the first time, the children procreated by Mr. Valenzuela and Ms. Mendoza, whose names are kept confidential for security reasons. In addition, the representatives requested that the contact information provided by the next of kin of Mr. Valenzuela be kept confidential, as well as that Ms. Mendoza López, in her affidavit rendered before the Court, stated that by virtue of her relationship with Mr. Valenzuela they procreated a son and a daughter, and requested that their names be withheld.<sup>19</sup>

50. The representatives considered that the State cannot invoke provisions of domestic law to fail to observe the obligations of international law. They indicated that documentation was presented that proves the blood relationship between Tirso Román Valenzuela Ávila, his mother, as well as the marriage bond with his wife. In addition, documentation was attached that accredits the de facto relationship that the alleged victim maintained with his cohabitant.

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<sup>18</sup> In the pleadings and motions brief, the representatives mentioned Mr. Valenzuela Ávila's mother as Lesbia Floralma Ávila López or as Florinda López de López, and she also appears as Florinda Ávila in other documents. The annexes to the pleadings and motions brief include the birth certificate of Florinda López de López and her personal identification document. In both documents it is established that her name is Florinda López de López, as well as in the passport presented at the time of giving her statement before the Court. Because the representatives use said names interchangeably, for the purposes of this Judgment, the Court will use the name of Florinda López de López.

<sup>19</sup> The representatives in their brief of final written arguments indicated that they would provide their birth certificates, which were not presented.

In addition, they argued that the State cannot allege ignorance of the presumed victims, since “the facts related to the refusal to hand over the body of Mr. Valenzuela to his wife and mother were notified to them in March 2007.”

## **B.2. Considerations of the Court**

51. With regard to the identification of the presumed victims, the Court recalls that Article 35(1) of the Court's Rules of Procedure provides that the case will be submitted to it through the submission of the Merits Report, which must contain the identification of the presumed victims. It is therefore up to the Commission to identify the presumed victims in a case before the Court with precision and at the due procedural opportunity,<sup>20</sup> except in the exceptional circumstances contemplated in Article 35(2) of the Court's Rules of Procedure, pursuant to which, when the impossibility of identifying them was justified, because they are cases of massive or collective violations, the Court will decide in due course whether to consider them victims according to the nature of the violation.<sup>21</sup>

52. The Commission indicated in its submission brief that the alleged victims in this case are Tirso Román Valenzuela Ávila and his next of kin, without identifying each of them. For this reason, pursuant to the provisions of Article 35(1) of the Rules of Procedure of the Court and the precedents on which this Court has ruled, the Court concludes that Tirso Román Valenzuela Ávila is the only presumed victim in this case. and it is not appropriate to admit the next of kin of Mr. Valenzuela as presumed victims. Furthermore, due to the requests made by the representatives and by Ms. Mendoza López, this Court requires the parties and the Commission to keep confidential the contact information of Mr. Valenzuela Ávila's next of kin, as well as the names of his two children procreated with Ms. Mendoza López.

53. In consideration of decisions made, this Court will not examine the arguments presented by the representatives regarding the alleged violations of the rights of the family and of the child, enshrined in Articles 17 and 19 of the American Convention, to the detriment of the next of kin of Mr. Valenzuela Ávila.

54. Regarding the State's objections aimed at pointing out that, in the event that compensation is ordered to be paid in accordance with Guatemalan regulations, the only beneficiaries would be Mr. Valenzuela's legal heirs, the Court considers that the arguments refer to evidential aspects that are not related to the admissibility of the case or to the Court's jurisdiction to hear it. In the case of fixing a reparation as a result of a causal link with the facts of the case, the declared violations and the accredited damages, the terms by which the corresponding designation and distribution will be made will be established in the corresponding chapter.

## **VI EVIDENCE**

### **A. Admissibility of documentary evidence**

55. In this case, as in others, the Court admits the evidential value of those documents presented by the parties and by the Commission in the due procedural opportunity, as well as

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<sup>20</sup> Cf. *Case of the Ituango Massacres v. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of July 1, 2006. Series C No. 148, para. 98, and *Case of Álvarez Ramos v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 30, 2019. Series C No. 380, para. 31.

<sup>21</sup> Cf. *Case of the Río Negro Massacres v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 4, 2012. Series C No. 250, para. 48, and *Case of Álvarez Ramos v. Venezuela, supra*, para. 31.

those documents presented as evidence to facilitate adjudication of the case<sup>22</sup> and that were not controversial or disputed, nor whose authenticity was questioned (*supra* paras. 1, 6 and 7) to the extent that they are pertinent and useful for the determination of the facts and their possible legal consequences.<sup>23</sup> Notwithstanding the above, specific considerations will be made below and the disputes raised on the admissibility of certain documents will be resolved. Regarding the expert opinion of Parvais Jabbar and Edward Fitzgerald, the State presented observations related to its evidential value. It should be remembered that said expert opinion was rendered in the cases of "*Girón and Castillo, Martínez Coronado, Ruiz Fuentes and Rodríguez Revolorio et al.*" all against Guatemala, and then transferred to this case. This Court considers that the State does not contest its admissibility, but rather questions its evidential value, and therefore admits it as documentary evidence.

56. *Supervening evidence.* On January 17, 2019, the representatives provided supervening evidence in relation to investigations related to extrajudicial executions in the framework of "Operation Gavilán". On March 5, 2019, the representatives provided evidence as an extension of the aforementioned supervening evidence.<sup>24</sup> Regarding the supervening evidence presented by the representatives on January 17, 2019 allegedly related to new facts,<sup>25</sup> as well as the evidential material presented on March 5, 2019,<sup>26</sup> the State submitted its observations in which it considered that the supervening evidence is not related to the case being discussed, and that, furthermore, it should have been offered to the Commission in a timely manner so that the adversarial process for its assessment could occur, for which reason it must be rejected in accordance with the provisions of Articles 40(2)(b) and 57(2) of the Rules of Procedure of the Court. The Commission stated that it is relevant for the Court to have access to recent information when it comes to establishing the international responsibility of the State in a possible judgment.

57. Regarding the documents presented by the representatives as evidence of supervening facts, the Court admits only documentation that is directly and exclusively linked to the

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<sup>22</sup> On May 3, 2019, the Secretariat of the Court, following instructions from the President of the Court, requested the State to present various documents as evidence to facilitate adjudication of the case, in accordance with Article 58(b) of the Rules of Procedure of the Court. On four occasions, the State requested an extension for the presentation of the aforementioned documents, which, following the instructions of the President of the Court, were granted through the communications of this Secretariat of May 15 and 28, 2019, and of May 6 and 21. June 2019. In its last request and in light of the above, following instructions from the President, the State was granted a non-extendable term that expired on July 22, 2019, to submit the aforementioned documentation. Finally, the State did not present the requested documentation.

<sup>23</sup> Cf. *Case of Velásquez Rodríguez v. Honduras. Merits.* Judgment of July 29, 1988. Series C No. 4, para. 140, and *Case of Galindo Cárdenas et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 2, 2015. Series C No. 301, para. 67.

<sup>24</sup> On March 6, 2019, the representatives were informed that the admissibility of this evidence would be determined by the Court at the appropriate procedural moment, and following instructions from the President of the Court, the State and the Commission were granted until March 18, 2019, so that they may present the observations they deem pertinent regarding the evidentiary material presented on January 17, 2019, and March 5, 2019. On March 18, 2019, the Commission and the State, respectively, forwarded their observations on the supervening evidence presented by the representatives.

<sup>25</sup> They sent various links available on the internet, related to "Vielmann Case News" (nine electronic links); "Videos of the Vielmann case" (ten electronic links); "Expulsion of the CICIG News" (five electronic links), and "Videos related to the Expulsion of the CICIG" (seven electronic links).

<sup>26</sup> They provided the following annexes: annex 1, Power Point presented by the CICIG on October 29, 2018; Appendix 2, Volume I of File M3542-4338; Appendix 3, Volume II of File M3542-4338; annex 4, Audio 01-01076-2010-00004 OFC 6TH 1ST Statement 11-13-2018.mp3; appendix 5, Audio 01-01076-2010-00004 OFC 6TH 1ST Statement 11-15-2018.mp3; annex 6, Audio 01-01076-2010-00004 OFC 6TH 1ST Statement 11-16-2018.mp3; annex 7, Audio 01076-2010-0004 OFC 6TH Resolution 1st Statement 11-26-2018; annex 8, appeal filed by FECCI. Case 01076-2010-00004; annex 9, Government Press Release 040918; annex 10, Jimmy Morales UN AG Speech; annex 11, Communication from the Government of Guatemala of September 25, 2018; annex 12, Government Agreement 2-2019; annex 13, Official statement from the Vielmann family, November 9, 2018, and annex 14, Copy with receipt signature of the Request to the MP of file M3542-4338-2005.

investigation of the Valenzuela Ávila case and does not admit the supervening evidence presented on March 17, 2019, related to different links available on the internet, nor annexes 6 to 14, since they refer to issues that are not directly related to this case.

58. Regarding the annexes presented together with the final arguments of the representatives,<sup>27</sup> the State in its observations indicated that with respect to annex 1, referring to the files identified as MP – Trial Opening – Suhairam Stu 1, 2, and 3, it considers that they are also not related to the facts of the case, since although it is an accusation of extrajudicial executions and torture against several people within the framework of "Operation Gavilán", none of the facts reported by the Public Prosecutor are related with Mr. Valenzuela. Regarding the file identified as annex 2, it is a joint report presented by the Myrna Mack Foundation, the International Commission against Impunity in Guatemala and Nómada media journalism entitled "Illegal networks and political crisis: reality of the Guatemalan Congress", the State considers it is not related to the facts presented by the Commission and that the representatives are attempting to introduce new facts and requested that it be discarded. Lastly, it indicated that the representatives did not attach documents that accredited the incurred expenses and the time to do so was precluded. Therefore, the State requested its inadmissibility.

59. This Court notes that annex 1, referring to an indictment dated February 26, 2019, presented by the prosecutor CVN of the Special Prosecutor against impunity of the Public Prosecution before the Judge of the First Court of First Instance for Criminal Justice, Drug-Trafficking and Environmental Crime, related to the "Gavilán Plan", is linked to this case, and admits it for this reason. As for annex 2, corresponding to the report "Illegal networks and political crisis: reality of the Guatemalan Congress", it refers in general to the political situation in Guatemala, which has no direct connection with this case, and therefore does not admit it. Finally, annex 3, referring to the folder of incurred expenses, was not presented.

## **B. Admissibility of testimonial and expert evidence**

60. The Court deems it pertinent to admit a statement made before the twenty-eighth notary public,<sup>28</sup> insofar as it meets the purpose defined by the President in the order for its receipt. Notwithstanding the foregoing, specific considerations will be made below, and the disputes raised on the admissibility of other statements or opinions will be resolved.

61. The State presented various observations regarding the evidential value of the following expert opinions rendered by a) Olga Patricia Roldán Monterroso, b) Leonel González Postigo, and c) Dennis Martínez.

62. This **Court** understands that the State does not challenge its admissibility, but rather questions its evidential value. Consequently, it admits the expert opinions of Olga Patricia Roldán Monterroso and Leonel González Postigo, which will be considered as pertinent as long as they meet to the ordered purpose and taking into account the observations of the State. Regarding the expert opinion of Dennis Martínez, the State distorted the expert opinion alleging that "the document is falsified" in accordance with Guatemalan legislation due to an error in the form in which it was presented. In this regard, Mr. Martínez gave his expert opinion

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<sup>27</sup> The documents presented are: annex 1, indictment of February 26, 2019 presented by the prosecutor CVN, of the Special Prosecutor against impunity of the Public Prosecutor before the Judge of the First Court of First Instance for Criminal, Drug Trafficking and Environmental Crime with competence to hear higher risk processes, Group "A", agency 4, file MP: M3542-2005-4338, Cause 01076-2010-00004; annex 2, Waxennecker, H Illicit networks and political crisis: THE REALITY OF THE GUATEMALAN CONGRESS, CICIG. Guatemala, 2019. P. 34. Annex 3: folder with supporting documents for supervening expenses was not presented.

<sup>28</sup> The Court received the statement by affidavit from Luis Fernando Valenzuela Ruiz.

before a public notary, which due to its characteristics is different from that of a testimonial statement, and in this sense, the assessment of its content is not subject to the formalities required for testimonial evidence. However, its evidential value will depend on whether it adheres to the ordered purpose and the body of evidence as a whole. Therefore, this Court admits the expert opinion of Mr. Martínez.

63. The State presented various observations regarding the statements of Florinda López de López, Rosa María Mendoza López and Cristóbal Gerónimo Chales. This **Court** notes that the State in its observations on the statements questions their content, so the Court understands that it is not challenging their admissibility, but rather questions their evidential value.<sup>29</sup> Consequently, this Court admits the aforementioned statements, which will be considered as relevant as long as they meet the ordered purpose and taking the observations of the State into account.

## **VII FACTS**

64. This chapter will establish the facts of the case and, where relevant, the facts in dispute, based on the factual framework submitted to the Court by the Commission, taking into account the body of evidence provided and the allegations by the parties. They will be set out in the following order: (A) Legislation in Guatemala; (B) Situation of Tirso Román Valenzuela Ávila and the criminal proceedings that culminated in the death sentence; (C) Alleged acts of violence, Mr. Valenzuela's escapes and judicial proceedings carried out, and (D) Death of Mr. Valenzuela and its investigation.

### **A. Legislation in Guatemala**

#### *A.1. Legislation in force in Guatemala at the time of the events regarding the death penalty*

65. Article 18 of the Guatemalan Constitution provides for the possibility of application of the death penalty within Guatemala<sup>30</sup>. Article 43 of the Criminal Code establishes that the death penalty "is an extraordinary measure and may only be applied in cases expressly stated in law and will not be carried out until all legal remedies have been exhausted."<sup>31</sup>

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<sup>29</sup> Regarding the allusions made by the State related to their status as presumed victims, this Court refers to what has already been decided (*supra* para. 52).

<sup>30</sup> Political Constitution of the Republic of Guatemala decreed by the Constituent Assembly, of May 31, 1985, Reformed by the Popular Consultation Legislative Agreement 18-93.

"Article 18. Death penalty. The death penalty may not be imposed in the following cases:

- a. Based on presumptions;
- b. To women;
- c. To those over sixty years of age;
- d. To those convicted of political and common crimes related to politicians; and
- e. To prisoners whose extradition has been granted under that condition.

Against the sentence that imposes the death penalty, all pertinent legal resources will be admissible, including cassation; this will always be admitted for processing. The penalty will be executed after all resources are exhausted. The Congress of the Republic may abolish the death penalty."

<sup>31</sup> Political Constitution of the Republic of Guatemala decreed by the Constituent Assembly, of May 31, 1985, Reformed by the Popular Consultation Legislative Agreement 18-93.

"Article 18. Death penalty. The death penalty may not be imposed in the following cases:

- a. Based on presumptions;
- b. To women;
- c. To those over sixty years of age;
- d. To those convicted of political and common crimes related to politicians; and
- e. To prisoners whose extradition has been granted under that condition.

66. Article 132 of the Criminal Code in force in 1995 defined murder in the following terms:

Murder will be committed by whoever kills a person:

1) With premeditation; 2) For a price, reward, promise, with a profit motive; 3) Through or on the occasion of a flood, fire, poison, explosion, collapsing of a building or any other affectation that may cause great damage; 4) With known premeditation; 5) With cruelty; 6) With the impulse of brutal perversity; 7) To prepare, facilitate, commit and hide another crime or to guarantee its results or immunity for themselves or their co-participants or for not having obtained the result proposed when attempting the other punishable act; 8) With terrorist purposes or in the development of terrorist activities.

A prison sentence of 25 to 50 years will be imposed on the offender convicted of murder, however, the death penalty will be imposed instead of the maximum prison time, if due to the circumstance of the acts and of the occasion, the way it was carried out and the determining motives, a greater dangerousness of the agent is revealed.<sup>32</sup>

67. The death penalty in Guatemala was applied only occasionally until the 1990s. However, as of 1996,<sup>33</sup> the State reapplied it first by firing squad, in accordance with Decree No. 234 of the Congress of the Republic,<sup>34</sup> and then through lethal injection, after Decree No. 234 was repealed by Decree No. 100-96 of November 1996, by which this new method of execution was established.<sup>35</sup>

68. Decree No. 159 of April 19, 1892, of the National Legislative Assembly considered granting pardon or commuting the sentence and regulated the procedure to put them into effect. On June 1, 2000, the aforementioned Decree No. 159 was repealed by the Guatemalan Congress through Legislative Decree No. 32/2000.

#### *A.2. Legislation in force in Guatemala regarding torture at the time of the events*

69. Article 201 bis of the Penal Code defines the crime of torture, in the terms already indicated (*supra* para. 28).

### **B. Situation of Tirso Román Valenzuela Ávila and the criminal proceedings that culminated in the death sentence**

70. Tirso Román Valenzuela Ávila, also known as Víctor Manuel Vásquez González, Pablo Sandoval Ramírez, Jorge Armando Fuentes or as Jorge "el Flaco", as he appears in different judicial records,<sup>36</sup> lived in the city of San Marcos, Guatemala. For purposes of this judgment, the Court will refer to Tirso Román Valenzuela Ávila.

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Against the sentence that imposes the death penalty, all pertinent legal resources will be admissible, including cassation; this will always be admitted for processing. The penalty will be executed after all resources are exhausted. The Congress of the Republic may abolish the death penalty."

<sup>32</sup> Criminal Code, Decree No. 17-73, Article 132, *supra*.

<sup>33</sup> Amnesty International, *Guatemala, The Return of the Death Penalty*. March 1997, p. 3; IACHR, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/11.63 doc.10, September 28, 1984, Guatemala, para. 9.

<sup>34</sup> Decree of the Congress of the Republic of Guatemala of May 21, 1946.

<sup>35</sup> Law that establishes the procedure for the execution of the death penalty. Decree of the Congress of the Republic of Guatemala No. 100-96.

"Article 7. After reading the resolutions referred to in the previous article, the death penalty will be carried out by means of the lethal injection procedure described below [...]"

<sup>36</sup> As indicated in the Judgment of the Sentencing Court of the Department of Quetzaltenango of October 21, 1999 (file of annexes to the Merits Report, annex 15, fs. 258 to 395), and official letter of May 11, 1999, of the Second Judge of the Court of First Instance for Criminal Justice, Drug-Trafficking and Environmental Crime (file of proceedings before the Commission, annex 1, f. 843).

### B.1. Detention and Search

71. Regarding the detention of Mr. Valenzuela, there is dispute as to the place, manner and time of his detention. According to Tirso Román Valenzuela Ávila's version, on May 27, 1998, he arrived at his home and was intercepted by some men, who beat him in various places, and put him into a vehicle and drove off. He also indicated that when the car in which he was being transported stopped, they got out and began to interrogate him, once again being beaten and suffocated. He also mentioned that one of the people holding him received a phone call and they put him back in the car<sup>37</sup> to take him back to his home. He specified that there were police vehicles at his house, and when they entered the house there were some police officers and other people in civilian clothes, as well as a prosecutor and the Second Justice of the Peace.<sup>38</sup>

72. Furthermore, according to the version recorded in the criminal proceedings, Mr. Valenzuela Ávila was detained during a search carried out in his home on May 27, 1998, by order of the Second Criminal Justice of the Peace in the framework of the investigation into the death of prosecutor SJR.<sup>39</sup>

73. There is also dispute about what happened during the search, for which reason two versions are indicated, one indicated by the State and the other by the alleged victim. As for the State's version, it appears in Official Letter No. 1709-98, that the search warrant was issued in Official Letter No. 112 of May 27, 1998 and signed by the Second Local Criminal Justice of the Peace. During the search of the house where Víctor Manuel Vásquez González (Tirso Valenzuela) lived, several weapons were located, which were seized, and Mr. Valenzuela was arrested for the crime of possession of firearms. Similarly, on May 28, 1998, Official Letter 1709-98 was expanded by Official Letter No. 1714-98, which recorded that Tirso Román Valenzuela Ávila voluntarily told the police officers that he had killed the prosecutor SJR. For this reason, his indictment was extended to include the crime of murder.<sup>40</sup> This last assertion is also recorded in the judgment of October 21, 1999 (*infra* para. 76).

74. Mr. Valenzuela testified at trial that during the search he saw how a private agent entered his house with a sack. Then someone said that he "found a package containing weapons." He stated that the prosecutor and the judge then met in a back courtyard, proceeded to open the sack and took out the weapons. Mr. Valenzuela stated that the order

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<sup>37</sup> Cf. Trial Record 38-99 of October 11, 1999, containing the statement of Tirso Román Valenzuela Ávila (file of annexes to the Merits Report, annex 1, pages 5 to 113), and psychological expert opinion rendered by Juan Cristóbal Aldana Alfaro (file of annexes to the Merits Report, annex 12, fs. 191 to 208).

<sup>38</sup> Cf. Record of Trial 38-99 of October 11, 1999, *supra*; psychological expert opinion rendered by Juan Cristóbal Aldana Alfaro, *supra*, and report of Doctor Edna Karina Vaquerano Martínez of June 15, 2005 (file of annexes to the Merits Report, annex 11, fs. 183 to 189).

<sup>39</sup> Mrs. SJR was the District Prosecutor of Retalhuleu and she was responsible for the investigation of various kidnapping cases. She was murdered on May 20, 1998, at kilometer two hundred and ten and a half, on the highway that leads from the city of Quetzaltenango to the South Coast. VGS stated that "on May twenty-seventh, nineteen hundred and ninety-eight, she participated in the detention of [Tirso Román Valenzuela Ávila] through a search warrant ordered by the Second Local Criminal Justice of the Peace [...] and at the request of the Prosecutor [...] based on the fact that there were (sic) weapons, drugs and stolen property at the location." Cf. Statement of Mr. VGS, Officer of the National Civil Police, before the Public Prosecutor's Office, on July 28, 1998 (file of proceedings before the Commission, annex 1, fs. 563 to 576). The fact that the raid took place is not disputed.

<sup>40</sup> Cf. Official communication No. 1709-98 of May 27, 1998, and 1714-98 of May 28, 1998, of the Departmental Headquarters of the Quetzaltenango National Police (file of proceedings before the Commission, annex 5, fs. 3279 to 3280, and 2070 to 2072). It is also recorded that "on the way from where the individual Vásquez González [(Valenzuela Ávila)] was detained, to the body, he voluntarily stated that he was directly responsible for the death of Ms. [SJR], District Prosecutor of the Public Ministry of Retalhuleu". This was also reiterated in the judgment of October 21, 1999. The situation regarding the seizure of weapons and Mr. Valenzuela's voluntary statement is disputed, since the alleged victim repeatedly indicates that he accepted the charges because he would have been subjected to acts of violence such as torture and sexual violence.

was then given to remove him from there, and they put him in a vehicle, being subject to various acts of violence, and then they took him to the Second Police Corps.<sup>41</sup> Regarding the "confession of the crime," Mr. Valenzuela stated that he "decid[ed] to give [his] statement because a man tortured [him] and he [said] that I spontaneously declared about the murder without asking me questions."<sup>42</sup>

## *B.2. Criminal proceedings against Mr. Valenzuela*

### *B.2.1 Facts giving rise to the conviction of death penalty*

75. On June 1, 1999, the Public Prosecutor filed charges against Tirso Román Valenzuela Ávila for the crimes of bodily harm, illegal possession of offensive firearms, murder, kidnapping, escape, and public use of an assumed name.<sup>43</sup> On July 2, 1999, the Criminal Court of First Instance dismissed the crime of bodily harm,<sup>44</sup> and admitted the accusation regarding the other crimes listed. Said resolution was appealed<sup>45</sup> and the appeal was declared inadmissible on July 8, 1999.<sup>46</sup>

76. On October 21, 1999, the Sentencing Court of the Department of Quetzaltenango issued a conviction against Mr. Valenzuela and other persons. In said judgment, Mr. Valenzuela was acquitted for the crime of abduction or kidnapping due to lack of evidence and declared responsible for the crimes of illegal possession of offensive firearms, murder, evasion, and public use of an assumed name. Mr. Valenzuela Ávila was sentenced to death for the crime of murder, as the court considered that the requirement of "social danger" was fulfilled.<sup>47</sup>

77. On November 3, 1999, Mr. Valenzuela's defense filed a special appeal against the conviction. They argued, among the grounds of form: violation of the principle of immediacy; lack of justification, referring to the fact that the Court limited itself to listing the means of evidence produced in the debate, without indicating the reasoning that led the court to convict or acquit and that all the evidence was not assessed; illegality of obtaining the means of evidence, insofar as the court took into account a confession from Mr. Valenzuela to his captors that was obtained by torture on the day of his arrest on May 27, 1998. They also alleged, among reasons of merit: erroneous application of the last paragraph of article 132 (crime of murder), since the motive for committing the crime was not proven and the court did not use direct evidence to determine Mr. Valenzuela's social danger, only presumptions.<sup>48</sup>

78. On August 7, 2000, the Seventh Chamber of the Court of Appeals declared the appeal inadmissible. Said Chamber concluded that the appeal was inadmissible because "it suffers

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<sup>41</sup> Record of Trial 38-99 of October 11, 1999, *supra*.

<sup>42</sup> Record of Trial 38-99 of October 11, 1999, *supra*.

<sup>43</sup> *Cf.* Brief of accusation and formulation of the opening of the trial dated May 31, 1999, signed by the Public Prosecutor addressed to the Second Judge the Court of First Instance for Criminal Justice, Drug-Trafficking and Environmental Crime of the Department of Quetzaltenango (file of annexes to the Merits Report, appendix 13, pages 210 to 243).

<sup>44</sup> *Cf.* Decision of the Court of First Instance for Criminal, Drug Trafficking and Environmental Crime of Quetzaltenango of July 2, 1999 (file of annexes to the Merits Report, annex 14, fs. 245 to 256).

<sup>45</sup> *Cf.* Motion for reconsideration of July 6, 1999, signed by the defense attorney of Tirso Valenzuela Ávila (file of proceedings before the Commission, annex 14, fs. 1534 to 1536)

<sup>46</sup> *Cf.* Resolution of the Court of First Instance for Criminal, Drug Trafficking and Environmental Crime of Quetzaltenango of July 8, 1999 (file of proceedings before the Commission, annex 14, f. 1537).

<sup>47</sup> *Cf.* Judgment of the Sentencing Court of the Department of Quetzaltenango of October 21, 1999, *supra*.

<sup>48</sup> *Cf.* Special appeal filed on November 3, 1999, by Tirso Román Valenzuela Ávila against the Judgment of the Sentencing Court of the Department of Quetzaltenango of October 21, 1999 (file of annexes to the Merits Report, annex 16, fs. 397 to 433).

from deficiencies regarding its formulation, invocation of the vices alleged as such; as well as the absence of an intelligible thesis in relation to the alleged underlying motives".<sup>49</sup>

79. Mr. Valenzuela filed a cassation appeal for reasons of form and merit. On December 1, 2000, the Criminal Chamber of the Supreme Court of Justice declared the appeal inadmissible. As for the formal reason, it indicated that "the argument by the appellant is not clear, precise and technical, as it does not specifically indicate the underlying justification of the reasons to attack the judgment." He added that "the judgment [...] contains the structure of the second-degree criminal judgment, dividing treatment into four sections [...] thus containing the internal and external requirements for a second-degree ruling to be valid."<sup>50</sup>

80. On June 10, 2002, Tirso Román Valenzuela Ávila's defense filed a motion for review against the judgment of October 21, 1999, issued by the Sentencing Court of the Department of Quetzaltenango, which was admitted on March 17, 2003, and declared inadmissible on July 5, 2004, by the Criminal Chamber of the Supreme Court of Justice. The Chamber understood that the evidence provided, which was all the sentences of the previous instances, did not constitute facts or elements of evidence that occurred after the conviction.<sup>51</sup>

81. According to the representatives, on September 9, 2004, Tirso Román Valenzuela filed an appeal for clemency before the Presidency of the Republic, in which he requested that his death sentence be commuted to the immediately lower sentence of 50 years. At the time of his death, according to the representatives, the aforementioned remedy had not been processed or resolved.

### **C. Alleged torture and mistreatment, Mr. Valenzuela's escapes and judicial proceedings carried out**

#### *C.1. Detention on May 27, 1998*

82. Mr. Valenzuela recounted that on May 27, 1998, after the raid on his home and his arrest, they put him in a vehicle and questioned him about various facts and about the death of a prosecutor, they beat him and suffocated him with rubber material, and they inserted a greased baton into his anus several times until he lost consciousness. Therefore, according to Mr. Valenzuela, he decided to accept his participation in the death of the aforementioned prosecutor.<sup>52</sup> After his spontaneous declaration, the police agents transferred him at dawn to the Quetzaltenango Men's Preventive Detention Center. In addition, he stated that due to the state he was in, some inmates helped him to go to the bathroom and gave him painkillers. SMR and EMM, who were detained at the Quetzaltenango Men's Preventive Detention Center, stated that Mr. Valenzuela arrived badly beaten, defecated blood, needed help to move around, could not sit down, slept standing up and constantly complained of the multiple pains that he had.<sup>53</sup> The State denies the alleged torture.

#### *C.2. First escape and recapture*

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<sup>49</sup> Cf. Order of the Seventh Chamber of the Court of Appeals of Quetzaltenango of August 7, 2000 (file of annexes to the Merits Report, annex 17, fs. 435 to 494).

<sup>50</sup> Resolution of the Criminal Chamber of the Supreme Court of Justice of December 1, 2000 (file of annexes to the Merits Report, annex 18, fs. 496 to 530).

<sup>51</sup> Resolution of the Criminal Chamber of the Supreme Court of Justice of July 5, 2004 (file of annexes to the Merits Report, annex 19, fs. 532 to 541).

<sup>52</sup> Cf. Record of Trial 38-99 of October 11, 1999, *supra*, and psychological expert opinion rendered by Juan Cristóbal Aldana Alfaro, *supra*, and Report of the doctor Edna Karina Vaquerano Martínez, *supra*.

<sup>53</sup> Cf. Record of Trial 38-99 of October 11, 1999, *supra*; statement made by Mr. SMR on July 13, 2004 (file of annexes to the Merits Report, annex 3, f. 118), and undated statement made by Mr. EMM (file of annexes to the Merits Report, annex 4, pages 120 to 121).

83. On June 14, 1998, there was an escape of prisoners, among whom was Mr. Valenzuela.<sup>54</sup> Until that moment no charges had been filed against him.<sup>55</sup>

84. On April 10, 1999, Mr. Valenzuela was recaptured at the "Juan José Ortega" Hospital in Coatepeque.<sup>56</sup> On April 16, 1999, he was transferred to the San Juan de Dios Hospital. He was then sent to the PNC private hospital located in the Detention Center, where he was hospitalized until April 21 of the same year.<sup>57</sup> From there they took him to the Preventive Detention Centre and in September he was taken to the Maximum-Security Prison known as "El Infiernito".<sup>58</sup>

### *C.3. Second Escape and recapture*

85. On June 17, 2001, a mass escape of 78 prisoners took place from the detention center known as "El Infiernito". That day, Mr. Valenzuela escaped along with other inmates and was recaptured by state agents. Subsequently, Mr. Valenzuela was transferred to preventive custody. In this regard, Mr. Valenzuela stated that on June 17 and 18, 2001, he had suffered abuse.<sup>59</sup> On this point, the State denies the alleged acts.

86. According to a prisoner, PRA stated that after being recaptured, Mr. Valenzuela was repeatedly taken from his cell by people dressed in civilian clothes and he came back more and more beaten. He added that Mr. Valenzuela was physically ill, that he had bruises all over his body and that in different conversations with him, he told him about the torture he had suffered with cigarettes in a part of his neck and genitals and that they had previously introduced an object (baton or stick) in his anus.<sup>60</sup>

### *C.4. Proceedings carried out by Mr. Valenzuela and his defense in relation to the alleged acts of violence*

87. Mr. Valenzuela reported the acts of violence perpetrated during his detention, in his preliminary statement of June 8, 1998,<sup>61</sup> in his statement of October 11, 1999,<sup>62</sup> and also referred to them in the appeal of 3 of November 1999 presented by his defense.<sup>63</sup>

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<sup>54</sup> Cf. Record of Trial 38-99 of October 11, 1999, *supra*, and psychological expert report rendered by Juan Cristóbal Aldana Alfaro, *supra*, and note of August 2, 1999, of the Interim Judge of the Court of First Instance for Criminal, Drug-Trafficking and Environmental Crime (file of proceedings before the Commission, annex 3, f. 1556).

<sup>55</sup> Cf. Brief of accusation and statement of opening of the trial of May 31, 1999, *supra*.

<sup>56</sup> Cf. Judgment of the Sentencing Court of the Municipality of Coatepeque, Quetzaltenango of February 10, 2000 (file of proceedings before the Commission, annex 2, fs. 1346 to 1360); Official letter of April 15, 1999, from the Director of the "Juan José Ortega" National Hospital in Coatepeque to emergency physicians of the San Juan de Dios General Hospital, Guatemala (file of proceedings before the Commission, annex 18, f. 2208), and Certification of the Director of the "Juan José Ortega" National Hospital of Coatepeque on May 3, 2005 (file of proceedings before the Commission, annex 3, f. 2205).

<sup>57</sup> Cf. Record of Trial 38-99 of October 11, 1999, *supra*; psychological expert opinion rendered by Juan Cristóbal Aldana Alfaro, *supra*, and Edna Karina Vaquerano Martínez's doctor's report, *supra*.

<sup>58</sup> Notification No. 24-99. Of. 2 of the Presiding Judge of the Criminal Sentencing Court of the department of Quetzaltenango (file of proceedings before the Commission, annex 1, f. 937).

<sup>59</sup> Cf. Psychological expert opinion rendered by Juan Cristóbal Aldana Alfaro, *supra*; Report of the doctor of Edna Karina Vaquerano Martínez, *supra*, and habeas corpus remedy filed by Tirso Román Valenzuela Ávila before the Third Chamber of the Court of Appeals on July 11, 2001 (file of annexes to the Merits Report, annex 7, fs 160 to 163).

<sup>60</sup> Cf. Undated statement made by Mr. PRA (file of annexes to the Merits Report, annex 9, f. 168).

<sup>61</sup> Cf. Report of the State of Guatemala to the Inter-American Commission on Human Rights, in relation to the Tirso Román Valenzuela Ávila case of May 27, 2005 (file of proceedings before the Commission, fs. 3074 to 3083). Said report indicates that Mr. Tirso Román Valenzuela Ávila gave his preliminary statement on June 8, 1998. This fact is not disputed.

<sup>62</sup> Cf. Record of Trial 38-99 of October 11, 1999, *supra*.

<sup>63</sup> Special appeal remedy of November 3, 1999, *supra*.

88. On July 11, 2001, Mr. Valenzuela filed a writ of habeas corpus against the Director of the National Civil Police, the Head of the Criminal Investigation Service Department, and the Director of the Preventive Center for Men in zone 18. In said appeal he also reported the abuse he suffered on June 17, 2001. On July 30, 2001, the Third Chamber of the Court of Appeals decided to declare the habeas corpus appeal inadmissible, based on the fact that in the case there were no the legal assumptions for its origin, provided for in article 82 of the Law of Protection, Personal Exhibition and Constitutionality.<sup>64</sup>

### *C.5. Third escape, death of Mr. Valenzuela and "Operation Gavilán"*

89. On October 22, 2005, during the early hours of the morning, 19 inmates classified as highly dangerous escaped from "El Infiernito" maximum security prison, through a tunnel 120 meters long,<sup>65</sup> Tirso Román Valenzuela Avila was among them. Faced with this event, the Criminal Intelligence Service of the National Civil Police issued Action Plan No. 002-2005 that establishes "Operation Gavilán" or "Plan Gavilán", whose main objective was the search and capture of the 19 escaped inmates described as "dangerous criminals", for the purposes of "protecting life, the physical integrity of people and their property, the free exercise of rights and freedoms, as well as preventing, investigating and combating crime while preserving order and public safety".<sup>66</sup>

90. The "Gavilán Plan" was formally established on October 24, 2005 and signed by Víctor Hugo Soto Diéguez, head of the PNC Criminal Investigation Service.<sup>67</sup> This operation would be effective from 07:30 hours on Saturday, October 22, 2005 until further notice.<sup>68</sup> The general framework of action of the "Gavilán Plan" had to be adapted to the provisions of the Political Constitution of the Republic of Guatemala, the National Civil Police Law Decree No. 11-97, article 112 of the Criminal Procedure Code (Decree No. 51 -92) of the Republic of Guatemala (hereinafter Criminal Procedure Code), Articles 1 and 4 of the Criminal Code, Decree No. 17-73, the Arms and Ammunition Law, Decree 38-89, international human rights treaties and other current legislation of the Republic of Guatemala.<sup>69</sup>

91. The general command of the "Gavilán Plan" was the responsibility of the Head of the Criminal Investigation Service. The Head of the Courts Auxiliary Section was in charge of supervising and monitoring the operational lines of action, which consisted of "coordination with police authorities of Central American countries through INTERPOL, for the implementation of border area security measures." The Administrative Chief of the Criminal Investigation Service was in charge of supervising and monitoring the investigative lines of action, which consisted of gathering information on the fugitives, conducting raids, and organizing eight nationwide search teams, each of them being in charge of searching for and

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<sup>64</sup> Cf. Resolution of the Third Chamber of the Court of Appeals constituted as the Habeas Corpus Court of July 30, 2001 (file of annexes to the Merits Report, annex 8, fs. 165 to 166). Amparo Law, Habeas Corpus and Constitutionality, Decree No. 1-86. As established in Article 82: "Right to Habeas Corpus. Anyone who is illegally imprisoned, detained or restrained in any other way in the enjoyment of his individual freedom, threatened with the loss of it, or suffers abuse, even when his imprisonment or detention is based on law, has the right to request his immediate appearance before the courts of justice, either for the purpose of restoring or guaranteeing his liberty, for the harassment to cease, or for the coercion to which he was subject to end."

<sup>65</sup> Cf. Report of the State to the Commission of November 8, 2005 (file of proceedings before the Commission, annex 5, fs. 2965 to 2966).

<sup>66</sup> Internal Action Plan No. 002-2005 "Operation Gavilán" (file of annexes to the brief with pleadings, motions and evidence, annex 47, fs. 12741 to 12745).

<sup>67</sup> Cf. Internal Action Plan No. 002-2005 "Operation Gavilán", *supra*.

<sup>68</sup> Cf. Internal Action Plan No. 002-2005 "Operation Gavilán", *supra*.

<sup>69</sup> Cf. Internal Action Plan No. 002-2005 "Operation Gavilán", *supra*. It is worth mentioning that the aforementioned regulations do not refer in detail to the regulation of police operations such as the "Operation Gavilán", they simply state general principles of the organization of the PNC.

capturing specific inmates. Each team was made up of 4 investigators from the Criminal Investigation Service and the Police Information Service.<sup>70</sup>

92. In the oral hearing of early evidence offered before the First Court of First Instance for Criminal Justice, Drug-Trafficking and Environmental Crime on February 15, 2012 in case C-01076-2010-004, Ms. MFF, who was part of the "Plan Gavilán", stated regarding the orders given to the officials in charge of the search and capture of the escaped inmates, that "the guidelines were direct, that those who were charged with serious crimes no longer had to return to prison."<sup>71</sup> Along the same lines, other officers who were part of "Operation Gavilán" reaffirmed this assertion.<sup>72</sup> On the occasion of the investigation of the extrajudicial execution of ESR in the framework of Operation Gavilán, on August 8, 2013, the First Court for Criminal Justice, Drug-Trafficking and Environmental Crime issued a sentence in which Víctor Hugo Soto Dieguez was sentenced, who:

[...] in his capacity as a public official as Commissioner of the National Civil Police, in Guatemala City in the month of October 2005, formed a special team made up of members of different bodies of the National Civil Police, for the recapture of the 19 escaped prisoners [...] parallel to said plan, it was determined that once the fugitives had been captured, they should be extrajudicially executed [...].<sup>73</sup>

93. Said judgment recognizes that the "Gavilán Plan" was created by the National Civil Police to search for and capture the 19 inmates who had escaped from "El Infiernito" prison, among whom was Mr. ESR. In addition, the judgment indicates as a proven fact that in parallel to the "Gavilán Plan" it was determined that once the prisoners were captured, they should be executed.<sup>74</sup> This action was also stated by other officers who were part of the "Gavilán Plan".<sup>75</sup>

94. In this regard, the International Commission against Impunity in Guatemala, in its press release 041, based on this judgment, indicated that the interference of authorities in the integration of a parallel structure with the power to carry out the extrajudicial execution of the

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<sup>70</sup> Cf. Internal Action Plan No. 002-2005 "Operation Gavilán", *supra*.

<sup>71</sup> Cf. Statement of Ms. MFF as advance evidence, offered at an oral hearing before the Court of First Instance for Criminal, Drug-Trafficking and Environmental Crime of Guatemala City on February 15, 2012, First High-Risk Court of 18 May 2012, Case C-01076-2010-004 (file of annexes to the brief with pleadings, motions and evidence, annex 38).

<sup>72</sup> Testimonial statements of: PMV rendered before the Special Prosecutor Against Impunity on January 23, 2019 (supervening evidence file of the representatives, annex 3, fs. 13616 to 13618); SPG rendered before the Special Prosecutor Against Impunity on November 23, 2018 (supervening evidence file of the representatives, annex 3, fs. 13687 to 13691); JTS rendered before the hearing room occupied by the First High-Risk Criminal Court of First Instance "A", of the Municipality and Department of Guatemala in the first statement hearing of November 13, 2018 (supervening evidence file of the representatives, annex 4).

<sup>73</sup> Judgment of the Court of First Instance for Criminal, Drug-Trafficking and Environmental Crime of Guatemala of August 8, 2013, of case C-01076-2006-17857 (file of annexes to the brief with pleadings, motions and evidence, annex 30, fs. 6950 to 7249).

<sup>74</sup> Cf. Judgment of the First Court of Criminal Sentencing, Drug Activity and Crimes against the Environment of Guatemala of August 8, 2013, *supra*.

<sup>75</sup> Cf. Testimonial statements of: PMV given before the Special Prosecutor Against Impunity on January 23, 2019, *supra*; SPG rendered before the Special Prosecutor Against Impunity on November 23, 2018, *supra*; of EJC rendered before the Special Prosecutor Against Impunity on November 22, 2018, *supra*; JTS rendered before the courtroom of the First High-Risk Criminal Court of First Instance "A", of the Municipality and Department of Guatemala in the first statement hearing of November 13, 2018, *supra*; HOO before the courtroom of the First High-Risk Criminal Court of First Instance "A", of the Municipality and Department of Guatemala, in the first statement hearing of November 13, 2018 (supervening evidence file of the representatives, annex 5); AVC rendered before the courtroom of the First High-Risk Criminal Court of First Instance "A", of the Municipality and Department of Guatemala, in the first statement hearing of November 13, 2018 (supervening evidence file of the representatives, annex 5); JDM before the courtroom of the First High-Risk Criminal Court of First Instance "A", of the Municipality and Department of Guatemala in the first statement hearing of November 13, 2018 (file of supervening evidence of the representatives, annex 5).

fugitives from "El Infiernito" was evident, on the basis of eliminating those who were considered "degenerates" and "enemies of society". Said document indicates that the "Gavilán Plan" was the façade of a structure made up of senior officials, PNC agents and civilians, led by the Minister of the Interior at the time, CVM, and the director of the National Civil Police ESV".<sup>76</sup> Along these lines, the Commission referred to the statement of the International Commission against Impunity in Guatemala regarding the conviction handed down on August 8, 2013 by the First Court of Higher Risk B for the extrajudicial execution of one of the people who escaped from "El Infiernito" prison.<sup>77</sup>

95. Furthermore, on February 19, 2007, the Special Rapporteur on extrajudicial executions published a report on the current context in Guatemala, and according to the information obtained from the complaints of employees of the Division of Criminal Investigation determined that "it [was] evident that groups dedicated to social cleansing continued to function," pointing out in particular the "National Police Detective Corps." He also specified that, "[t]he information obtained indicates that social cleansing is something more than the actions of a few corrupt agents. This does not mean that it has reached the category of official policy, but due to its frequency and systematic nature, social cleansing does raise a question of institutional responsibility".<sup>78</sup>

#### **D. Investigation of Mr. Valenzuela Ávila's death**

96. On December 8, 2006, Mr. Valenzuela's lifeless body was found, along with that of another fugitive, in the city of Gomera, department of Escuintla.<sup>79</sup> On December 8, 2006, when Mr. Valenzuela was killed, an officer from Station 31-44 of the PNC in the city of Gomera de Escuintla, requested, through official letter 1050-06, for the Justice of the Peace to be present at the scene of the death, to carry out the respective procedures, indicating that "today at 18:30 hrs. it was learned that [...] there were two deceased males, so the agents went to the site [...] and verified the facts of the case, being two males who died of multiple gunshot wounds of unknown caliber."<sup>80</sup> Later, through a further official letter, it indicated that "according to versions of people who witnessed the event and who refused to provide their names, they stated that the two deceased were riding [a] motorcycle [...], being chased by several armed individuals who were driving an unknown pick-up vehicle, who shot them with high-caliber firearms, causing their death."<sup>81</sup>

97. The Justice of the Peace prepared the visual inspection report and in it described the place where Mr. Valenzuela's body was found, the position of the body, its physical characteristics, the injuries it presented, clothing and other objects on the body.<sup>82</sup>

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<sup>76</sup> CICIG, press release 041, Court sentences those responsible for extrajudicial executions, August 8, 2013. Viewed at: <https://www.cicig.org/casos/tribunal-condena-a-responsables-de-ejecuciones-extrajudiciales/>.

<sup>77</sup> Cf. Admissibility and Merits Report of the Commission, *supra*.

<sup>78</sup> UN, Human Rights Council, Report of the Special Rapporteur, Philip Alston, on extrajudicial, summary or arbitrary executions, Guatemala Mission from August 21 to 25, 2006, A/HRC/4/20/Add.2, February 19 of 2007, paragraphs 19 and 21.

<sup>79</sup> Record of Visual Inspection at the scene of the crime of December 8, 2006 (file of annexes to the brief with pleadings, motions and evidence, annex 40, fs. 12192 to 12197), and Death Certificate of June 21, 2007, Civil Registry of the Villa de la Gomera, of the Department of Escuintla (file of annexes to the brief with pleadings, motions and evidence, annex 40, f. 12393).

<sup>80</sup> Cf. Official Letter No. 1050-06 of December 8, 2006, of the PNC, Sub-Station 31-44<sup>a</sup>, La Gomera Escuintla (files of annexes to the brief with pleadings, motions and evidence, annex 40, f. 12181).

<sup>81</sup> Cf. Official Letter No. 1051-06 of December 8, 2006, of the PNC, Sub-Station 31-44<sup>a</sup>, La Gomera Escuintla (files of annexes to the brief with pleadings, motions and evidence, annex 40, fs. 12184 to 12186).

<sup>82</sup> Record of Visual Inspection of the crime scene of December 8, 2006, *supra*. According to Mr. Saulo Daniel Ruiz López, Mr. Valenzuela's brother-in-law, he recognized the body, and they did not give it to him. Acknowledgment certificate before the Office of the Prosecutor of Santa Lucía de Cotzumalguapa of December 9, 2006 (file of annexes to the brief with pleadings, motions and evidence, annex 40, fs. 12203 to 12205).

98. On December 8, 2006, a medical death certificate was issued without identification, with the denomination "XX", a male of approximately 26 years of age.<sup>83</sup> Subsequently, on December 10, 2006, an autopsy was performed on the corpse of "an unidentified person "XX", male and 26 years old," indicating that the body had "a completely shattered skull with an exposed brain mass caused by a high-caliber firearm, little finger of the left hand shattered" and as cause of death "1) CEREBRAL LACERATION[,] 2) MULTIFRAGMENTARY SKULL FRACTURE [...]".<sup>84</sup>

99. On December 26, 2006, a fingerprint study was carried out, which revealed that the body belonged to Tirso Román Valenzuela Ávila.<sup>85</sup> On June 21, 2007, the death certificate was issued, indicating that "it belongs to an 'unknown man'".<sup>86</sup> Later, on September 18, 2007, the Prosecutor's Office requested the death certificate be rectified since it had been possible to identify Tirso Román Valenzuela Ávila as the deceased,<sup>87</sup> which is why on November 16, 2007 the name of Tirso Román Valenzuela was entered on the Death Certificate.<sup>88</sup>

100. On September 28, 2009, the Municipality of Santa Lucía de Cotzumalguapa, Escuintla informed the Prosecutor's Office that in the Municipal Cemetery there is a tiny grave with a wooden cross, on which one can read the inscription "R.I.P. Tirso Román Valenzuela A".<sup>89</sup>

101. On June 16, 2009, the Attorney General and the Head of the Public Prosecution sent a note to the three prosecutors, who at that time were investigating the case of Mr. Valenzuela's death, asking them to hold a working meeting to determine which of the three is responsible for hearing it and for them to submit a detailed report on the case of Tirso Román Valenzuela Ávila.<sup>90</sup> One of these Prosecutor's responded on June 17, 2009 with all the proceedings carried out from December 8, 2006 to the date of submission of the report.<sup>91</sup>

102. On December 6, 2011, the International Commission against Impunity in Guatemala "deem[ed] appropriate that the file [investigating Mr. Valenzuela's case] be transferred to the [...] Special Prosecutor's Office against Impunity, to join it to the rest of the cases of those who escaped from "El Infiernito" maximum security prison in Escuintla and who were killed when they were recaptured".<sup>92</sup>

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<sup>83</sup> Medical Certification of Death of December 8, 2006 (file of annexes to the brief with pleadings, motions and evidence, annex 40, f. 12264).

<sup>84</sup> Autopsy No. 234/06 of December 10, 2006 (file of annexes to the brief with pleadings, motions and evidence, annex 40, f. 12259).

<sup>85</sup> Cf. Fingerprint expert opinion of December 26, 2006 (file of annexes to the brief with pleadings, motions and evidence, annex 40, fs. 12288 to 12292).

<sup>86</sup> Death Certificate issued on June 21, 2007, by the Municipality of La Gomera, department of Escuintla (file of annexes to the brief with pleadings, motions and evidence, annex 40, f. 12393).

<sup>87</sup> Brief of the Prosecutor's Office of September 18, 2007, addressed to the Civil Court Judge of First Instance of the Municipality of Santa Lucía de Cotzumalguapa requesting that the death certificate of Tirso Román Valenzuela Ávila be rectified (file of annexes to the brief with pleadings, motions and evidence, annex 40, pages 12396 to 12400).

<sup>88</sup> Death Certificate of Tirso Román Valenzuela Ávila dated December 12, 2006, issued by the Municipality of La Gomera, Escuintla (file of annexes to the brief with pleadings, motions and evidence, annex 40, f. 12407).

<sup>89</sup> Cf. Official Letter No. 452-2009 of September 28, 2009 (file of annexes to the brief with pleadings, motions and evidence, annex 40, f. 12404).

<sup>90</sup> Brief of the Public Ministry of Guatemala of June 16, 2009, case 674-05 SCT-MP EGDC/a.a (file of annexes to the brief with pleadings, motions and evidence, annex 40, f. 12423).

<sup>91</sup> Cf. Letter from the Deputy District Prosecutor of Santa Lucía de Cotzumalguapa, department of Escuintla dated June 17, 2009 (file of annexes to the brief with pleadings, motions and evidence, annex 40, fs. 12424 to 12432).

<sup>92</sup> Report of the International Commission against Impunity in Guatemala of December 6, 2011, 102. On December 6, 2011, the International Commission against Impunity in Guatemala "deem[ed] opportune that the file [investigating Mr. Valenzuela's case] be transferred to the [...] Special Prosecutor's Office against Impunity, to link it to the other cases of those who escaped from "El Infiernito" maximum security prison in Escuintla and who were

103. On December 12, 2018, the Special Prosecutor against Impunity reported on the investigative procedures it was undertaking on that date

the proceedings [related to] the violent death of Mr. VALENZUELA ÁVILA, under jurisdictional control under the First Judge of the Criminal Court of First Instance for Drug-Trafficking and Environmental Crime [...] and had recently carried out [on that date] various investigative measures related to his extrajudicial execution, having requested [...] State agencies for testimonial statements from witnesses, relatives and references, [...] carrying out reconstructions of the facts, including ballistic material evidence, [...] and] made testimonial statements in advance of evidence"; but "the identity of the persons responsible has not been determined"<sup>93</sup> (capitals in the original text).

The circumstances of the death of Tirso Román Valenzuela Ávila are still being investigated at the domestic level.

## **VIII MERITS**

104. This case deals with the alleged international responsibility of the State for the imposition of the death penalty based on a criminal category that provided for dangerousness as a typical element, as well as for the alleged torture, acts of violence and violations of due process committed in the context of the criminal proceedings against Tirso Román Valenzuela Ávila. Said process culminated in the death sentence for Mr. Valenzuela. In addition, regarding the alleged extrajudicial execution of Mr. Valenzuela after his last escape from the "El Infiernito" prison, the possible international responsibility of the State for the violations of the right to life and judicial guarantees due to the lack of investigation, prosecution, where appropriate, the punishment of those possibly responsible, since the investigation is still ongoing. This Court then proceeds to consider and resolve the merits of the dispute. To do this, it will analyze: (1) the alleged violation of the right to a fair trial and judicial protection; (2) the imposition of the death sentence on Mr. Valenzuela Ávila; (3) the death of Mr. Valenzuela Ávila; (4) the alleged torture, sexual abuse and mistreatment suffered by Mr. Valenzuela Ávila, during his detention and while he was detained, as well as the cruel, inhuman and degrading treatment suffered for having been subjected to "death row", and (5) the alleged violation of the right to personal liberty.

### **VIII-1 RIGHT TO A FAIR TRIAL AND JUDICIAL PROTECTION<sup>94</sup>**

#### **A. Arguments of the Commission and the parties**

105. The **Commission** concluded that within the criminal proceedings against Mr. Valenzuela culminating in a death sentence, the principle of presumption of innocence was violated and due process guarantees were not observed for instances where Article 132 of the Penal Code was applied according to the element of social dangerousness. Additionally, it argued that his statement was obtained through physical and psychological torture, insofar as the right not to be forced to testify against himself and not to be coerced to confess was

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killed when they were recaptured". (file of annexes to the brief with pleadings, motions and evidence, annex 40, pages 12479 to 12482).

<sup>93</sup> Official Letter of the Special Prosecutor against Impunity of December 12, 2018 (file of annexes to the Answering brief, annex 5, fs. 13050 to 13052).

<sup>94</sup> Articles 8 and 25 of the American Convention.

violated, for which it was concluded that the State violated articles 8(2)(g) and 8(3) of the Convention. Similarly, it argued that it was not possible for Mr. Valenzuela to appeal the conviction, since, in accordance with the standards of the Convention, he did not have an effective remedy, neither appeal nor cassation, to challenge the death sentence, therefore constituting a violation of Article 8(2)(h) of the Convention. Finally, it argued that the State did not initiate an investigation into the acts of torture, which violated the right to a fair trial and judicial protection, established in Articles 8(1) and 25(1) of the Convention.

106. The **representatives** reiterated the Commission's allegations and indicated that the State is internationally responsible for the violation of the rights to a fair trial and effective judicial protection contained in Articles 8(1), 8(2)(c), (d), (e), (g) and (h), and 25(1) of the Convention, in relation to articles 1(1) and 2 of the same instrument, to the detriment of Mr. Valenzuela Ávila. They also alleged that the police forces used torture to try to obtain a confession from the alleged victim. They also argued that the State is responsible for imposing the death penalty based on a norm contrary to the Convention and did not guarantee access to an effective remedy to challenge it, in accordance with the content of articles 8(1), 8(2) and 8(3) of the American Convention. They added that the investigations carried out to clarify the facts related to his execution have suffered from omissions, irregularities and negligence that have hindered the process and delayed obtaining justice in this case.

107. The **State** argued that Mr. Valenzuela Ávila was subject to criminal proceedings in which his participation was proven and that the sentence issued did not result exclusively from his statement, for which it considered that it had not violated Article 8 of the American Convention. The State argued that in the criminal process all procedural guarantees were respected, in accordance with the principle of legality, in which the sentence was duly founded, consequently, it is not responsible for the violation of Articles 8(2)(g), (h), and 9 of Convention. In addition, it recognized its international responsibility for the lack of investigation of the acts of torture reported by Mr. Valenzuela Ávila. Finally, it is not possible to establish that the death of Mr. Valenzuela Ávila was derived from the participation of State agents, given that it is under investigation, therefore the State is not responsible for the violation of Articles 8(1) and 25(1) of the Convention.

## **B. Considerations of the Court**

108. According to the allegations of the Commission and the representatives relating to the violation of right to a fair trial and judicial protection, enshrined in Articles 8 and 25(1) of the American Convention, the Court will analyze these in two sections: B.1 the criminal proceedings that resulted in the death sentence against Mr. Valenzuela Ávila, and B.2 the criminal proceedings in regard to the death of Mr. Valenzuela Ávila.

### *B.1. Criminal proceedings that resulted in the death sentence against Mr. Valenzuela Ávila*

#### *B.1.1. Minimum judicial guarantees*

109. The Court has indicated that the right to due process refers to the set of requirements that must be observed in the procedural instances so that people are in a position to adequately defend their rights before any act of the State, adopted by any public authority, whether administrative, legislative or judicial, that may affect them.<sup>95</sup>

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<sup>95</sup> Cf. Exceptions to the Exhaustion of Domestic Remedies (arts. 46.1, 46.2.a and 46.2.b, American Convention on Human Rights). *Advisory Opinion OC-11/90* of August 10, 1990. Series A No. 11, para. 28, and *Case*

110. Under the terms of the Convention, due process translates centrally into the “judicial guarantees” of the right to a fair trial recognized in Article 8 of the American Convention. The aforementioned provision under the convention includes a system of guarantees that condition the exercise of the *ius puniendi* of the State and that seek to ensure that the accused or defendant is not subjected to arbitrary decisions, since “due guarantees” must be observed to ensure the right to due process, according to the corresponding procedure.<sup>96</sup> From the beginning of the first proceedings of a process, the maximum procedural guarantees must be present to safeguard the defendant’s right to a defense.<sup>97</sup> Similarly, the necessary elements must be present so that there is the greatest balance between the parties, for the due defense of their interests and rights, which implies, among other things, that the adversary principle governs.<sup>98</sup>

111. The right to defense is seen in two facets within the criminal process: on the one hand, through the accused’s own acts, its central exponent being the ability to give a free statement on the events attributed to him and, on the other, through technical defense, exercised by a legal professional, who fulfills the function of advising the person under investigation on their duties and rights and executes, inter alia, a critical control and legality in the production of evidence.<sup>99</sup>

#### *B.1.2. Scope of articles 8(2) and 8(2)(g)*

112. The Court finds that from the examination of the arguments presented by the Commission and the representatives related to the violation of Articles 8(1) and 25(1) of the American Convention, they are related to the lack of minimum guarantees, as well as the absence of defense, therefore, they must be analyzed under the assumptions of article 8(2) of the Convention. It should be noted that Mr. Valenzuela’s criminal proceedings culminated in the sentence of the death penalty imposed under the application of Article 132 of the Criminal Code, regarding the element of “dangerousness of the agent”, of which the Court will carry out the respective analysis within the chapter on Articles 4 and 9 of the American Convention in this judgment.

113. The Court’s case law has been emphatic in pointing out the importance of the principle of presumption of innocence, enshrined in Article 8(2) of the Convention, as it constitutes a foundation for judicial guarantees to a fair trial. The presumption of innocence implies that the accused does not have to prove that he has not committed the crime attributed to him, since the *onus probandi* corresponds to the accusing party.<sup>100</sup>

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*of Colindres Schonenberg v. El Salvador. Merits, Reparations and Costs.* Judgment of February 4, 2019. Series C No. 373, para. 63.

<sup>96</sup> *Cf. Case of Yatama v. Nicaragua. Preliminary Objections, Merits, Reparations and Costs.* Judgment of June 23, 2005. Series C No. 127, para. 148, and *Case of Rico v. Argentina. Preliminary Objections and Merits.* Judgment of September 2, 2019. Series C No. 383., para. 49.

<sup>97</sup> *Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs.* Judgment of November 22, 2005. Series C No. 135, para. 174, and *Case of Herrera Espinoza et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 1, 2016. Series C No. 316, para. 174.

<sup>98</sup> *Cf. Juridical Condition and Human Rights of the Child. Advisory Opinion OC-17/02* of August 28, 2002. Series A No. 17, para. 132, and *Case of Ruano Torres et al. v. El Salvador. Merits, Reparations and Costs.* Judgment of October 5, 2015. Series C No. 303, para. 152.

<sup>99</sup> *Cf. Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs.* Judgment of November 17, 2009. Series C. 205, para. 61, and *Case of Maldonado Ordóñez v. Guatemala. Preliminary Objection, Merits, Reparations and Costs.* Judgment of May 3, 2016. Series C No. 311, para. 18.

<sup>100</sup> *Cf. Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs.* Judgment of August 31, 2004. Series C No. 111, para. 154, and *Case of Zegarra Marín v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of February 15, 2017. Series C No. 331, para. 138.

114. In addition, this Court has indicated that a guarantee for the material exercise of the right of defense is the prohibition of a person being forced to testify against themselves (Article 8(2)(g)). This article implies the right of active participation of the accused in the evidence, the right not to testify against themselves and more specifically, the right to remain silent. In this sense, using torture to obtain a confession from the accused would be completely contrary to the conditions established by this right. In this regard, the Court has indicated that, "[t]he exclusion of evidence obtained through coercion is absolute and non-derogable." Therefore, any confession obtained through torture is absolutely invalid and cannot be used as evidence in a conviction.<sup>101</sup>

### *B.1.3. Analysis of this specific case*

115. It is proven that Mr. Valenzuela was detained by PNC officials on May 27, 1998, when firearms were found during a search of his home.<sup>102</sup> It has been proven that Mr. Valenzuela was subjected to acts of torture and sexual abuse, which were intentionally committed by State agents, with the purpose of making him agree to having participated in the commission of a criminal act (*infra* paras. 194 and 195). In addition, despite the fact that the State was aware of the acts of torture against Mr. Valenzuela on several occasions (*supra* para. 87), it did not initiate an investigation to determine the truth, capture, prosecute and eventually punish those responsible (*infra* parr. 144). Thus, this Court notes that Mr. Valenzuela was forced to testify against himself in order to accept having participated in a criminal act. Therefore, the Court considers that the State violated Articles 8(2) and 8(2)(g), in relation to Article 1(1) of the Convention, to the detriment of Tirso Román Valenzuela Ávila.

116. Regarding the allegation of the Commission and the representatives regarding the violation of Article 8(3), the Court notes that Mr. Valenzuela, as recorded in the trial record 38 – 99, stated "that he decided to give his statement because [... they were] torturing him (*supra* para. 74). In addition, it is stated in the judgment of October 21, 1999, that Mr. Valenzuela "categorically denied the accusation made against him." However, the Sentencing Court of the Department of Quetzaltenango, which sentenced Mr. Valenzuela, did not confer probative value to said statement (*supra* para. 76). Therefore, this Court considers that the State is not responsible for the violation of Article 8(3) of the Convention, since Mr. Valenzuela Ávila was found guilty based on other means of evidence<sup>103</sup> and no probative value was granted to Mr. Valenzuela's confession made under torture, to support the death sentence. Based on the above, this Court considers that it is not necessary to rule on Article 10 of the IACPPT.

117. Alternatively, the representatives, both in the purpose of the pleadings and motions brief and in the petition, indicated that the State had violated, in addition to the articles already mentioned, articles 8(2)(a), 8(2)(c), 8(2)(d), and 8(2)(e) and 25(2), all of the American Convention. However, with respect to Articles 8(2)(a), 8(2)(c), 8(2)(d), and 8(2)(e) of the

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<sup>101</sup> Cf. *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 26, 2010. Series C No. 220, para. 165, and *Case of Pollo Rivera et al. v. Peru. Merits, Reparations and Costs*. Judgment of October 21, 2016. Series C No. 319, para. 176.

<sup>102</sup> This Court notes that, where relevant, the official letter refers to Víctor Manuel Vásquez González; however, it is an undisputed fact that Mr. Valenzuela Ávila was identified for said search under that name. Cf. Official Letter No. 1709-98, *supra*.

<sup>103</sup> Testimonial evidence from: JLM; JAML; GAP; forensic medical report made by Doctor ESC; report rendered by the expert EMO; report rendered by the expert AMO regarding the ballistic and mechanical expertise; reports rendered by the expert MRR; report of the expert reporting carried out by JSM and SZ album of photographs and video cassette that contains the filming made by the expert reporting and the sketch of the scene of the event that was ratified by the experts; photo album taken by the expert SFS; report rendered by doctor JNO; the record relating to the mechanical and ballistic expertise of the Honda Civic vehicle in which the victim was driving. Cf. Sentencing Court of the Department of Quetzaltenango. Judgment of October 21, 1999, *supra*.

Convention, the Court finds no elements to determine their violation, since there are no factual assumptions establishing that the assistance of an interpreter or translator was necessary during the trial, or that in the case in question the alleged victim did not have an adequate technical defense during the process. While in the case of article 25(2) of the Convention, there is no evidence of any basis to verify its violation. Therefore, this Court does not find it necessary to analyze the alleged violation of the aforementioned articles.

### *B.2. Right to appeal the conviction against Mr. Valenzuela*

118. Both the Commission and the representatives argued that there was no opportunity for Mr. Valenzuela to appeal the conviction since, according to the standards of the Convention, certain categories such as the facts and the evaluation of the evidence are excluded from verification, and there was also no effective remedy, either on appeal or on cassation to challenge the death sentence.

119. The Court has, in its established case law, referred to the scope and content of Article 8(2)(h) of the Convention, as well as to the standards that must be observed to ensure the guarantee of the right to appeal the ruling before a higher judge or court. The Court has understood that said right consists of a minimum and fundamental guarantee that "must be respected within the framework of due legal process, in order to allow an adverse sentence to be reviewed by a different judge or court of superior rank [... ]".<sup>104</sup> Bearing in mind that judicial guarantees aim to guarantee that whoever is involved in a process is not subjected to arbitrary decisions, the Court has interpreted that the right to appeal the judgment cannot be effective if it is not guaranteed for everyone who is sentenced,<sup>105</sup> since the sentence is the manifestation of State exercising its punitive power.<sup>106</sup>

120. In addition, the Court held that Article 8(2)(h) of the Convention refers to an ordinary, accessible and effective remedy, that is, it should not require greater complexities that render this right unattainable. It must be understood that, regardless of the regime or system for recourse adopted by the States Parties and the denomination they give to the means of challenging the conviction, in order for it to be effective, it must constitute an adequate means to seek the correction of an erroneous conviction. This requires that it be able to analyze the factual, evidentiary and legal issues on which the contested judgment is based, since in the judicial sphere there is an interdependence between the factual determinations and the application of the law, in such a way that an erroneous determination of the facts implies an erroneous or improper application of the law. Consequently, the original grounds of the appeal must allow a broad control of the contested aspects of the conviction.<sup>107</sup>

121. Therefore, the Court notes that the Code of Criminal Procedure considers two remedies that seek to satisfy the right to appeal the judgment: the special appeal remedy and the cassation appeal. The special appeal remedy is regulated as follows in article 430:

[t]he sentence may in no case make merit of the evidence or of the facts that are declared proven in accordance with the rules of sound reasoned criticism. It can only refer to them for the application of the substantive law or when there is a clear contradiction with the appealed judgment.

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<sup>104</sup> Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 158, and *Case of Gorioitía v. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of September 2, 2019. Series C No. 382, para. 47.

<sup>105</sup> Cf. *Case of Mohamed v. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 23, 2012. Series C No. 255, paras. 92 and 93, and *Case of Gorioitía v. Argentina, supra*, para. 47.

<sup>106</sup> Cf. *Case of Baena Ricardo et al. v. Panama. Merits, Reparations and Costs*. Judgment of February 2, 2001. Series C No. 72, para. 107, and *Case of Gorioitía v. Argentina, supra*, para. 47.

<sup>107</sup> Cf. *Case of Herrera Ulloa v. Costa Rica, supra*, paras. 161, 164 and 165, and *Case of Gorioitía v. Argentina, supra*, para. 48.

122. From the transcribed legislation it can be deduced that the special appeal remedy is a somewhat limited remedy, since it only allows the review of facts "for the application of the substantive law or when there is a clear contradiction with the appealed judgment."

123. The cassation appeal is regulated, where relevant, as follows:

Article 442. "The court of cassation will hear only the legal errors contained in the appealed decision. It is subject to the facts that have been taken as proven by the sentencing court, and only in cases in which it notices a violation of a constitutional or legal norm, can it make use of annulment and remission for the due correction.

124. From the transcribed regulations it can be deduced that the cassation remedy, like the special appeal remedy, does not allow the review of facts or evidence, only of law.

125. The Court recalls that Mr. Valenzuela was sentenced on October 21, 1999, by the Sentencing Court of the Department of Quetzaltenango (*supra* para. 76). On November 3, 1999, Mr. Valenzuela's defense attorney filed a special appeal for reasons of form and substance based on Articles 415 and 419 of the Guatemalan Code of Criminal Procedure, requesting the annulment of the judgment and contested procedural act, the which was submitted to the Seventh Chamber of the Court of Appeals (*supra* para. 77).<sup>108</sup> The defense based the appeal on the lack of adequate reasoning, given "that the judgment has proven a decisive fact to aggravate the sentence, without such fact having been proven in the sentencing court", therefore it requested the annulment of the contested judgment, modifying it in the sense that instead of the death penalty, the maximum prison sentence would be imposed because it had not been proven that the accused individual was a danger to society.

126. On August 7, 2000, the Seventh Chamber of the Court of Appeals declared the special appeal to be inadmissible due to reasons of form and substance and limited itself to reiterating some of the reasons forming the basis on which the Sentencing Court Department of Quetzaltenango concluded Mr. Valenzuela's guilt, but without making any assessment as to whether said assessment had been adequately carried out. It did not conduct any type of review on the facts or evidence. Consequently, this Court considers that the refusal by the Seventh Chamber of the Court of Appeals to review the merits of the issue raised by Mr. Valenzuela's defense counsel, as well as the factual issues raised, constituted, internationally, a wrongful act insofar as it resulted in a breach of the duty of comprehensive review of the ruling established in Article 8(2)(h) of the Convention.

### *B.3. Conclusion*

127. Consequently, the Court considers that the State violated Articles 8(2) and 8(2)(g) of the American Convention, in relation to Article 1(1) of the Convention, to the detriment of Mr. Tirso Román Valenzuela Ávila.

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<sup>108</sup> Mr. Valenzuela alleged as basis of his appeal (i) reason: failure to observe and erroneous application of the law. Violation of the principle of immediacy; (ii) reason: non-compliance and erroneous application of the Law: Lack of substantiation, because the motivation is not complete because the Court failed to fully and completely assess the evidence legally introduced to the debate; (iii) reason: non-observance and erroneous application of the law. Illegality of obtaining the means of proof, due to the fact that the Court did not observe the norms estimated to have been violated and at the same time applied them erroneously, when basing its decision on the means of evidence obtained illegally and therefore inadmissible for its assessment; (iv) reason: non-observance and erroneous application of the law. Defects of the Sentence; The Sentencing Court, at the time of sentencing, failed to record the express and precise decisions, in relation to the name of the accused [...]; (v) reason: non-observance and erroneous application of the Law. Violation of the rules of healthy reasoned critique in the evaluation of the evidence. *Cf. Special Appeal, supra.*

128. In addition, the Court concludes that the State is responsible for the violation of Article 8(2)(h) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Valenzuela.

#### *B.4. Criminal proceedings regarding the death of Mr. Valenzuela*

129. The Court will rule on the investigation of the events occurring in relation to Mr. Valenzuela's death, firstly, related to the alleged lack of due diligence in the investigation within a reasonable period of time and, secondly, regarding the lack of investigation of the alleged acts of torture and sexual abuse suffered by Mr. Valenzuela. The Court will not refer to facts or arguments whose examination is not necessary because they have been included in the analysis of other violations in the following chapters.

##### *B.4.1. Due diligence in the investigation*

130. The Court has consistently indicated that the duty to investigate is an obligation of means and not of results, which must be assumed by the State as its own legal duty and not as a simple formality condemned in advance to be ineffective, or as a mere management of private interests, which depends on the procedural initiative of the victims or their families or the private contribution of evidence. In addition, the investigation must be serious, objective, and effective, and be aimed at determining the truth and pursuing, capturing, and eventually prosecuting and punishing the perpetrators.<sup>109</sup>

131. It has also indicated that the obligation to investigate must be assumed by the State as its legal duty and not as a simple formality condemned in advance to be ineffective, or as mere management of private interests, which depends on the procedural initiative of the victims or their relatives or the private contribution of evidence. The right to effective judicial protection requires that the proceedings be directed in such a way as to avoid undue delays and hindrances that could frustrate said purposes.<sup>110</sup>

132. In order to determine whether the investigation was carried out diligently, the Court will refer to various measures of the criminal process, related to the identification of the victim, the treatment of the crime scene, the performance of an autopsy and other means of evidence.

133. The Court has established that the efficient determination of the truth within the framework of the obligation to investigate a possible death, must be meticulously shown from the first proceedings. This Court has specified that the state authorities conducting an investigation of this type must try, at a minimum, inter alia: (i) to identify the victim; (ii) recover and preserve the evidence related to the death, in order to assist in any potential criminal investigation of those responsible; (iii) identify possible witnesses and obtain their statements in relation to the death under investigation; (iv) determine the cause, manner, place and time of death, as well as any pattern or practice that may have caused the death, and (v) distinguish between natural death, accidental death, suicide and homicide. In addition, it is necessary to thoroughly investigate the crime scene, autopsies and analyzes of human

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<sup>109</sup> Cf. *Case of Juan Humberto Sánchez v. Honduras. Preliminary Objections, Merits, Reparations and Costs*. Judgment of June 7, 2003. Series C No. 99, para. 127, and *Case of Arrom Suhurt et al. v. Paraguay, supra*, para. 142.

<sup>110</sup> Cf. *Case of Bulacio v. Argentina. Merits, Reparations and Costs*. Judgment of September 18, 2003. Series C No. 100, para. 115, and *Case of Pacheco León et al. v. Honduras. Merits, Reparations and Costs*. Judgment of November 15, 2017. Series C No. 342, para. 74.

remains must be carried out rigorously by competent professionals and using the most appropriate procedures.<sup>111</sup>

*a) Investigation into Mr. Valenzuela's death*

134. Regarding the investigation of the death of Mr. Valenzuela, both the **Commission** and the **representatives** argued that although there is no information on the investigation to clarify his death, there are indications in other actions to determine the participation and responsibility of the police officers or state agents. They also stated that the State has exceeded the reasonable time to carry out the investigation. On the other hand, the **State** argued that it is not feasible to establish the agents' participation in the death of Mr. Valenzuela, since the investigation to clarify the facts is still active. It added that this event occurred when he was a fugitive from justice, therefore, according to the body of evidence, it is not possible to establish with absolute certainty the manner of his death.

135. In light of the above, it is up to the Court to determine whether the State has diligently investigated the facts related to the circumstances of Mr. Valenzuela's death, in accordance with the minimum, fundamental standards to clarify what had taken place, and the possible participation of State agents leading to the responsibility of the State.

136. In this case, on December 8, 2006, Mr. Valenzuela's body was found in the city of Gomera de Escuintla. According to the crime scene, Mr. Valenzuela died violently from a firearm, approximately one year after his escape on October 22, 2005 (*supra* paras. 96 to 98).

137. The State initiated a criminal investigation to clarify the facts, and it was not until March 2, 2009, according to the State, that the owner of the motorcycle used by Mr. Valenzuela was identified. There is no other relevant information in search of information, procedures for reconstruction of events and trajectories of the shots; or interviews with possible eyewitnesses of the events. In addition, in the case regarding the death of Mr. Valenzuela, it was recorded as a criminal hypothesis, according to the visual inspection carried out by the Justice of the Peace, that two unknown persons aboard a pickup killed Mr. Valenzuela and another person known as EMF, without going into greater details. It was not until June 16, 2009, that the Attorney General and the head of the Public Prosecution were asked to determine the prosecutor's office in charge of the investigation. On December 12, 2018, the Office of the Special Prosecutor against Impunity of the Public Ministry of Guatemala reported the investigation proceedings which are still active (*supra* para. 103). The State has indicated that the investigation is currently ongoing, and that one of the hypotheses is a possible extrajudicial execution.

138. Similarly, in the course of the first proceedings there have been a series of shortcomings, which appear in the various actions carried out, such as in the visual inspection record of December 8, 2006,<sup>112</sup> prepared by the Justice of the Peace; the autopsy in which it is indicated that the corpse of an unknown 26-year-old person had a "completely shattered

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<sup>111</sup> Cf. *Case of Juan Humberto Sánchez v. Honduras*, *supra*, para. 127, and *Case of Villamizar Durán et al. v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 20, 2018. Series C No. 364, para. 175.

<sup>112</sup> The police record of December 8, 2006, shows that the unidentified body was found in the city of Gomera de Escuintla at 6:30 p.m. Subsequently, it is established that there is no evidence whatsoever, and the transfer to the Santa Lucia Cotzumalguapa morgue and the legal autopsy are ordered (file of annexes to the brief with pleadings, motions and evidence, fs. 12192 to 12197). According to the police record and its additions by the Head of the sub-station. From the facts it can be deduced that the officer reported that two deceased males were on the main Eufracia Tambito road, with multiple gunshot wounds (file of annexes to the brief with pleadings, motions and evidence, f. 12181). Later in the additions, the description of each one of the corpses was made (file of annexes to the brief with pleadings, motions and evidence, f. 12188).

skull with an exposed brain mass caused by a heavy-caliber firearm, shattered little finger of the left hand,"<sup>113</sup> whose cause of death was "1) CEREBRAL LACERATION[,] 2) MULTIFRAGMENTARY SKULL FRACTURE [...]".<sup>114</sup> Subsequently, Mr. Saulo Daniel Ruíz<sup>115</sup> recognized the body and indicated that it belonged to Mr. Valenzuela, as stated in the JPM Investigator's report. It was also recognized by Mrs. Florinda López de López, who also confirmed that this body belonged to Mr. Valenzuela.<sup>116</sup> In addition to this, on December 26, 2006, a fingerprint study was carried out, which resulted in the identification of Mr. Valenzuela.<sup>117</sup> However, on June 21, 2007, the death certificate was issued indicating that the body "belongs to an 'unknown man'" and it was not until November 16, 2007 that the death certificate was rectified and on September 18, 2007 the Prosecutor's Office requested to rectify the death certificate since it had been possible to identify the deceased as Tirso Román Valenzuela Ávila,<sup>118</sup> which is why on November 16, 2007 the name of Tirso Román Valenzuela was recorded on the Death Certificate. (*supra* para. 99).

139. In addition, this Court is struck by the fact that the investigation protocols in force at that time were not used, the implementation of which was necessary to collect all the evidence and indications that would allow the crime scene to be clarified. Therefore, since said elements are unrepeatable, they had to be processed with the greatest possible care, even more so when these elements could help determine whether it was an extrajudicial execution. In this sense, it is evident that the protection, preservation and cordoning off of the crime scene was deficient, that the actions carried out do not provide further details on the reconstruction of the events, nor documents that record the way in which the criminal act was carried out, nor is there photographic material of the scene of the crime.<sup>119</sup>

140. Regarding the assertions made by the Commission and the representatives regarding the participation of state agents in the facts, despite the fact that the State has disputed it, it has not disproved it through a serious and diligent investigation. Therefore, it is necessary for the State to take into account said actions where relevant to clarifying the death of Mr. Valenzuela in the investigation that is under way in the domestic jurisdiction.

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<sup>113</sup> Ref. MTB/ch. Official letter No. 1050 – 2006 of December 8, 2016 (file of annexes to the brief with pleadings, motions and evidence, annex 40, f. 12188).

<sup>114</sup> Autopsy No. 234/06 of December 10, 2006, *supra*.

<sup>115</sup> Cf. Testimonial statement of Saulo Daniel Ruiz López, *supra*.

<sup>116</sup> Cf. Testimonial statement of Florinda Ávila (Florinda López de López), given before the Municipality of Cotzumalguapa on September 2, 2009 (file of annexes to the brief with pleadings, motions and evidence, annexure 40, fs. 12209 to 12211).

<sup>117</sup> Cf. Fingerprint expert opinion of December 26, 2006, *supra*.

<sup>118</sup> Prosecution Brief of September 18, 2007, *supra*.

<sup>119</sup> In this regard, in her statement given at the public hearing before this Court on March 7, 2019, the expert witness Olga Patricia Roldán stated that: "[w]hose protocols [...] have of course remained the same during the time have improved, these protocols have been established forcing all the pertinent diligence to be carried out, but at that time all the procedures submitted had already been established, which I argue in my expert opinion, toxicology was already done for violent deaths, X-rays were already done, it was already known that all those diligences were needed in these cases". In addition, the expert witness indicated that "the processing of the crime scene was not carried out by the crime scene team of the Public Prosecution despite the fact that it is an hour away from the location, the crime scene was not cordoned off, [...] there is no drawing of a layout of the crime scene and this was important for the location of the victims, there is no description of the method used to collect the evidence [...], none of the elements collected at the crime scene were photographed, marked, numbered and packaged correctly, the corpses were not individualized and marked, it shows a photograph showing the incorrect packaging if you see in the bag it has a list of objects it contains all of them in the same bag next to it are all the objects that it contained from various places at the crime scene [...], within the evidence from the scene a rifle holder is mentioned that was never analyzed, the ballistic evidence shows several cartridges and shell casings fragments of jackets, projectile fragments of various calibers, among which rifles that could be AK-47, etc., all this is based on the ballistics report [...] it is not documented if the position of a motorcycle that was found at the scene of the crime has any relationship with the victims or the perpetrators."

141. The Court considers that the omissions that occurred in the investigation of this case have prevented the clarification of the facts and the diligent investigation, prosecution and, where appropriate, punishment of those possibly responsible for the events, despite the fact that it has been nearly 13 years since the start of the investigation.

142. On this point, this Court has considered that a prolonged delay may constitute, in itself, a violation of judicial guarantees of a fair trial. In this case, given the time that has elapsed, it is not necessary to carry out an exhaustive analysis in this regard.<sup>120</sup> Therefore, the Court concludes that the State did not carry out a diligent investigation that would allow, within a reasonable time, ability to determine the facts and, if applicable, the corresponding legal consequences. Thus, the State is obliged to address this situation of impunity by all available legal means, since this fosters the chronic repetition of human rights violations and the defenselessness of the victims.<sup>121</sup>

143. Therefore, the Court concludes that the State did not act with due diligence to investigate, prosecute and, where appropriate, punish those possibly responsible for the death of Mr. Valenzuela within a reasonable time, continuing the impunity in this case. Consequently, this Court considers that the State is responsible for the violation of the judicial guarantees enshrined in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of the same treaty, to the detriment of Tirso Román Valenzuela Ávila.

*b) Lack of investigation into the torture of Mr. Valenzuela*

144. As ruled in the section on the partial acknowledgment of responsibility made by the State, the dispute regarding the failure to investigate the torture suffered by Mr. Valenzuela ceased. Consequently, the Court finds that the State violated the judicial guarantees and judicial protection enshrined in Articles 8(1) and 25(1) of the American Convention, in relation to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Tirso Román Valenzuela Ávila.

### **C. Conclusion**

145. Based on the foregoing, the Court considers that the judicial guarantees were not observed in the criminal proceedings against Mr. Valenzuela, since these proceedings culminated in a death sentence, where his rights to due process were affected, therefore the State is responsible for the violation of the rights of presumption of innocence, and of not testifying against oneself, and the right to appeal the ruling, enshrined in articles 8(2), 8(2)(g) and 8(2)(h) of the American Convention, in relation to Article 1(1) of the Convention, to the detriment of Tirso Román Valenzuela Ávila.

146. In addition, the Court concludes that the State did not act with due diligence to investigate, prosecute and, where appropriate, punish those possibly responsible for the death of Mr. Valenzuela within a reasonable time, prolonging the impunity in this case. Therefore, the State is responsible for the violation of judicial guarantees to a fair trial and judicial

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<sup>120</sup> The same would imply, in order to determine if there was reasonableness in the time elapsed in the proceedings, carefully examine different elements of the case: a) complexity of the matter; b) procedural activity of the interested party; c) conduct of the judicial authorities, and d) the impact on the legal situation of the person involved in the process (Cf. *Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs.* Judgment of November 27, 2008. Series C No. 192, paragraph 155, and *Case of Terrones Silva et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 26, 2018. Series C No. 360, paragraph 193.)

<sup>121</sup> Cf. *Velásquez Rodríguez v. Honduras, supra*, para. 174, and *Case of Omeara Carrascal et al. v. Colombia, supra*, para. 263.

protection, enshrined in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Tirso Román Valenzuela Ávila.

147. Finally, the Court considers that, in accordance with the partial acknowledgment of responsibility made by the State, it is responsible for the violation of judicial guarantees and judicial protection, enshrined in Articles 8(1) and 25(1) of the American Convention, in relation to with Article 1(1) of the Convention and in relation to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Tirso Román Valenzuela Ávila, for failing to investigate the torture he suffered.

## **VIII-2 RIGHT TO LIFE AND FREEDOM FROM EX POST FACTO LAWS, ON THE APPLICATION OF THE DEATH PENALTY TO MR. VALENZUELA ÁVILA <sup>122</sup>**

### **A. Arguments of the Commission and the Parties**

148. The **Commission** concluded that article 132 of the Criminal Code is contrary to the American Convention and affirmed that the judicial authority that imposed the death penalty referred to the "unfavorable personal background of the guilty party" to justify the "social danger", thus violating, in the opinion of the Commission, the right to the presumption of innocence and the principle of legality and, consequently, the right to life. It also indicated that the imposition of the death penalty in the framework of processes that violate due process produces a violation of the right to life, for these reasons, the Commission concluded that the State violated articles 4(1), 4(2) and 9 of the American Convention, in relation to articles 1(1) and 2 therein.

149. The **representatives** argued that the State sentenced Tirso Román Valenzuela Ávila to the death penalty through a sentence that was based on a norm contrary to the American Convention, therefore, it is internationally responsible for the violation of the right to life and the principle of legality, established in articles 4(1), 4(2) and 9 of the Convention, in relation to article 1(1) of the same instrument. They also alleged the violation of Article 4(6) of the Convention for failing to guarantee access to an effective remedy to challenge an arbitrary sentence.

150. The **State** considers that applying the criterion of the incompatibility of dangerousness with the Convention to declare the international responsibility of Guatemala for having sentenced Mr. Valenzuela to the death penalty, is to give retroactive use to the content of the Convention, because although it was in force in Guatemala at the time of Mr. Valenzuela Ávila's conviction in 1999, the jurisprudential criterion of the Court that opposes the principle of legality of the dangerousness of the agent did not exist at that time, so it would be a violation of the legal certainty and the principle of legality in the Inter-American System to sanction the State for it. It concluded that there was no violation of articles 4(1), 4(2) and 9 of the Convention, in relation to article 1(1) and 2 thereof.

### **B. Considerations of the Court**

151. For purposes of examining the alleged violation of the right to life of Mr. Tirso Román Valenzuela Ávila due to the imposition of the death penalty, it should be remembered that the Court has recently highlighted in the case of *Martínez Coronado v. Guatemala*<sup>123</sup> that in the

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<sup>122</sup> Articles 4(2) and 9 of the American Convention.

<sup>123</sup> Cf. Case of Martínez Coronado v. Guatemala. *Merits, Reparations and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 62 to 67.

exceptional cases in which States are allowed to apply the death penalty, it is subject to a set of rigorous limitations. It is stipulated that the death penalty may only be imposed for the most serious crimes (Article 4(2)) and its application for political crimes or for common crimes related to political crimes is absolutely excluded (article 4(4)). The fact that the American Convention reduces the possible scope of application of the death penalty in the most serious and unrelated common crimes reveals the intention of considering said penalty applicable only in exceptional conditions.

152. The Court emphasizes that in this case, in order to determine the conviction of Mr. Valenzuela Ávila, Article 132 of the Criminal Code in force on that date was applied, which regulates the criminal classification of murder (*supra* para. 66), to substantiate the categorization of the facts of the criminal offense and determine the corresponding sanction. Specifically, Mr. Valenzuela Ávila was sentenced to death in application of the second paragraph of said norm, which provided for its application "if due to the circumstances of the fact and the occasion, the manner in which it was carried out and the determining motives, reveal a greater and particular dangerousness of the agent".

153. In the judgment of October 21, 1999, "social danger" was considered taking into account, inter alia, the position taken by the Public Prosecution official, the police record of the alleged victim, the motive of the crimes, and that "the purpose of the murder was to cause anxiety and uneasiness in society and an attempt on the administration of justice" [...] indicating the social impact of such acts is serious; [...] Contempt for the offended party, because the victim turned out to be a woman, abuse of physical superiority, because the perpetrator of the crime used a firearm that weakened the victim's defense" (*supra* para. 76).

154. This Court has already had the opportunity to rule specifically on the application of the aforementioned Article 132 of the Criminal Code and the concept of "future danger" in the *Case of Fermín Ramírez v. Guatemala*. This Court established that the "assessment of the agent's dangerousness implies the judge's appreciation of facts that have not occurred and, therefore, supposes a sanction based on a judgment on the personality of the offender and not on the criminal acts imputed in accordance with the applicable criminal definition."<sup>124</sup> In said judgment, it was determined that the aforementioned norm was contrary to the American Convention, particularly because it violated Article 9 of the Convention; with the order to adapt said norm to international human rights law.<sup>125</sup>

155. Subsequently, this Court reiterated the incompatibility of the imposition of the death penalty based on the criterion of "dangerousness" with the principle of legality and the American Convention in the cases of *Raxcacó Reyes v. Guatemala* and *Martínez Coronado v. Guatemala*. Given the above and given the use of the criterion of dangerousness of the agent, both in the classification of the acts of the criminal offense committed by Mr. Valenzuela Ávila, and in the determination of the corresponding sanction, it is incompatible with the principle of legality established in the American Convention.

156. Consequently, the Court considers that the State is responsible for the violation of Articles 4(2) and 9 of the American Convention, in relation to Articles 1(1) and 2 of the same instrument, to the detriment of Mr. Valenzuela. The Court also notes that in relation to the imposition of the death penalty, it was never executed, since the alleged victim died due to circumstances unrelated to the possible execution of the death penalty. In this sense, this

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<sup>124</sup> Cf. *Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs*. Judgment of June 20, 2005. Series C No. 126, para. 95, and *Case of Martínez Coronado v. Guatemala, supra*, para. 70.

<sup>125</sup> Cf. *Case of Fermín Ramírez v. Guatemala, supra*, paras. 90, 93 to 98, and *Case of Martínez Coronado v. Guatemala, supra*, para. 69.

Court considers that the State did not violate Article 4(1) of the Convention, in relation to Article 1(1) of the same instrument, notwithstanding it will be analyzed later in relation to his alleged extrajudicial execution.

157. Alternatively, the **representatives** argued the violation of Article 4(6) of the Convention for failing to guarantee access to an effective remedy to challenge an arbitrary sentence. In this regard, they indicated that Mr. Valenzuela filed an appeal for clemency on September 9, 2004, in which they requested that the death sentence be commuted to the immediately lower sentence of 50 years. As was alleged, this appeal had not been processed or resolved before Mr. Valenzuela's death. However, given that not enough evidence has been provided to allow the Court to determine a violation in the terms proposed by the representatives, it does not rule on the matter.

### **C. Conclusion**

158. Based on the above, taking into account the application of the death penalty as a consequence of the concept of "future dangerousness" of the agent, this Court concludes that the State is internationally responsible for the violation of the rights recognized in Articles 4(2) and 9 of the American Convention, in relation to articles 1(1) and 2 of the Convention, to the detriment of Tirso Román Valenzuela Ávila. In addition, this Court considers that in this case the State is not responsible for the violation of Articles 4(1) and 4(6) of the American Convention.

## **VIII-3 RIGHT TO LIFE, REGARDING THE DEATH MR. VALENZUELA ÁVILA<sup>126</sup>**

### **A. Arguments of the Commission and the Parties**

159. The **Commission** argued that the State had extrajudicially executed Mr. Tirso Román Valenzuela on December 8, 2006, as part of a plan to recapture the prisoners. It concluded that the State violated Article 4(1) of the Convention, in relation to Article 1(1) of the same instrument.

160. The **representatives** argued that the State is responsible for having arbitrarily deprived Mr. Valenzuela Ávila of his life, in violation of Article 4(1) of the Convention, in relation to Article 1(1) of the same instrument.

161. The **State** argued that the situation regarding the death of the alleged victim is still under investigation and has not been resolved because it has not been possible to establish or verify the elements of an extrajudicial execution due to the complexities that the case has presented. Consequently, the State considered that Article 4(1) of the Convention was not violated, in relation to Article 1(1) of the same instrument.

### **B. Considerations of the Court**

162. This Court notes that both the Commission and the representatives argued that Mr. Valenzuela had been extrajudicially executed. Therefore, they concluded that Guatemala violated Article 4(1) of the American Convention, in relation to Article 1(1) thereof. The State, however, indicated that it has not yet been possible to establish the elements of an

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<sup>126</sup> Article 4 of the American Convention.

extrajudicial execution due to the complexities that arise in the case, which is still being investigated at the domestic level.

163. In cases such as this one, where there is no direct evidence of the actions of state agents, the Court has highlighted that the use of circumstantial evidence and presumptions as basis of a judgment is legitimate, provided that they infer consistent conclusions about the facts.<sup>127</sup> In this regard, this Court has indicated that, in principle, the burden of proof of the facts on which its argument is based corresponds to the complainant. However, it has stressed that, in proceedings involving human rights violations, the State cannot rely on the defense that the complainant has failed to present evidence when it is the State that has control of the means to clarify events that occurred within its territory.<sup>128</sup>

164. The Commission and the representatives made various assertions related to the activity carried out by state agents in the search for Mr. Valenzuela within the "Gavilán Plan", created between 2005 and 2006 by the State to recapture the 19 fugitives from the maximum-security prison of Escuintla, "El Infiernito", and focused their allegations on a series of actions carried out in other investigations related to other fugitives from "El Infiernito".<sup>129</sup>

165. Therefore, the State indicated that although it considers the existence of a plan to recapture the escaped prisoners to be incontrovertible, within which nine fugitives were recaptured, it did not consider it "pertinent to affirm that the execution of that plan resulted in the death of seven people."

166. Given the arguments of the parties and the Commission, it is up to this Court to examine the circumstances in which Mr. Valenzuela's death occurred and whether it is attributable to the State, taking the body of evidence into account.

167. However, it is proven that on October 22, 2005, Mr. Valenzuela and 18 others, escaped from the maximum-security prison "El Infiernito", and that on that same date the State created "Operation Gavilán" with the purpose of carrying out the search and recapture of the 19 fugitive prisoners. In addition to this, it is proven that Mr. Valenzuela died violently together with EMF (both fugitives from justice) on December 8, 2006, by firearms in the heart of the city of La Gomera, Escuintla, and his body was not delivered to his relatives.<sup>130</sup>

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<sup>127</sup> Cf. *Case of Velásquez Rodríguez v. Honduras*, *supra*, para. 135, and *Case of Arrom Suhurt et al. v. Paraguay*, *supra*, para. 95.

<sup>128</sup> Cf. *Case of Velásquez Rodríguez v. Honduras*, *supra*, para. 135, and *Case of Arrom Suhurt et al. v. Paraguay*, *supra*, para. 95.

<sup>129</sup> Such as: a) a police officer, who participated in "Operation Gavilán", declared that in the framework of this operation they had been given the direct order that "those who were charged with serious crimes [...] did not have to go back to jail"; b) Domestically, at least three agents who participated in the "Operation Gavilán" were convicted of committing extrajudicial executions within its framework. For example, on August 8, 2013, the former head of Criminal Investigation of the National Civil Police was sentenced for the crime of extrajudicial execution of seven prisoners from the Pavón Prison Farm and three prisoners from the maximum-security prison "El Infiernito" that occurred between 2005 and 2006. "According to the CICIG in [said] judgment [...] the [c]ourt considered 'the interference of the authorities in the actions carried out for the extrajudicial execution of the fugitives was obvious'". In addition, the Commission and the representatives argued that there are indications of a possible cover-up by the State, since the body of Mr. Valenzuela was not delivered to his family, since, according to State agents, this was due to his criminal actions and that investigations were necessary.

<sup>130</sup> Mrs. Florinda López de López, mother of Mr. Valenzuela, in her statement made before the Municipality of Santa Lucía de Cotzumalguapa, on September 2, 2009, indicated that she was aware of the death of her son on December 8, 2006, by means of the news item. Then, on Sunday December 10, 2006, she approached the place where she was able to identify his body. She also indicated that she asked "the person in charge of said morgue to give [her] the body of [...her] son [...], [but they did not give it to her,] because she did not have an identity card to identify [herself], so [...specified that] [...she went] to the Public Prosecutors' Office [to] ask for [them] to give [her] the body of [her] son so that he could be transferred to the Caballo Blanco subdivision, where he lived, but [they] denied the transfer, arguing that they had orders not to deliver the body" (Testimonial Statement of Florinda Ávila

168. In addition, in the oral hearing of early evidence offered before the Court of First Instance for Criminal, Drug-Trafficking and Environmental Crime on February 15, 2012 in case C-01076-2010-004, Ms. MFF, who formed part of the "Gavilán Plan", declared that within the framework of this plan they had been given the direct order that "those who were charged with serious crimes no longer had to return to prison" (*supra* para. 92). In the same vein, other officers who were part of "Operation Gavilán" reaffirmed this assertion.<sup>131</sup>

169. As seen from the judgment of August 8, 2013, of the First Court of Criminal Sentencing, Drug Activity and Crimes against the Environment of Guatemala, the domestic judicial body concluded that in parallel to the recapture of the escaped prisoners under "Operation Gavilán", a plan was created whose objective was to extrajudicially execute the fugitives once they were captured. This fact in the aforementioned judgment was outlined in the following terms:

[...] VÍCTOR HUGO SOTO DIÉGUEZ, in his capacity as a public official as Commissioner of the National Civil Police, in Guatemala City in October 2005, formed a special team made up of members of different Nacional Civil Police units, for the recapture of the 19 escaped prisoners [...] parallel to said plan, it was determined that once the fugitives had been captured they should be extrajudicially executed [...].<sup>132</sup>

170. In addition, the Court notes that on August 8, 2013, the First Court of Higher Risk B issued a conviction against Víctor Manuel Ramos Molina and Axel Arnold Martínez Arreaza for the extrajudicial execution of ESR, one of the people who escaped from "El Infiernito". In addition, it sentenced Víctor Hugo Soto Diéguez, who was the former head of Criminal Investigation of the National Civil Police, to 33 years in prison for the crime of extrajudicial execution of prisoners from the Pavón Penal Farm and from "El Infiernito" maximum security prison that occurred between 2005 and 2006. In this regard, the International Commission against Impunity in Guatemala in relation to said sentence, indicated that "the interference of the authorities in the actions carried out for the extrajudicial execution of the fugitives was evident" and added that "the investigations determined that a parallel structure was created within the State that had the power to extrajudicially execute whom they considered 'degenerates' and enemies of society" (*supra* para. 94).

171. The Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, on the occasion of his visit to Guatemala, reported the existence of groups dedicated to social cleansing in the PNC (*supra* para. 95).

172. Furthermore, this Court makes note of the fact that after the events surrounding the death of Mr. Valenzuela, the investigation protocols that were necessary to collect all the evidence that would have allowed the crime scene to be clarified were not used, as they are unrepeatable elements that can only be obtained *ipso facto*. Therefore, they had to be

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(Florinda López de López), *supra*. In this regard, the Court notes that the assertions made by Mr. Valenzuela's mother are consistent with her statement given before this Court in a public hearing on March 7, 2019. In this regard, Mr. Saulo Daniel Ruiz, Mr. Valenzuela's brother-in-law, in his statement given before the Municipality of Santa Lucía, Cotzumalguapa on December 9, 2006, physically recognized the body of Mr. Valenzuela (*Cf. Statement of Saulo Daniel Ruiz, supra*). In addition, through a press outlet, on December 10, 2006, it was reported that "[a] group of unknown individuals shot and killed Tirso Román Valenzuela." (*Cf. <http://www.radiolaprimerisima.com/noticias/7234/asesinan-a-uno-de-los-principales-criminales-en-guatemala/>*).

<sup>131</sup> Testimonial statements of: PMV given before the Special Prosecutor Against Impunity on January 23, 2019, *supra*; SPG rendered before the Special Prosecutor Against Impunity on November 23, 2018, *supra*; JTS before the courtroom of the First High-Risk Criminal Court of First Instance "A", of the Municipality and Department of Guatemala in the first statement hearing of November 13, 2018, *supra*.

<sup>132</sup> Judgment of the First Court of Criminal Sentencing, Drug Activity and Environmental Crime of Guatemala of August 8, 2013, *supra*.

processed with the greatest possible care, applying all the basic protocols in force at the time of the events, even more so when this series of elements could contribute to the investigation of an extrajudicial execution.

173. The Court notes that the body of Mr. Valenzuela had wounds caused by gunshots, and according to the autopsy of December 10, 2006, his body was not identified. His skull was completely destroyed, and the cause of death was cerebral laceration and multi-fragmentary fracture of the skull, without other details, as can be seen from the concluding note, which indicates that no samples or evidence were attached. Similarly, the ballistics report of November 19, 2009, prepared by the Crime Laboratory Unit of the National Institute of Forensic Sciences, stated in general terms that the two people were killed "by gunshots when a moving vehicle fired at them with assault rifles, as they were riding a motorcycle" and describes the five weapons that participated in the events according to the shell casings that were found.<sup>133</sup> The Court also finds that there were a series of shortcomings in the police report and in the visual inspection carried out by the Justice of the Peace on December 8, 2006, as well as in the autopsy carried out on December 10, 2006. These aspects were reaffirmed by the expert witness Olga Marta Roldán in her statement before the Court on March 7, 2019, where she also specified that there were a series of irregularities in the processing of the crime scene.<sup>134</sup>

174. In addition, this Court considers that this series of omissions have, from the day of Mr. Valenzuela's death to the present, made it impossible to clarify the facts or diligently investigate, prosecute and, where appropriate, punish the possible perpetrators of the events, despite the fact that almost 13 years have passed since the beginning of the investigation.

175. In consideration of: (i) the creation of the "Gavilán Plan" for the search and recapture of the 19 fugitive prisoners from "El Infiernito" maximum security prison; (ii) the extrajudicial executions promoted by the State between 2005 and 2006 to end the lives of the aforementioned 19 fugitives under "Operation Gavilán" and its parallel structure; (iii) the internal decisions that determined that once the fugitives were captured they should be executed extrajudicially, which is consistent with the assertions by the CICIG, and the Special Rapporteur on Extrajudicial Executions; (iv) the fact that Mr. Valenzuela was a fugitive from justice and persecuted by State agents under "Operation Gavilán"; (v) to the death of Mr. Valenzuela on December 8, 2006, along with another fugitive from the "El Infiernito" prison; (vi) the negligence in the crime scene processing due to the set of omissions in the investigation of the facts to clarify his death, and (vii) the ongoing impunity in this case, the Court concludes that the State is responsible of the extrajudicial execution of Mr. Valenzuela Ávila, in violation of the right to life enshrined in Article 4(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Tirso Román Valenzuela Ávila.

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<sup>133</sup> Expert opinion of the National Institute of Forensic Sciences, Ballistics Section of November 19, 2009 (file of annexes to the brief with pleadings, motions and evidence, annex 40, fs. 12237 to 12240).

<sup>134</sup> Such as: the crime scene was not cordoned off, there is no sketch of the scene; there is no description of the method used to collect the evidence; there was no chain of custody of the collected elements; the corpses were not individualized and marked; deficiencies in the collection of ballistic evidence, the position of a motorcycle found at the crime scene is not documented; the photographs presented by the Public Ministry in which they are taken in the morgue of the Judicial Branch present some deficiencies such as the numbered photographs not having a logical order, and they were taken without forensic techniques, the clothes were not packed; there is an inadequate description of the wounds, the autopsy or video were not photographed, blood samples were not taken, nor viscera for the toxicology tests that must be done in violent deaths; in the conclusions of the autopsy protocol we do not see the main objectives of a protocol that are the cause of death, the date of death, the identification and the manner of death; In the visual inspection there was no use of forensic techniques such as photography, video, and panoramic, intermediate and close-up shots, the evidence collected at the crime scene, has no connection with the photographs, the video and the plan, and its origin cannot be identified.

## C. Conclusion

176. This Court determines that the State violated the right to life enshrined in Article 4(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Tirso Román Valenzuela Ávila.

## VIII-4 RIGHT TO HUMANE TREATMENT, TO DIGNITY AND TO A PRIVATE LIFE<sup>135</sup>

### A. Arguments of the Parties and the Commission

177. The **Commission** alleged that Tirso Román Valenzuela Ávila was subjected to physical and psychological torture by state agents, including sexual torture through anal penetration with a baton until he lost consciousness on May 27, 1998, with the purpose of obtaining his confession for a specific crime. This fact, in the opinion of the Commission, proves the severity of the violence against Mr. Valenzuela. In addition, it indicated that Mr. Valenzuela was tortured on two occasions through severe blows to different parts of the body, suffocation with rat poison, accompanied by death threats and rape that reached a high level of severity to be classified as torture in order to punish the alleged victim for escaping from prison. Consequently, the Commission considered that the State violated the absolute prohibition of torture, the autonomy and private life of the alleged victim, in violation of Articles 5(1), 5(2) and 11(1), in relation to Article 1(1) thereof, to the detriment of Mr. Valenzuela. The Commission similarly concluded that the State violated Articles 1 and 6 of the IACPPT.

178. The **representatives** argued that the State committed acts of torture to the detriment of Mr. Valenzuela on May 27 and 28, 1998 at the time of his arrest through physical violence such as suffocation and the introduction of a baton into his anus, in order to obtain a confession about the murder of the prosecutor SJR. In addition to this, they indicated that during his second recapture he was subject to new acts of torture on June 17 and 18, 2001, evidenced by punctures in his hand, cigarette burns on his face and genitals; sexual torture, consisting of forcefully squeezing his testicles; threatening him with rape; torture by suffocation with a hood containing a rat poison called "gamezán" in order to obtain information on how the mass escape of prisoners had been planned and executed on June 17, 2001; intimidate or punish him, for having reported the torture inflicted by CAL and the other police officers, in the criminal trial and to obtain information about the murder of the prosecutor SJR. Furthermore, they indicated that the State inflicted cruel, inhuman and degrading treatment on Mr. Valenzuela, since he did not receive adequate medical treatment after his arrest on April 10, 1999, and after the torture he suffered on May 27, 1998, and on June 17 and 18, 2001. They also argued that the State is responsible for the violation of Mr. Valenzuela Ávila's personal integrity for having subjected him to the phenomenon of death row. Consequently, it indicated that the State violated Articles 5(1) and 5(2) of the American Convention, in relation to Article 1(1) of the same instrument, and is responsible for failing to comply with the obligations contained in Articles 1, 6, 7 and 8 of the IACPPT.

179. The **State** specified, when acknowledging its responsibility for the lack of investigation of the acts of torture reported by Mr. Valenzuela, that said acknowledgment does not extend to the existence of the alleged acts of torture. The State pointed out that there are no documents to substantiate the acts of torture, so it does not have the certainty to determine whether they occurred.

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135 Articles 5 and 11(2) of the American Convention.

## B. Considerations of the Court

180. The Court recalls that Article 5(1) of the Convention establishes in general terms the right to humane treatment, be it mental, physical or moral. In addition, article 5(2) establishes, more specifically, the absolute prohibition of subjecting someone to torture or cruel, inhuman or degrading treatment or punishment. Additionally, it has been recognized that the absolute prohibition of torture, both physical and psychological, belongs today to the domain of international *jus cogens*.<sup>136</sup>

181. In turn, those acts that have been "prepared and carried out deliberately against the victim to eliminate his mental resistance and force him to accuse himself of or confess to certain criminal conduct, or to subject him to other punishments, in addition to the deprivation of freedom itself".<sup>137</sup>

182. The Court has indicated that the violation of a person's right to physical and psychological integrity has various categories of degree and that it ranges from torture to other types of abuse or cruel, inhuman or degrading treatment, whose physical and psychological consequences vary in intensity according to endogenous and exogenous factors of the person (duration of treatment, age, sex, health, context, vulnerability, among others) that must be analyzed in each specific situation.<sup>138</sup> In other words, the personal characteristics of an alleged victim of torture or cruel, inhuman or degrading treatment must be taken into account when determining whether personal integrity was violated, since such characteristics can change the individual's perception of reality and , therefore, increase the suffering and the sense of humiliation when they are subjected to certain treatment.<sup>139</sup>

183. With regard to cases of alleged sexual violence, the Court has indicated that sexual assaults are characterized, in general, by occurring in the absence of other persons beyond the victim and the aggressor or aggressors. Given the nature of these forms of violence, the existence of graphic or documentary evidence cannot be expected and, therefore, the victim's statement constitutes fundamental evidence of the fact.<sup>140</sup>

184. The Court also recalls that the evidence obtained through medical examinations plays a crucial role during the investigations carried out against detainees and in cases where mistreatment is alleged.<sup>141</sup> In this sense, the allegations of mistreatment that occurred in police custody are extremely difficult for the victim to substantiate if they were isolated from the outside world, without access to doctors, lawyers, family or friends who can support and gather the necessary evidence.<sup>142</sup> Therefore, judicial authorities have the duty to guarantee the rights of the detainee, which entails obtaining and securing any evidence that can prove

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<sup>136</sup> Cf. *Case of Maritza Urrutia v. Guatemala. Merits, Reparations and Costs*. Judgment of November 27, 2003. Series C No. 103, para. 92, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 178.

<sup>137</sup> *Case of Maritza Urrutia v. Guatemala*, para. 93, and *Case of Bueno Alves v. Argentina. Merits, Reparations and Costs*. Judgment of May 11, 2007. Series C No. 164, para. 75.

<sup>138</sup> Cf. *Case of Loayza Tamayo v. Peru. Merits*. Judgment of September 17, 1997. Series C No. 33, para. 57, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 177.

<sup>139</sup> Cf. *Case of Ximenes López v. Brazil*. Judgment of July 4, 2006. Series C No. 149, para. 127, and *Case of Omeara Carrascal et al. v. Colombia, supra*, para. 193.

<sup>140</sup> Cf. *Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 30, 2010. Series C No. 215, para. 100, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 315.

<sup>141</sup> Cf. *Case J. v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 27, 2013. Series C No. 275, para. 333, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 315.

<sup>142</sup> Cf. *Case of J. v. Peru, supra*, para. 333, and *Case of Espinoza González. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 20, 2014. Series C No. 289, para. 151.

acts of torture, including medical examinations.<sup>143</sup> Additionally, it is important to note that in cases where there are allegations of alleged torture or abuse, the time elapsed for the corresponding medical examinations is essential to reliably determine the existence of the harm, especially when there are no witnesses beyond the perpetrators and the victims themselves and, consequently, evidence may be scarce. Thus, it may be concluded that in order for an investigation into acts of torture to be effective, it must be carried out promptly.<sup>144</sup>

185. In the same sense, in cases where sexual assaults are alleged, the lack of medical evidence does not diminish the veracity of the alleged victim's statement.<sup>145</sup> In such cases, the occurrence of sexual violence or rape will not necessarily be reflected in a medical examination, since not all cases of sexual violence and/or rape cause physical injuries or illnesses verifiable through said examinations.<sup>146</sup>

186. In the case under examination, both the Commission and the representatives argued that Mr. Valenzuela was subjected to torture by the State on May 27, 1998, in his first detention, to make him confess about his alleged participation in the murder of a prosecutor, and on June 17 and 18, 2001 after being recaptured after his second escape in June 2001. In addition, the representatives indicated that the State is responsible for cruel, inhuman and degrading treatment against Mr. Valenzuela, as the alleged victim had not received adequate medical treatment. In this regard, the State denied the occurrence of such events, but recognized the lack of investigation of the alleged torture.

187. Based on these considerations, this Court will now analyze the alleged international responsibility of the State for the alleged torture, or cruel, inhuman or degrading treatment suffered by Mr. Valenzuela Ávila.

### **B.1. Detention and imprisonment of Mr. Valenzuela**

188. As established, Mr. Valenzuela Ávila was arrested on May 27, 1998 (*supra* para. 82). First, the Court will refer to the alleged torture that occurred that day after the arrest following the search.<sup>147</sup> In this regard, the trial record No. 38-99 of October 11, 1999 issued by the Criminal Court of Quetzaltenango, records that Mr. Valenzuela stated that on that day he was a victim of torture through blows, suffocation with a rubber cloth and "gamezán", and indicated that they penetrated "his anus for approximately fifteen seconds with [a] greased baton."<sup>148</sup>

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<sup>143</sup> Cf. *Case of Bayarri v. Argentina. Preliminary Objection, Merits, Reparations and Costs*. Judgment of October 30, 2008. Series C No. 187, para. 92, and *Case of Favela Nova Brasília v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of February 16, 2017. Series C No. 333, para. 253.

<sup>144</sup> Cf. *Case of Bueno Alves v. Argentina, supra*, para. 111, and *Case of Espinoza González v. Argentina, supra*, para. 152.

<sup>145</sup> Cf. *Case of J. v. Peru, supra*, para. 333, and *Case of Espinoza González v. Argentina, supra*, para. 153.

<sup>146</sup> Cf. *Case of Fernández Ortega et al. v. Mexico, supra*, para. 124, and *Case of Espinoza González v. Argentina, supra*, para. 153.

<sup>147</sup> It will not refer to the alleged detention that occurred prior to the search of his home for the reasons stated in relation to Article 7 of the Convention (*infra* para. 216 and 217).

<sup>148</sup> Record of Trial 38-99 of October 11, 1999, *supra*.

[...] what I want you to tell me, look, son of a bitch, I'm going to take you with me (sic) the bastard took out a black baton from a black bag [...] you're going to talk, they lowered my pants (sic) and my underpants, on top from the ramp to be [...] (sic) one of them began to rub the baton on my anus, do you want to talk, I'm not doing anything... and I started to cry and I didn't answer any questions. It was at that moment that he inserted the greased baton into my anus for about fifteen seconds, but for me it took forever and he moved it and took it out, please don't (sic) kill me I have children pardon my life, ...I'm just fucking your ass but if you don't tell me I will kill you, he started wanting to insert it again I started (sic) to squirm as the baton (sic) was covered with grease (sic) he couldn't put it in due to the movements, the baton fell and hurt my right testicle, I screamed at that moment he told another private officer with the piece of rubber, bring the hood and cover his mouth [...].

189. In addition, the Court notes that two detainees in the Preventive Detention Center for Men where the alleged victim was referred to Mr. Valenzuela's situation. Mr. SMR stated that on May 28, 1998, Mr. Valenzuela Ávila "arrived badly beaten, on his face, [and] he was defecating blood," and Mr. EMM stated that on May 29, 1998, he saw that the alleged victim "could not nor sit to the extent that he slept standing up because he defecated blood" (*supra* para. 82).

190. In turn, Mrs. Rosa María Mendoza, the alleged victim's partner, also indicated that Mr. Valenzuela told her that on the day of his arrest: "[...] they covered his face with a plastic bag containing gamezán to suffocate him [...] [and that] he had problems defecating [...]".<sup>149</sup> The mother of the alleged victim also indicated that when she went to visit her son at the penitentiary center five days after his capture, he told her that they "beat him in the ribs" and put something in his rectum.<sup>150</sup>

191. In addition, the body of evidence provided in this case includes three reports prepared by doctors made seven years after the alleged torture suffered by Mr. Valenzuela in May 1998. Two of them were submitted during the proceedings before the Commission. In the first place, the medical certificate of Edna Karina Vaquerano Martínez, issued on June 15, 2005, in which she concluded that Mr. Valenzuela "present[ed] a mental examination consistent with a person who has experienced torture, abuse and violence".<sup>151</sup> Second, the psychological expert opinion of Juan Cristóbal Aldana Alfaro, in which he concluded that "Tirso shows the characteristics of a tortured person both from a physical and psychological point of view", showing "metabolic changes and somatic disorders [...] sexual dysfunctions that are common in tortured people, especially those who have suffered sexual torture or rape".<sup>152</sup> However, in light of these reports, there is evidence of the medical examination issued on February 25, 2005 by Carlos Guillermo Quijada Sandoval, coordinator of the Medical Services of the Penitentiary System, in which he concluded the opposite, since it established that "the physical and mental state of the patient does not present any evidence of aggression or physical mistreatment"<sup>153</sup>, and it was stated in response to a question put to the alleged victim, that on the date of the medical examination, Mr. Valenzuela stated "he had not suffered any aggression or mistreatment." In addition, although said doctor describes the emotional state of the alleged victim, it does not appear that he performed a psychological or psychiatric examination.

192. This Court recalls statements in its existing case law regarding "the absence of physical signs does not mean that ill-treatment has not occurred, because these acts of violence against the individual often do not leave permanent marks or scars."<sup>154</sup> In accordance with the foregoing, the Court considers it relevant to assess the medical and psychological certificates issued on June 15, 2005 by Mrs. Vaquerano Martínez and Mr. Aldana Alfaro, which are consistent with the account of the victim himself and the other witnesses and relatives who saw him, while they conclude that Mr. Valenzuela, due to his mental and psychological condition, "exhibits characteristics of a tortured person

193. Based on the foregoing, it is proven that Mr. Valenzuela suffered a series of acts of violence during his detention, when he was in the custody of the State. Therefore, it is up to this Court to determine whether said acts constituted torture and sexual violence in light of

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<sup>149</sup> Statement made by Mrs. Rosa María Mendoza López on May 22, 2004 (file of annexes to the Merits Report, annex 2, fs. 115 to 116).

<sup>150</sup> Statement made by Mrs. Florinda López de López at the public hearing before the Court on March 7, 2019.

<sup>151</sup> Medical report of Edna Karina Vaquerano Martínez, *supra*.

<sup>152</sup> Psychological expert opinion rendered by Juan Cristóbal Aldana Alfaro, *supra*.

<sup>153</sup> Note from Doctor Carlos Guillermo Quijada Sandoval to the General Director of the Guatemalan Penitentiary System on February 28, 2005 (file of annexes to the Merits Report, annex 10, fs. 170 to 173).

<sup>154</sup> Cf. *Case J. v. Peru*, *supra*, para. 329, and *Case of Favela Nova Brasília v. Brazil*, *supra*, para. 249.

Article 5(2) of the Convention, and the case law of the Court, through the analysis of whether the act was: (i) an intentional act; (ii) caused severe physical or mental suffering, and if it (iii) was committed with a given aim or purpose.<sup>155</sup>

194. Regarding the first and third elements, it has been proven that on May 27, 1998, Mr. Valenzuela Ávila was subjected to different acts of violence deliberately carried out by state agents, in order to obtain information about the death of the prosecutor SJR. Regarding the second element, it is proven that Mr. Valenzuela received a series of blows, suffocation and even an anal penetration with a greased baton, which constitutes in this case a form of rape.<sup>156</sup> In this regard, the Court has affirmed that the severe suffering of the victim<sup>157</sup> is inherent in rape and that rape can constitute torture even when it consists of a single act or occurs outside state facilities.<sup>158</sup>

195. This Court considers that the serious and severe suffering undergone by Mr. Valenzuela due to the acts committed by state agents in order to obtain his statement on his alleged participation in the commission of a crime have been proven, fulfilling the three elements that this Court has listed. Therefore, the Court concludes that Mr. Valenzuela Ávila was subjected to acts of torture after his arrest, when he was already in the custody of the State, in violation of Article 5(2) of the American Convention.

196. Furthermore, this Court notes that the Commission also alleged the violation of Article 11 of the American Convention. In this regard, this Court has indicated that although this article is entitled "Right to Privacy", its content includes, among others, the protection of private life, which includes, among other protected areas, sexual life<sup>159</sup> and the right to establish and develop relationships with other human beings,<sup>160</sup> for this reason, sexual violence such as rape can suppose an interference in the most personal and intimate aspects of a person's private life.<sup>161</sup> Based on the foregoing, the Court in this case considers that the rape perpetrated on Mr. Valenzuela entailed an intrusion on his privacy.

197. Consequently, regarding the elements considered in this analysis, the Court finds that after his arrest on May 27, 1998, Mr. Valenzuela was subjected to acts of physical torture and sexual violence, in accordance with the three constituent elements cited, as established by this Court in its case law.

198. Secondly, this Court will refer to the alleged torture suffered by Mr. Valenzuela on June 17 and 18, 2001. In this regard, this Court notes that Mr. Valenzuela filed a writ of habeas corpus on July 11, 2001, in which he requested a medical evaluation, as well as the cessation of abuse (*supra* para. 88). In said appeal he argued that:

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<sup>155</sup> Cf. *Case of Bueno Alves vs. Argentina, supra*, para. 79, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 194.

<sup>156</sup> In this regard, this Court recalls that "sexual rape [...] must also be understood as act of vaginal or anal penetration, without the victim's consent, through the use of other parts of the aggressor's body or objects, as well as oral penetration with the virile member." *Case of the Miguel Castro-Castro Prison v. Peru. Merits, Reparations and Costs*. Judgment of November 25, 2006. Series C No. 160, para. 310.

<sup>157</sup> Cf. *Case of Fernández Ortega et al. v. Mexico, supra*, para. 124, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 192.

<sup>158</sup> Cf. *Case of Fernández Ortega et al. v. Mexico, supra*, para. 128, and *Case of Rosendo Cantú and Others v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 31, 2010. Series C No. 216, para. 118.

<sup>159</sup> Cf. *Case of Fernández Ortega et al. v. Mexico, supra*, para. 129, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 179.

<sup>160</sup> Cf. *Case of Fernández Ortega et al. v. Mexico, supra*, para. 129, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 179.

<sup>161</sup> Cf. *Case of J. v. Peru, supra*, para. 367, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 179.

[On] June seventeen of the year two thousand and one at night I was subjected to torture and harassment in which I was required to give information regarding the death of the Prosecutor [SJR] for which I was tried and I am sentenced to the death penalty in these acts I was the object of death threats, my body is injured and I still have scars and impediments in my upper limbs, and in my sexual organs, as a result of said abuse to which I was subjected, by people who identified themselves as members of the Criminal Investigation Service of the National Civil Police.

199. In addition, this Court notes that Mr. PRA, who was detained in the Preventive Detention Center for Men, stated that "when they opened the prison of hell (sic), they left and when they recaptured [them] , [they] were transferred to preventive custody, while Tirso Román Valenzuela Ávila was in his cell he was repeatedly taken out by people dressed in plain clothes [who] took him away and he [Mr. Valenzuela] came back more and more beaten, This is what [h]e states, since [Mr. PRA] was in different cells, [Valenzuela] was physically ill as he had blows all over his body and on occasions when we talked [he] told that they had tortured him with cigarettes in the part of the neck and in his genitals" (*supra* para. 86).

200. In addition to the above, as already indicated in the medical and psychological reports issued on June 15, 2005, by Mrs. Edna Karina Vaquerano Martínez and Mr. Juan Cristóbal Aldana Alfaro (*supra* para. 191), it was concluded that the alleged victim presents "the characteristics of a tortured person both from a physical and psychological point of view."

201. Based on the foregoing and as the victim himself reported the alleged torture and abuse and threats he suffered during his incarceration, through the writ of habeas corpus, which is consistent with what was stated by another prisoner and the medical reports , this Court considers it proven that Mr. Valenzuela suffered serious injuries while he was being held in State custody, which were intentionally perpetrated in order to obtain information about the death of the Prosecutor SJR. In addition, the Court notes that despite the fact that the State was aware of said acts, it did not attempt to guarantee his right to humane treatment, nor did it immediately initiate an investigation in this regard. Therefore, in consideration of the elements considered, the Court finds that Mr. Valenzuela was subjected to acts of physical torture and abuse.

202. Therefore, this Court finds that Mr. Valenzuela, after his detention on May 27, 1998, was subjected to acts of physical torture and sexual abuse and, furthermore, in June 2001 he suffered acts of physical torture again, when he remained confined in the Men's Preventive Detention Center. Consequently, the Court concludes, without prejudice to the criminal responsibility that must be settled in the domestic sphere, that the State is responsible for the violation of Articles 5(1) and 5(2) and 11(1) of the American Convention, in relation to Article 1(1) thereof, as well as in violation of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Tirso Valenzuela Ávila. Furthermore, the representatives alleged the violation of Article 7 of the IACPPT, this Court, based on the decision, considers that it is not necessary to rule on the alleged violation.

203. The representatives also argued that Mr. Valenzuela Ávila did not receive medical treatment during his stay in the detention center, following the torture he suffered when he was detained and recaptured. In this regard, the Court has established that "in order to protect and ensure the right to life and the right to humane treatment of persons deprived of their liberty and in its role as guarantor of those rights, the State has an ineluctable obligation to provide those persons with the minimum conditions befitting their dignity as human beings, for as long as they are interned in a detention facility."<sup>162</sup> On this point, the Court has

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<sup>162</sup> Cf. *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 2, 2004. Series C No. 112, para, 159.

developed a set of obligations for the fulfillment of this duty, among them, is the obligation to provide medical attention, through any appropriate treatment that is necessary.<sup>163</sup> It has also indicated that the absence of "adequate and timely medical treatment or care" constitutes a violation of Article 5 of the Convention.<sup>164</sup>

204. For this Court, from the facts and the evidence provided, it can be deduced that the State did not provide adequate medical care at the time that Mr. Valenzuela requested it due to his physical and mental state<sup>165</sup> after having been tortured on May 27, 1998, and in June 2001, after his second recapture. Therefore, the Court considers that the lack of adequate medical care constitutes a violation of Article 5 of the Convention.

205. Finally, the **representatives** argued that the State also violated the alleged victim's right to humane treatment by subjecting him to death row. This Court has had the opportunity to rule on the so-called "death row phenomenon" in the case of *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago* and in the case of *Raxcacó Reyes v. Guatemala*. The Court notes that, in these cases, an assessment was made of the expert opinions provided regarding the specific detention conditions of the persons sentenced to death and victims of the case, as well as the specific impact on them, which led to a violation of articles 5(1) and 5(2) of the American Convention, in relation to article 1(1) thereof.<sup>166</sup> Similarly, the European Court of Human Rights,<sup>167</sup> the Universal Human Rights System<sup>168</sup> and some national courts<sup>169</sup> warn that the so-called "death row" affects the right to humane treatment due to the anguish in which the people sentenced to death find themselves, a situation that generates psychological trauma due to the present and growing specter of the execution of the maximum sentence,<sup>170</sup> therefore, it is considered cruel, inhuman and degrading treatment. Thus, to determine the existence of a violation of humane treatment derived from "death row", it is necessary to analyze particular personal circumstances of the case in order to assess whether

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<sup>163</sup> Cf. *Case of Tibi v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 7, 2004. Series C No. 114, para. 156, and *Case of Chinchilla Sandoval et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of February 29, 2016. Series C No. 312, para. 28.

<sup>164</sup> *Case of Tibi v. Ecuador, supra*, para. 157.

<sup>165</sup> Document Ref. C-698-98. Of No.2. of Mr. Valenzuela's defense attorney before the Judge of First Instance for Criminal, Drug-Trafficking and Environmental Crime on July 11, 2001 (file of annexes to the Merits Report, annex 7, fs. 123 and 124); Decision No. 300-2001; Of. 6, of the Second Execution Court of May 7, 2003 (proceedings file before the Commission, annex 2, f. 1296), and Letter from the social worker ALLS addressed to the Judge of the Second Execution Court of May 13, 2003 (file of proceedings before the Commission, annex 2, f. 1306).

<sup>166</sup> Cf. *Case of Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago. Merits, Reparations and Costs*. Judgment of June 21, 2002. Series C No. 94, paras. 167 to 172, and *Case of Raxcacó Reyes v. Guatemala. Merits, Reparations and Costs*. Judgment of September 15, 2005. Series C No. 133, paras. 97 to 102.

<sup>167</sup> ECHR. *Öcalan v. Turkey [GS]*, no. 46221/99, Judgment of May 12, 2005, paras. 166-169, and *Bader and Kanbor v. Swedish*, no. 13284/04, Judgment of November 8, 2005, paras. 42 to 48.

<sup>168</sup> Cf. United Nations. Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, A/67/279, (2012), para. 42. The phenomenon of death row is defined as: "It consists of a combination of circumstances that produce severe mental trauma and physical deterioration in prisoners under sentence of death. Those circumstances include the lengthy and anxiety-ridden wait for uncertain outcomes, isolation, drastically reduced human contact and even the physical conditions in which some inmates are held. Death row conditions are often worse than those for the rest of the prison population, and prisoners on death row are denied many basic human necessities [...]". See also, Human Rights Committee, *Larrañaga vs. Philippines*, CCPR/C/87/D/1421/2005 (2006), para. 7(1)1, and *Mwamba v. Zambia*, CCPR/C/98/D/1520/2006 (2010), para. 6.8.

<sup>169</sup> Cf. *Judgment of the Supreme Court of Zimbabwe* of 24 June 1993 in *Catholic Commissioner for Justice and Peace in Zimbabwe v. Attorney General* (4) SA 239 (ZS); *Supreme Court of Uganda in Attorney General v. Susan Kigula and 417 others* (Constitutional Appeal No. 3 of 2006), 2009, and *Godfrey Mutiso v. Republic*, Kenya Court of Appeal (2010). See also *U.S. v. Burns*, Supreme Court of Canada, 2001 SCC 7, paras. 118-123.

<sup>170</sup> Cf. ECHR. *Soering v. The United Kingdom*, no. 14038/88, Judgment of July 7, 1989, paras. 56, 81 and 111.

remaining in this state became so grave/serious as to be qualified as cruel, inhuman or degrading.<sup>171</sup>

206. The Court notes that Mr. Valenzuela remained for 6 years and 2 months under constant threat that he could be executed at any moment. As a result of this conviction, Mr. Valenzuela had to contemplate the prospect of the extinction of his life<sup>172</sup> during that time. The Court also highlights that the manner in which a death sentence is imposed may constitute a factor that determines its incompatibility with the provisions of Article 5 of the American Convention.<sup>173</sup> The Court notes that Mr. Valenzuela was sentenced to death in the context of criminal proceedings in which clear violations of Article 4(2) of the Convention occurred, and in violation of several precepts related to due process in the context of the criminal proceedings. (*supra* paras. 145 and 158). In addition, the Court notes that in the expert opinion given by Mr. Aldana Alfaro when Mr. Valenzuela was detained, he indicated that other effects "extend to his situation [...] on death row, such as depression, feelings of guilt, emotional turmoil, and moderate anxiety about being distanced from family visits."<sup>174</sup>

207. Therefore, the Court concludes that Mr. Valenzuela Ávila faced serious mental suffering from the anguish of knowing he was on "death row" after a procedure that had numerous shortcomings, which violated his right to physical, mental and moral integrity, contained in article 5(1) of the American Convention and constituted cruel, inhuman and degrading treatment contrary to article 5(2) of the Convention, all in relation to article 1(1) of the same instrument.

### C. Conclusion

208. In light of all the arguments set forth, this Court considers that the State is responsible for the violation of the prohibition of torture, the right not to be subjected to cruel, inhuman and degrading treatment for having remained on "death row", and for the lack of adequate medical care, in violation of Articles 5(1) and 5(2) and 11(1) of the American Convention, in relation to Article 1(1) of the same instrument and in relation to Articles 1, 6 and 8 of the IACPPT, to the detriment of Tirso Román Valenzuela Ávila.

## VIII-5 RIGHT TO PERSONAL FREEDOM<sup>175</sup>

### A. Arguments of the Commission and the parties

209. The **representatives** argued that the State violated the rights contained in Articles 7(1) to 7(5), in relation to 1(1) of the American Convention, to the detriment of Tirso Román Valenzuela, because the alleged detention was "illegal and arbitrary", since at the time of the arrest there was no court order, the prerequisites for flagrant crime were not met, he was not informed of his rights or the reason for the detention and, finally, his detention was not diligently submitted to judicial review. Additionally, they alleged the violation of Articles 7(6) and 25(1) of the Convention due to a writ of habeas corpus filed by Mr. Valenzuela, which was

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<sup>171</sup> Cf. ECHR, *Case of Ireland v. the United Kingdom*, no. 5310/71, Judgment of January 18, 1978, para. 162; *Case of Jalloh v. Germany [GS]*, no. 54810/00, Judgment of July 11, 2006, para. 67 and *Case of Bouyid v. Belgium [GS]*, no. 23380/09/03, Judgment of September 28, 2015, para. 86.

<sup>172</sup> Cf. Psychological expert opinion rendered by Juan Cristóbal Aldana Alfaro, *supra*.

<sup>173</sup> Cf. ECHR, *Soering v. United Kingdom*, *supra*, para. 106, and *Shamayev et al. v. Georgia and Russia*, no. 36378/02, April 12, 2005, para. 333.

<sup>174</sup> Psychological expert opinion rendered by Juan Cristobal Aldana Alfaro, *supra*.

<sup>175</sup> Article 7 of the American Convention.

denied. Neither the **Commission** nor the **State** made specific allegations regarding said rights.

## **B. Considerations of the Court**

210. It should be noted that, previously, the representatives alleged the violation of this right not invoked by the Commission. In this regard, it is the established case law of this Court that the alleged victims and their representatives may invoke the violation of rights other than those included in the Merits Report, as long as they adhere to the facts contained in said document.<sup>176</sup>

211. The Court has already indicated in its case law that the essential content of Article 7 of the American Convention establishes the protection of the individual against any arbitrary or illegal interference by the State.<sup>177</sup> In turn, the Court has also indicated that this article has two types of regulations, one general and one specific. The general regulation is found in numeral 1, while the specific regulations is in numerals 2 to 7. Any violation of these numerals will necessarily entail the violation of Article 7(1) of the American Convention.<sup>178</sup>

212. The specific regulation of Article 7 of the American Convention are guarantees that establish limits to the exercise of authority carried out by State officials, limits that apply to instruments of State control. Among them is detention, which must be applied in accordance with the other guarantees of the American Convention. It must also be of an exceptional nature and respect the principle of presumption of innocence, legality, necessity and proportionality, all essential principles for the proper functioning of a democratic society that respects human rights.<sup>179</sup> In order to deprive someone of their liberty, it is necessary that the cause or reason for which they are detained be established in advance. In addition, this detention cannot be arbitrary, the person who suffers it must be informed of the reasons for their detention, the detainee must be brought before a judge as soon as possible, and he has the right to appeal to a competent judge or court for the purpose of assessing the legality of the detention.

213. The guarantee of legal detention in Guatemala is derived from its Political Constitution, in Article 6, which establishes:

Lawful detention. No person may be arrested or imprisoned, except for a crime or misdemeanor and by virtue of an order issued in accordance with the law by a competent judicial authority. Cases of flagrante delicto or misdemeanor are excepted. Detainees must be brought before the competent judicial authority within a period not exceeding six hours, and may not be subject to any other authority. The official or agent of the authority who violates the provisions of this article will be sanctioned in accordance with the law, and the courts, ex officio, will initiate the corresponding process.

214. In addition, the Code of Criminal Procedure refers to arrest in Article 257 in the following terms:

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<sup>176</sup> Cf. *Case of Five Pensioners v. Peru. Merits, Reparations and Costs*. Judgment of February 28, 2003. Series C No. 98, para. 155, and *Case of Coc Max et al. (Xamán Massacre) v. Guatemala. Merits, Reparations and Costs*. Judgment of August 22, 2018. Series C No. 356, para. 133.

<sup>177</sup> Cf. *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 2, 2004. Series C No. 112, para. 223, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 351.

<sup>178</sup> Cf. *Case of Chaparro Álvarez and Lapo Iñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 21, 2007. Series C No. 170, para. 51, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 352.

<sup>179</sup> Cf. *Case of the "Juvenile Reeducation Institute" v. Paraguay, supra*, para. 228, and *Case of Norín Catrimán et al. Merits, Reparations and Costs*. Judgment of May 29, 2014. Series C No. 279, para. 310.

Article 257. (Apprehension). The police must arrest anyone caught committing an offence or pursue immediately after the commission of a punishable act.

In the same case, any person is authorized to carry out the arrest and to prevent the punishable act from producing subsequent consequences. You must immediately deliver the apprehended person, together with the items collected, to the Public Prosecutor, the police or the nearest judicial authority.

The Public Prosecutor may make a request to the judge or court for the apprehension of the accused when it deems that the requirements of the law are met and that their imprisonment is necessary, in which case it will place them at the disposal of the judge in charge of the investigation. The judge may order any substitute measure for detention, or dispense with it, in which case the accused will be released.

215. In accordance with the aforementioned articles 6 of the Constitution and 257 of the Code of Criminal Procedure, there must be immediate judicial control of the detention, as a measure to avoid the arbitrariness or illegality of the measure.

216. However, in this case there is dispute regarding the alleged facts of the detention, since the representatives and the State presented different versions. According to Mr. Valenzuela, he was first detained on May 27, 1998, by PNC officials dressed in civilian clothes, around 1:45 p.m., who took him to the Olintepeque Quetzaltenango Summit, where he was subjected to violence to obtain information regarding the crime of which the prosecutor SJR had been a victim. Subsequently, he was taken back to his home to carry out a search, during which a state agent entered the home with a sack containing the weapons and claimed he was in possession of the weapons that they "planted." The other version is that of the State, which does not refer to the detention described by Mr. Valenzuela, but rather part of the search carried out and the seizure of large caliber weapons found in his home as the reason for his detention. (*supra* paras. 73 and 74).<sup>180</sup>

217. Regarding the aforementioned dispute, the body of evidence submitted to this Court does not have sufficient elements to conclude that Mr. Valenzuela had indeed been detained, before the search, on May 27, 1998, and therefore it will not analyze the allegations of the representatives regarding this detention.

218. Having resolved the above, it is up to the Court to analyze whether, based on the events that occurred after the arrest following the search, Mr. Valenzuela was promptly brought before a judge or other competent official to guarantee his rights, and if applicable, said omission can be attributed to the State in violation of the American Convention.<sup>181</sup>

219. It has been shown that Tirso Román Valenzuela Ávila, after the search carried out at his home, between 4:55 p.m. and 5:50 p.m., on May 27, 1998 (*supra* footnote 40), as stated in the official letter No. 1709-98 (*supra* para. 73), was detained by state agents to be transferred to the Quetzaltenango Men's Preventive Detention Center. Although there is no record of his admission to said center, it is not a disputed fact that he was admitted in the early morning hours of May 28, 1998. By this time, several hours had already elapsed after Mr. Valenzuela's detention had been carried out. at the end of the search on May 27, 1998. According to the State, on May 28, 1998, the "judicial statement" by Mr. Valenzuela was

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<sup>180</sup> On repeated occasions, the Court requested the State to submit evidence to decide on "documents related to the arrest warrant [of the victim] and all the proceedings that were issued" in this regard were not presented (*supra* citation footnote 22).

<sup>181</sup> In order for a violation of the American Convention to be established, the acts or omissions that caused said violation must be attributable to the respondent State. These acts or omissions can be of any power or organ of the State, regardless of its place in the hierarchy. *Cf. Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 10, 2007. Series C No. 167, para. 79, and *Case of Arrom Suhurt et al. v. Paraguay, supra*, para. 94.

received by a judge,<sup>182</sup> and on May 29, 1998, the Second Criminal Court of First Instance of Quetzaltenango, issued a preventive detention order. The representatives argued that for the first time, on the last date indicated, a judge heard Mr. Valenzuela Ávila.

220. Based on the foregoing, it is evident that Mr. Valenzuela Ávila's constitutional right established in Article 6 of the Political Constitution to be placed at the disposal of the competent judicial authority within a period not exceeding six hours was not respected (*supra* para. 213), since he was not brought before a competent judge to verify the legality of his detention. In other words, a judicial control was not carried out without delay, taking into account that the constitutionally determined period of 6 hours, for May 28 or 29, in which Mr. Valenzuela would have been brought before a competent authority, had already been exceeded. Therefore, this Court considers that the State failed to comply with its duty to bring Mr. Valenzuela before a judge or official authorized by law, in violation of the right to personal liberty enshrined in Article 7(1), 7(2) and 7(5) of the American Convention, in relation to Article 1(1) thereof to his detriment.

221. Given the ruling, the Court deems that it is not necessary to rule on the alleged violation of paragraphs 3 and 4 of Article 7 of the American Convention.

222. Lastly, the **representatives** argued the violation of Articles 7(6) and 25(1) of the American Convention, due to the rejection of a writ of habeas corpus filed by the alleged victim's defense counsel, based on the alleged torture and abuse suffered by the Mr. Valenzuela that, in fact, refers to aspects of humane treatment, which have already been examined with respect to Article 5 of the Convention. Therefore, these arguments will not be examined.

### C. Conclusion

223. This Court concludes that the State is responsible for the violation of the right to personal liberty enshrined in Articles 7(1), 7(2) and 7(5) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Tirso Román Valenzuela Ávila.

## IX REPARATIONS<sup>183</sup>

224. Based on the provisions of Article 63(1) of the American Convention, the Court has indicated that any violation of an international obligation that has caused damage entails the duty to adequately repair it, and that this provision includes a customary norm that constitutes one of the fundamental principles of contemporary International Law on the responsibility of a State.<sup>184</sup>

225. Reparation for damages caused by a violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which is to reinstate the situation that existed prior to the commission of the violation. If this is not feasible, as occurs in most cases of human rights violations, this Court will order measures to safeguard the violated rights and repair the consequences that the violations produced.<sup>185</sup> Therefore, the Court has

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<sup>182</sup> It should be noted that in said proceedings, Mr. Valenzuela refrained from testifying. *Cf. Report of the State of Guatemala to the Inter-American Commission on Human Rights, supra.*

<sup>183</sup> Article 63 of the American Convention.

<sup>184</sup> *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Gorioitía v. Argentina, supra*, para. 59.

<sup>185</sup> *Cf. Case of Velásquez Rodríguez v. Honduras, supra*, para. 26, and *Case of Gorioitía v. Argentina, supra*, para. 60.

considered the need to grant various measures of reparation, in order to compensate the damage in a comprehensive manner, so that in addition to pecuniary compensation, the measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition have special relevance to the damage caused.<sup>186</sup>

226. This Court has established that the reparations must have a causal link with the facts of the case, the alleged violations, the proven damages, as well as with the measures requested to repair the resulting damages. Therefore, the Court must observe such coincidence in order to adjudge and declare according to law.<sup>187</sup>

227. In consideration of the violations declared in the previous chapters, this Court will proceed to analyze the claims presented by the Commission and the representatives, as well as the arguments of the State, in light of the criteria established in the Court's case law in relation to the nature and scope of the obligation to repair, in order to provide the measures aimed at repairing the damage caused to the victims.<sup>188</sup>

228. International case law, and in particular that of this Court, has repeatedly established that the judgment constitutes by itself a form of reparation.<sup>189</sup> However, considering the circumstances of this case and the violations committed against the victim, the Court deems it pertinent to establish other measures.

## A. Injured Party

229. This Court reiterates that it considers an injured party, in the terms of Article 63(1) of the Convention, to be the victim of a violation of any right recognized therein. Therefore, this Court considers Tirso Román Valenzuela Ávila to be the "injured party".

## B. Obligation to investigate

*B.1. Investigate, identify and, where appropriate, punish those responsible for the death of Tirso Román Valenzuela Ávila.*

230. The **Commission** asked the Court to order the State to investigate, diligently, effectively and within a reasonable time, the "extrajudicial execution" of Mr. Valenzuela Ávila in order to fully clarify the facts, identify the perpetrators and impose the corresponding sanctions. The **representatives** asked the Court to order the State to investigate all the facts related to the violations committed so that they do not remain unpunished.

231. The **State** argued that the investigation process for the death of Mr. Valenzuela Ávila is still open and that his case has not gone unpunished, that the delay in the proceedings has been due to the complexity of the matter and that all proceedings considered appropriate to find those responsible have been conducted.

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<sup>186</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and Costs*. Judgment of December 3, 2001. Series C No. 88, paras. 79 to 81, and *Case of Gorioitía v. Argentina, supra*, para. 60.

<sup>187</sup> Cf. *Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations and Costs*. Judgment of November 27, 2008. Series No. 191, para. 110, and *Case of Gorioitía v. Argentina, supra*, para. 61.

<sup>188</sup> Cf. *Case of Andrade Salmón v. Bolivia. Merits, Reparations and Costs*. Judgment of December 1, 2016. Series C No. 330, para. 189, and *Case of Gorioitía v. Argentina, supra*, para. 62.

<sup>189</sup> Cf. *Case of Neira Alegría et al. v. Peru. Reparations and Costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Gorioitía v. Argentina, supra*, para. 63.

232. In this judgment the **Court** declared, inter alia, that the investigations carried out were not diligent or effective, nor did the State respect the guarantee of a reasonable time, to establish what happened, identify, prosecute and, where appropriate, punish those responsible for the events that occurred to Tirso Román Valenzuela Ávila.

233. Taking into account that the criminal proceedings remain open to clarify the facts related to the death of Tirso Román Valenzuela Ávila (*supra* para. 103), the Court orders that the State must continue with the investigations that are necessary to identify, prosecute and, where appropriate, punish those responsible for his death, taking into account the possible hypotheses of the cause of death. Said obligation must be fulfilled in accordance with the standards established by the case law of this Court,<sup>190</sup> that is, with due diligence and within a reasonable time.<sup>191</sup> To this end, the State must: (a) ensure that the various organs of the justice system involved in the case have the necessary human and material resources to carry out their tasks in an adequate, independent and impartial manner and that the persons who participate in the investigation, including victims, witnesses and judicial officers, have the due security guarantees,<sup>192</sup> and (b) ensure the full access and capacity to act of Mr. Valenzuela Ávila's next of kin at all stages of these investigations, in accordance with the law and the regulations of the American Convention, in accordance with the established case law of the Court.<sup>193</sup> The purpose of said participation must be access to justice and knowledge about the truth of what happened.

*B.2. Investigate, identify and, where appropriate, punish those responsible for the torture of Tirso Román Valenzuela Ávila.*

234. The **Commission** requested that the State be ordered to investigate the acts of torture suffered by Mr. Valenzuela Ávila diligently, effectively and within a reasonable time in order to fully clarify the facts, identify the perpetrators and impose the corresponding punishment. The **representatives** argued that the acts of torture were never investigated, and remain unpunished, so they asked the Court to order the State to investigate all the facts related to the violations committed.

235. The **State** acknowledged its international responsibility for the omission of the obligation to investigate acts of torture ex officio and has also accepted the measure of reparation requested with respect to initiating an investigation into these facts, in the terms already indicated in paragraph 19 of this judgment.

236. In consideration of the partial acknowledgment of international responsibility of the State for the omission to investigate the alleged torture suffered by Tirso Román Valenzuela Ávila, as determined in the corresponding section of this judgment (*supra* paras. 22 and 147), the **Court** determines that the State must initiate, in accordance with the provisions of domestic law, within a period not exceeding six months, the aforementioned investigation to clarify the alleged facts, with due diligence, and enable the participation of the victim's family

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<sup>190</sup> Cf. *Case of the Human Rights Defender et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 28, 2014. Series C No. 283, para. 252, and *Case of Munárriz Escobar et al. v. Peru, supra*, para. 122.

<sup>191</sup> Cf. *Case of the Human Rights Defender et al. v. Guatemala, supra*, para. 252, and *Case of Omera Carrascal, supra*, para. 293.

<sup>192</sup> Cf. *Case of the Dos Erres Massacre v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 24, 2009. Series C No. 211, para. 233, and *Case of Omeara Carrascal et al. v. Colombia, supra*, para. 293.

<sup>193</sup> Cf. *Case of the Caracazo v. Venezuela. Reparations and Costs*. Judgment of August 29, 2002. Series C No. 95, para. 118, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 339.

or their representatives and access to the proceedings carried out. This Court recalls that the State has the obligation to initiate an investigation *ex officio* in any case where there is news of the possible occurrence of acts of torture or cruel, inhuman or degrading treatment.<sup>194</sup>

### C. Measures of satisfaction

#### *a) Publication of the judgment*

237. The **representatives** asked the Court to order the State: (i) to carry out an act of acknowledgment of responsibility before the victim's family, in which it expressly accepts that Tirso Román Valenzuela Ávila was tortured and executed by agents of the State as part of a criminal plan aimed at the misnamed "selective social cleansing", this act is to be in writing, and include a request for forgiveness from the victim's family members, and (ii) urge the State to guarantee that the judgment is published in the newspaper with the largest national circulation, and access to it is available on the websites of the Ministry of Foreign Affairs of Guatemala, the Presidential Commission for the Coordination of Executive Policy on Human Rights (COPREDEH), of the National Civil Police, the Ministry of the Interior and the Penitentiary System. The Commission and the State have not made a statement on this request.

238. The **Court** orders, as it has done in other cases,<sup>195</sup> that the State publish, within six months from the notification of this judgment: (a) the official summary of this judgment prepared by the Court, once only, in a newspaper with wide national circulation and in the official gazette in a legible and adequate font size, and (b) this judgment, in its entirety, available to the public on the official website for at least one year.

239. The State must inform this Court immediately once it proceeds to make each of the publications ordered, regardless of the one-year term to present its first report established in operative paragraph 17 of this judgment.

#### *b) Transfer of the remains of Tirso Román Valenzuela Ávila to the cemetery of the village of Caballo Blanco, department of Retalhuleu.*

240. The **representatives** asked the Court to order the State to transfer the remains of Tirso Román Valenzuela Ávila from the cemetery of La Gomera, Escuintla to the cemetery of the village of Caballo Blanco in the department of Retalhuleu, so that funeral honors can be carried out, with expenses to be paid by the State.

241. In a public hearing, the **State** accepted the request to take the relevant steps so that the remains of Tirso Román Valenzuela Ávila can be transferred to the place requested by his next of kin, and in the final written arguments, it indicated that "it has stated and reiterated in different times, their availability to collaborate with the family of Tirso Román Valenzuela Ávila in the exhumation and transfer of his remains, provided that they present a formal request." This, according to the State, "was not communicated to them in a timely manner by the representatives, causing the unnecessary prolongation of a painful situation that is, according to the details in the statements made by the same relatives of Mr. Valenzuela Ávila, one of the reasons why they went to [...] Court."

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<sup>194</sup> Cf. *Case J. v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 27, 2013. Series C No. 275, para. 375, and *Case of Women Victims of Sexual Torture in Atenco v. Mexico, supra*, para. 270.

<sup>195</sup> Cf. *Case of Cantoral Benavides v. Peru. Reparations and Costs*. Judgment of December 3, 2001. Series C No. 88, para. 79, and *Case of Perrone and Preckel v. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of October 8, 2019. Series C No. 384, para. 163.

242. The **Court** assesses positively that the State is willing to exhume and transfer the remains of Mr. Valenzuela Ávila. Therefore, this Court orders the State to transfer the remains of Mr. Valenzuela Ávila from the cemetery of La Gomera, Escuintla, to the cemetery of the village of Caballo Blanco in the department of Retalhuleu, within a period of six months, after verifying his identity, in coordination with his next of kin or their representatives. In addition, the State must cover the expenses of the exhumation, transfer and funeral honors, by mutual agreement with his family.<sup>196</sup> For this purpose, the relatives of the victim or their representatives must appear in person, as soon as possible, before the pertinent authorities to coordinate said procedure.

#### **D. Measures on non-repetition**

*a) Adopt legislation to adequately define the crime of torture*

243. Given the partial acknowledgment of international responsibility made by the State, in the sense that article 201 bis of the Criminal Code, which states that the classification of torture has not yet been adapted to international human rights standards and that in the judgment in the case of *Ruiz Fuentes et al. v. Guatemala*, in paragraph 225, it was ordered, as a guarantee of non-repetition, that the definition of the crime of torture contained in article 201 bis of the current Penal Code be adapted within a reasonable time to the standards international human rights. Therefore, the Court considers that it is not necessary to reiterate to Guatemala measures of reparation regarding the adaptation of its provisions of domestic law to the American Convention in this regard, since compliance with said measure will be analyzed by the Court in the supervision stage of the corresponding compliance of said case.

*b) Prohibit the adoption of regressive legislation on the death penalty*

244. On this point, in paragraph 151 of this judgment, the **Court** referred to the clearly restrictive regime of the death penalty established in Article 4 of the American Convention and to the abolitionist trend contained in the Protocol to the American Convention on Human Rights relating to the abolition of the death penalty, also prevailing in the universal system, for which it refers to previous indications.

*c) Include training courses on the prohibition of torture for the police and officers in the criminal system*

245. The **representatives** asked the Court to order the State to include a series of measures in the training of security agents and authorities in charge of crime investigation and training programs. The **Commission** did not specifically comment on these requests. The **State** alleged that it has carried out an update in the PNC School Studies program that includes extensive training on human rights issues and, in particular, regarding the prevention of torture and extrajudicial executions.

246. In this regard, a similar measure has been ordered in the judgment of the Court in the case of *Ruiz Fuentes et al. v. Guatemala*, in paragraph 228, that the State must include, in the training courses for the members of the police and security agencies, specific training and permanent courses on the absolute prohibition of torture. Therefore, the Court considers that it is not necessary to reiterate such a training measure to Guatemala, since compliance with

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<sup>196</sup> Cf. *Case of the Caracazo v. Venezuela. Reparations and Costs*. Judgment of August 29, 2002. Series C No. 95, paras. 122 to 124, and *Case of Alvarado Espinoza et al. v. Mexico, supra*, para. 300.

said measure will be analyzed by the Court in the corresponding compliance monitoring stage of said case.

## **E. Other measures**

247. The **representatives** also requested that the Court order Guatemala the following measures of non-repetition: (a) adopt legislative measures to ensure access to an adequate remedy of appeal; (b) adopt measures to guarantee adequate judicial control, which guarantees respect for the judicial guarantees of the accused persons; (c) adopt measures to implement General Instruction 13-2008 of the Public Prosecutor; (d) create a control system, which will serve as external police control bodies for the PNC; (e) implement a process of restructuring and a purge of the PNC; (f) carry out education and training processes to regulate the proper use of force by those in charge of security, and (g) grant a scholarship to the three children of Tirso Román Valenzuela.

248. Regarding the aforementioned measures of reparation requested, the **Court** considers that the issuance of this judgment and the reparations ordered in this chapter are sufficient and adequate to remedy the violations suffered by the victim and it does not consider it necessary to order additional measures. In addition, it should be noted that some of the measures requested do not have a causal link with the violations declared in this judgment, so it does not find it necessary to order them and others have already been ordered to the State in another case.

249. Furthermore, the **representatives** in their final arguments requested other measures for the first time.<sup>197</sup> The Court considers that said requests were submitted extemporaneously, therefore it will not rule on the matter.

## **F. Compensation**

### *F.1. Pecuniary Damages*

#### *F.1(1). Consequential Damages*

250. The **representatives** indicated that this relates to the expenses incurred by Mr. Valenzuela Ávila' next of kin to travel to visit him when he was detained, and after his death in the search for justice. Due to the passage of time, the victim's relatives do not have proof of the aforementioned expenses. Therefore, they asked the Court to determine, in equity, the amount corresponding to the pecuniary damage that must be delivered to the next of kin. The **Commission** requested full reparation, both pecuniary and non-pecuniary, to the next of kin of Mr. Valenzuela Ávila. The **State** argued that it should not be sentenced to any type of reparation.

#### *F.1.2. Loss of Income*

251. The **representatives** requested that an amount be set in fairness for loss of earnings, and that the wages not earned by the victim be reimbursed from the moment of his detention to date. They alleged that Mr. Valenzuela Ávila "was an auto mechanic, who had his own workshop located in Flores Costa Cuca, Quetzaltenango." The **Commission** and the **State** reiterated, respectively, their arguments.

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<sup>197</sup> The measures requested were a) rehabilitation measures; b) improve training in the National Civil Police academy, and c) create a control body to verify that trainers effectively meet specialty and experience requirements.

## F.2. Non-pecuniary Damages

252. Regarding non-pecuniary damages, the **representatives** in the pleadings and motions brief asked the Court to order the State to pay said item in fair terms. However, in their final arguments, they requested the payment of compensation and requested for Tirso Román Valenzuela Ávila the amount of US\$100,000 (one hundred thousand United States dollars), an amount that must be delivered directly to his heirs.

253. In this case, the **Court**, in consideration of the special characteristics of the case and the causal link of the declared violations, will rule only on non-pecuniary damage. This Court has determined that this concept "can include both the suffering and afflictions caused to the direct victim and his or her relatives, the impairment of very significant values for people, as well as the alterations, of a non-pecuniary nature, in the conditions of the day-to-day existence of the victim or his family".<sup>198</sup>

254. As the Court has declared the violation of articles 4(1), 4(2), 5(1), 5(2), 7(1), 7(2), 7(5), 8(1), 8(2), 8(2)(g), 8(2)(h), 9, 11(1) and 25(1) of the American Convention and articles 1, 6 and 8 of the IACPPT, to the detriment of Mr. Valenzuela Ávila in this judgment and given the specificities of this case, the Court considers it appropriate to order compensation, in equity, for an amount of USD\$60,000.00 (sixty thousand United States dollars) in favor of Tirso Román Valenzuela Ávila. In consideration of the information provided by the representatives regarding the direct next of kin of Tirso Román Valenzuela Ávila, the Court considers that said amount should be delivered to each of his next of kin, according to the following criteria:

- a) Fifty percent (50%) of the compensation corresponding to the victim will be distributed, in equal parts, among the victim's children, namely: Jorge Luis, Luis Fernando and Tirso Román, all with the surname Valenzuela Ruiz and their daughter and son fathered by Rosa María Mendoza López, whose identity is withheld for their safety (*supra* para. 52). If one or more of the children have already died, the part that corresponds to him or them will increase that of the other children of the same victim, and
- b) The remaining fifty percent (50%) of the compensation corresponding to the victim will be distributed, in equal parts, between the former spouse, Ludim Azucena Ruiz López, and the former partner, Rosa María Mendoza López.

## G. Costs and Expenses

255. The **representatives** requested:

- a) Regarding the Institute for Comparative Studies in Criminal Sciences of Guatemala (ICCPG), in the pleadings and motions brief, they requested: (i) payment for the trips made from Guatemala City to San José, Costa Rica, and to Washington, DC, in the United States, some of these trips were not exclusively related to this case, and (ii) expenses corresponding to legal work. In their final arguments, they presented a table of fees for the attorneys and assistants who worked on the case, for hourly payment where there was a disbursement by the ICCPG representing an amount of USD\$76,865.19 (seventy-six thousand eight hundred and sixty-five United States dollars and nineteen cents). Finally, they requested the amount of USD\$192,000.00

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<sup>198</sup> 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, and *Case of Gorioitía v. Argentina, supra*, para. 82.

(one hundred and ninety-two thousand United States dollars) as the final amount, and that said amounts be repaid directly to the ICCPG.

- b) The IDPP, who has acted as the victims' representative in the international process since August 2011, incurring travel expenses, lodging, legal work, did not request a specific amount.
- c) Regarding future expenses: they requested the expenses required to obtain future evidence and any others that might be incurred for adequate representation before the Court; in addition to considering the stage of compliance with judgment both nationally and internationally.

256. The **State** asked the Court not to order the State for procedural expenses and costs, because the representatives' request is outside the established parameters.<sup>199</sup> It also stated that when a civil society organization receives funding from any type of cooperation to process a case before the Inter-American System, in reality it is not incurring any type of expenses or costs, since the funds have been granted with the condition that are used for this purpose, thus, there is a lack of active legitimacy of the representative to demand the reimbursement of the amounts disbursed, since their assets was never damaged. It argued that receiving funds to represent the victims before the Inter-American System and then claiming their return is an unfair attitude that undermines the true meaning of reparations for human rights violations and supposes a decrease in the funds that can be used by the State to invest in other types of reparations.

257. The **Court** reiterates that, in accordance with its case law,<sup>200</sup> the costs and expenses are part of the concept of reparation, since the activity carried out by the victims in order to obtain justice, both at the national and international levels, implies expenses that must be compensated when the international responsibility of the State is declared through a conviction. Regarding the reimbursement of costs and expenses, it is up to the Court to prudently assess its scope, which includes the expenses generated before the authorities of the domestic jurisdiction, as well as those generated in the course of the process before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment can be made based on the principle of equity and taking into account the expenses indicated by the parties, provided that their amount is reasonable.<sup>201</sup> In consideration of the State's indications regarding the fact that the representatives allegation is outside the parameters that have been established in relation to the accreditation of the additional sum requested by the representatives for costs and expenses, this Court has verified that indeed some of the expenses indicated are not subject to reimbursement, nor have the receipts been presented.

258. In consideration of the above, the Court sets, in fairness, the amount of USD\$20,000.00 (twenty thousand United States dollars) for expenses incurred in processing the proceedings before the inter-American human rights system. Said amount must be delivered, within a period of one year from the notification of this judgment, in the following manner: to the Institute of Comparative Studies in Criminal Sciences of Guatemala the sum of USD\$10,000.00 (ten thousand United States dollars) and to the Institute of Public Criminal

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<sup>199</sup> In this regard, it indicated that the representatives requested a reimbursement for the trip of a person to San José, Costa Rica to carry out an internship in "CEJIL" for US\$1,000.04, it is not possible for recognition of this expense to be considered as a measure of reparation.

<sup>200</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*. Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of Gorioitía v. Argentina, supra*, para. 84.

<sup>201</sup> Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs, supra*, para. 82, and *Case of Gorioitía v. Argentina, supra*, para. 84.

Defense the sum of USD\$10,000.00 (ten thousand United States dollars). In the stage of monitoring compliance with this judgment, the Court may order the State to reimburse the victims or their representatives for reasonable expenses incurred in said procedural stage.

#### **H. Access to the victims' legal assistance fund.**

259. In this case the necessary financial assistance was granted, charged against said fund, to cover the travel, transfer, lodging and per diem expenses necessary for Florinda López de López and Olga Patricia Roldán Monterroso and Edgardo Enríquez Cabrera<sup>202</sup> to appear before the Court to give their statement at the public hearing of this case.

260. By means of a note from the Court Registrar dated July 11, 2019, a report was sent to the State on the disbursements made in application of the Victims Legal Assistance Fund in this case, which amounted to the sum of USD\$1,620.53 (one thousand six hundred and twenty United States dollars and fifty-three cents) and, in accordance with the provisions of Article 5 of the Court's Rules for the Operation of the aforementioned fund, a term was granted for Guatemala to present the observations it deemed pertinent. The State presented its observations on July 23, 2019, in which it objected to the payment of the outlay because the interventions of the people who attended the hearing did not provide significant information that could contribute to the case and because the cost was very high relative to the items corresponding to air tickets, lodging expenses, food and incidental expenses, and terminal expenses.

261. In light of Article 5 of the Fund's Rules, due to the violations declared in this judgment and as the requirements to benefit from the fund were met, the Court orders the State to reimburse said fund the amount of USD \$1,620.53 (one thousand six hundred and twenty United States dollars and fifty-three cents) for the necessary expenses incurred. Said amount must be reimbursed within a period of six months from the notification of this judgment.

#### **I. Methods of compliance with the payments ordered**

262. The State must pay the compensation for non-pecuniary damage and the reimbursement of costs and expenses established in this judgment directly to the persons and organizations indicated therein, within a period of one year from notification of this judgment, under the terms of the following paragraphs.

263. In the case where the beneficiaries die before the respective compensation is paid, it will be paid directly to their heirs, in accordance with the applicable domestic legislation.

264. The State must meet its financial obligations by paying in United States dollars or its equivalent in national currency, using the exchange rate in effect on the New York Stock Exchange, United States of America, for the respective calculation on the day before payment is made.

265. If, for reasons attributable to the beneficiaries of the compensation, or their heirs, it is not possible to pay the amounts determined within the indicated period, the State shall deposit said amounts in their favor in an account or certificate of deposit in a solvent financial institution in Guatemala, in US dollars, and in the most favorable financial conditions permitted by law and banking practice. If the corresponding compensation is not claimed after ten years have elapsed, the amounts will be returned to the State with accrued interest.

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<sup>202</sup> Enríquez Cabrera did not appear at the public hearing.

266. The amounts allocated in this judgment as compensation and as reimbursement of costs and expenses must be delivered to the persons and organizations indicated in full, in accordance with the provisions of this judgment, without reductions derived from possible taxation. In the event that the State incurs in arrears, it must pay interest on the amount owed corresponding to the default bank interest in the Republic of Guatemala.

## **X OPERATIVE PARAGRAPHS**

267. Therefore,

**THE COURT,**

**DECIDES:**

Unanimously, that:

1. The State is responsible for the violation of the right to a fair trial, enshrined in articles 8(2), 8(2)(g) and 8(2)(h) of the American Convention on Human Rights, in relation to the obligation to guarantee the rights established in Article 1(1) of the Convention, in the process that culminated in the death penalty, in the terms of paragraphs 109 to 115, 118 to 126, 127, 128 and 145 of this Judgment.

2. The State is responsible for the violation of judicial guarantees to a fair trial and judicial protection, enshrined in Articles 8(1) and 25(1) of the American Convention on Human Rights, in relation to Article 1(1) of the same Convention, to the detriment of Tirso Román Valenzuela Ávila for the lack of due diligence within a reasonable time in the investigation into his death, in the terms of paragraphs 129 to 143, and 146.

3. The State is responsible for the violation of judicial guarantees to a fair trial and judicial protection, enshrined in articles 8(1) and 25(1) of the American Convention on Human Rights, in relation to article 1(1) of the same treaty and in relation to the Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of Tirso Román Valenzuela Ávila, due to the failure to investigate the torture he suffered, in the terms of paragraphs 144 and 147 of this judgment.

4. The State is responsible for the violation of the right to life and the principle of legality enshrined in articles 4(2) and 9 of the American Convention on Human Rights, in relation to the obligation to guarantee the rights established in articles 1(1) and 2 of the Convention, to the detriment of Tirso Román Valenzuela Ávila, in the terms of paragraphs 151 to 156 and 158 of this judgment.

5. The State is responsible for the violation of the right to life enshrined in Article 4(1) of the American Convention on Human Rights, in relation to the obligation to guarantee the right established in Article 1(1) of the Convention, to the detriment of Tirso Román Valenzuela Ávila, for his extrajudicial execution, in the terms of paragraphs 162 to 176 of this judgment.

6. The State is responsible for the violation of the right to humane treatment and to a private life, enshrined in Articles 5(1) and 5(2) and 11(1) of the American Convention on Human Rights, in relation to the obligation to guarantee the right established in Article 1(1) of the Convention and in relation to Articles 1, 6 and 8 of the Inter-American Convention to Prevent

and Punish Torture, to the detriment of Tirso Román Valenzuela Ávila, in the terms of paragraphs 180 to 208 of this judgment.

7. The State is responsible for the violation of the right to personal liberty, enshrined in Articles 7(1), 7(2) and 7(5) of the American Convention on Human Rights, in relation to the obligation to guarantee the rights established in Article 1(1) of the Convention, to the detriment of Tirso Román Valenzuela Ávila, in the terms of paragraphs 210 to 220 and 223 of this Judgment.

8. The State is not responsible for the violation of the right to life established in articles 4(1), in relation to the execution of the death penalty, and 4(6) of the American Convention on Human Rights, to the detriment of Tirso Román Valenzuela Ávila, in the terms of paragraphs 157 and 158 of this judgment.

9. The State is not responsible for the violation of the rights to personal liberty and judicial protection, enshrined in articles 7(6) and 25(1) of the American Convention on Human Rights, in relation to the obligation to guarantee the rights established in article 1 (1) of the Convention, to the detriment of Tirso Román Valenzuela Ávila, in the terms of paragraph 222 of this judgment.

**DECLARES:**

Unanimously, that:

10. This judgment constitutes per se a form of reparation.

11. The State will continue with the necessary investigations to identify, prosecute and, if applicable, punish those responsible for the death of Tirso Román Valenzuela, in the terms of paragraph 233 of this judgment.

12. The State will initiate, in accordance with the provisions of domestic law, within a period not exceeding six months, the investigations that are necessary to identify, prosecute and, where appropriate, punish those responsible for the torture suffered by Tirso Román Valenzuela, in the terms of paragraph 236 of this judgment.

13. The State will make the publications indicated in paragraphs 238 and 239 of this judgment.

14. The State will transfer the remains of Mr. Tirso Román Valenzuela Ávila to another cemetery, within six months, under the terms of paragraph 242 of this judgment.

15. The State shall pay the amounts set forth in paragraphs 254 and 258 of this judgment for non-pecuniary damages and reimbursement of costs and expenses.

16. The State will reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the amount disbursed during the processing of this case, in the terms of paragraph 261 of this judgment.

17. The State shall, within one year of the date of notification of this judgment, submit to the Court a report on the measures adopted to comply therewith, without prejudice to the stipulations of paragraph 239 of this judgment.

18. The Court will monitor full compliance with this judgment, in exercise of its authority and in compliance with its obligations pursuant to the American Convention on Human Rights,

and shall declare this case closed when the State has fully complied with all the measures ordered herein.

I/A Court H.R., Case of *Valenzuela Ávila v. Guatemala*. Merits, Reparations and Costs.  
Judgment of October 11, 2019.

Eduardo Ferrer Mac-Gregor Poisot  
President

Eduardo Vio Grossi

Humberto A. Sierra Porto

Elizabeth Odio Benito

L. Patricio Pazmiño Freire

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri  
Registrar

So ordered,

Eduardo Ferrer Mac-Gregor Poisot  
President

Pablo Saavedra Alessandri  
Registrar