In the case of Acosta Calderon,

the Inter-American Court of Human Rights (hereinafter "the Court", "the Inter-American Court", or "the Tribunal"), pursuant to Articles 29, 31, 55, 56, and 58 of the Court's Rules of Procedure (hereinafter "the Rules of Procedure") and Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") delivers the present Judgment.

I. INTRODUCTION OF THE CASE

1. On June 25, 2003, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") submitted an application against the State of Ecuador (hereinafter "the State" or "Ecuador") to the Court, originating from petition No. 11,620, received at the Commission's Secretariat on November 8, 1994.

2. The Commission submitted the application pursuant to Article 61 of the American Convention, for the Court to decide if the State has violated Articles 2 (Domestic and Legal Effects), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 24 (Right to Equal Protection), and 25 (Judicial Protection) of the American Convention, all of them in connection with Article 1(1) (Obligation to Respect Rights) of the same, in detriment of Mr. Rigoberto Acosta Calderón (hereinafter "Mr. Acosta Calderón" or "the alleged victim").

3. According to the facts alleged in the application, on November 15, 1989, the Customs Military Police arrested Mr. Acosta Calderon, of Colombian nationality, under suspicion of drug trafficking. Supposedly, the statement of Mr. Acosta Calderon was not received by a Judge until two years after his detention, he was not notified of his right to consulate assistance, he was in custody pending trial during five years and a month, he was condemned on December 8, 1994

without the alleged drugs appearing at any time, and he was released on July 29, 1996 for having served part of his sentence while he was in prison pending trial. After having been released in July of 1996, the Commission lost contact with Mr. Acosta Calderon, reason for which when the application was presented his whereabouts were unknown.

4. Finally, as a consequence of the previously stated, the Commission requested the Court to order that the State adopt a series of pecuniary and non-pecuniary measures of reparation, as well as the payment of the costs and expenses generated in the processing of the case before the internal jurisdiction and before the Inter-American System for the Promotion and Protection of Human Rights.

II. COMPETENCE

5. The Court is competent to hear the present case. Ecuador has been a State Party to the American Convention since December 28, 1977 and accepted the Court's obligatory jurisdiction on July 24, 1984.

III. PROCEEDING BEFORE THE COMMISSION

6. On November 8, 1994, the Inter-American Commission received a petition against Ecuador, filed by the Ecumenical Commission for Human Rights (hereinafter "CEDHU"). On March 1, 1996, the petitioners presented additional information regarding the alleged violations in detriment of Mr. Acosta Calderon. On May 2, 1996 the Commission forwarded the pertinent parts of the petition to the State and requested its observations, pursuant to the Rules of Procedure of the Commission in force at that time.

7. On October 10, 2001, the Commission approved Report No. 78/01, in which it declared the admissibility of the case and decided to proceed to the consideration of the merits.

8. On October 22, 2001, the Commission transmitted the mentioned Report of Admissibility to the State and the petitioners and put itself at the disposal of the parties with the objective of achieving an amicable solution.

9. On November 15, 2001 the State requested that the case be declared inadmissible. On November 26, 2001 the Commission informed the State that the case had already been declared admissible and reiterated their intention of putting themselves at the disposition of the parties in order to achieve a possible amicable solution. On January 22, 2002 the petitioners communicated their rejection to an amicable solution, stating that violations of such severity cannot be susceptible of such extremes.

10. On March 3, 2003, after analyzing the position of the parties, the Commission approved Report No. 33/03 on the merits of the case, in which it made the following recommendations to the State:

1) Completely repair Mr. Rigoberto Acosta Calderon, which would include eliminating the criminal record and grant him the corresponding indemnification.

2) Take the necessary measures to prevent that these acts be repeated in the future.
3) Include the requirements of Article 36 of the Vienna Convention on Consular Relationships into the legislation and internal practices, so that the corresponding consulate is informed immediately of the detention of one of its nationals, so that it can provide the assistance it considers appropriate.

11. On March 25, 2003, the Commission transmitted to the State the previously mentioned Report, and granted it two months, as of the date of its transmission, so that they can report on the measures adopted to fulfill the recommendations. On that same day the Commission informed the petitioner of the issuing of Report No. 33/03 on the merits of the case, and requested that they present, within one month, its position regarding a possible referral of the case to the Inter-American Court.

12. The two-month period granted to the State to report on the measures adopted to fulfill the Commission's recommendations concluded on May 25, 2003, without it sending its observations. The Commission was notified by the parties that the Sate was interested in an amicable solution of the case and that a religious organization, the Social Pastoral of the Colombian Church, was trying to locate Mr. Acosta Calderon. Based on the request of the petitioners in favour of the presentation of the case to the Court, and despite the difficulty to locate the alleged victim, the Commission decided to submit the present case to the to the jurisdiction of the Court.

IV. PROCEEDING BEFORE THE COURT

13. On June 25, 2003 the Commission submitted the application to the Court, which included documentary evidence.

14. On August 4, 2003 the State and the CEDHU, in its capacity of representative of the alleged victim (hereinafter (the "representative of the alleged victim" or "the representatives") were notified of the application.

15. On August 29, 2003 the State appointed Mr. Juan Leoro Almeida, Ambassador of Ecuador before the Republic of Costa Rica, and Erick Roberts as its agents, and Mr. Rodrigo Durango Cordero as Deputy Agent. It also appointed Mr. Hernán Salgado Pesantes as Judge ad hoc.

16. On October 7, 2003, after having been granted an extension, the CEDHU, through Messrs. Elsie Monge, César Duque, and Alejandro Ponce Villacís, in their capacity of representatives presented their brief of pleadings, motions, and evidence (hereinafter "brief of pleadings and motions"), which included documentary evidence and they offered expert evidence.

17. On November 24, 2003, after the extension granted, the State submitted its answer to the application and its observations on the brief of pleadings and motions, which included documentary evidence. The term for its submission had expired on November 10 of the same year. The mentioned answer to the application presented by the State was placed before the

consideration of the full Court, which decided to reject it, "since it was submitted outside the term granted to the State to answer the application."

18. On April 6, 2004 the Commission appointed Mr. Evelio Fernández Arévalos and Santiago A. Canton as delegates of the present case and Mrs. Christina Cerna as legal advisor.

19. On January 17, 2005 the Secretariat, following the President's instructions, requested that the representatives present, no later than February 1, 2005, the definitive list of suggested expert witnesses with the objective of programming the possible public hearing on the merits and possible reparations and costs in the present case.

20. On February 1, 2005 the Secretariat, following the President's instructions and pursuant to Article 45 of the Rules of Procedure, requested that the State submit the following documents as evidence to facilitate adjudication of the case: complete file of the criminal actions carried out against Mr. Acosta Calderón; Constitution of Ecuador in force at the time of the facts of the present case, as well as the Constitution currently in force; Criminal Code in force at the time of the facts of the present case; Code of Criminal Procedures in force at the time of the facts of the present case; and the Law on the Control of the Trafficking of Narcotics and Psychotropic Substances valid until September of 1990.

21. On February 1, 2005 the Commission pointed out that "based on the characteristics of the instant case, it was possible to omit its public hearing" and they requested that the Court "proceed to receive relevant documentary evidence in conjunction with the final written allegations of the parties, without ordering the initiation of the oral proceeding."

22. On February 1, 2005, the representatives informed that Mr. Reinaldo Calvachi Cruz would render his expert report by affidavit, and they pointed out the specific object of said expert assessment. They also stated that they did not consider necessary to hold a public hearing in this case.

23. On February 3, 2005, the Secretariat, following the President's instructions, requested that the State present its remarks, no later than February 11, 2005, in regard to the observations made by the Commission and the representatives with reference to the holding of a public hearing.

24. On February 10, 2005, the State informed that it was "in dialogues [with the representatives] seeking to achieve an amicable solution," reason for which they considered that it was "possible to omit a public hearing" in this case.

25. On March 18, 2005, the President issued an Order through which he decided, pursuant to that stated by the parties and considering that the Tribunal had enough evidence to decide on the case, to omit the public hearing. He also decided to request, through statement given by affidavit, the expert report of Mr. Reinaldo Calvachi Cruz, offered by the representatives of the alleged victim, which had to be presented no later than April 15, 2005, and requested that the State and the Commission present the observations considered appropriate within a non-extendable ten-day term, as of its receipt. Finally, the President decided to grant the parties time until May 16, 2005

to present their final written allegations with regard to the merits and possible reparations and costs in the instant case. The parties were notified of the mentioned Order on this same date.

26. On April 15, 2005, the representatives presented Mr. Reinaldo Calvachi Cruz's expert report.

27. On April 25, 2005, the State requested that the communications regarding the case of Acosta Calderón should be sent to the main agent, Minister Julio Prado Espinosa, the deputy agent, Doctor Erick Roberts, and the provision agent, Doctor Juan Leoro Almeida, Ambassador of Ecuador in Costa Rica.

28. On April 28, 2005 the Commission pointed out that they had no observations to Mr. Reinaldo Calvachi Cruz's expert report. The State did not present any observations to Mr. Reinaldo Calvachi Cruz's expert report.

29. On May 6, 2005 the State presented the evidence to facilitate adjudication of the case that had been requested (supra para. 20), with the exception of the Law on the Control of the Trafficking of Narcotics and Psychotropic Substances that was in force until September 1990.

30. On May 11, 2005 the State presented information, in attention to that requested by the President of the Court through Order of March 18, 2005 (supra para. 25), in which "it insisted on the possibility of an amicable solution" and considered that "in order to reach an agreement of this nature, it was essential that Mr. Rigoberto Acosta Calderón be located." The State also pointed out that the Court "must wait for the result of the conversations between the representatives of the alleged victim, Mr. Acosta [Calderón] and the State, aimed at reaching an amicable agreement and know the [alleged victim's] current whereabouts." Ecuador also requested that the Court issue "a ruling regarding the continuation of the amicable solution process [...] prior to issuing any report."

31. On May 16, 2005 the representatives presented their brief of final pleadings with regard to the merits and the possible reparations and costs.

32. On May 19, 2005 the Commission presented its brief of final pleadings with regard to the merits and possible reparations and costs.

33. On May 31, 2005 the representatives presented a copy of the Law on the Control of the Trafficking of Narcotics and Psychotropic Substances of 1990.

V. PREVIOUS CONSIDERATIONS

34. The Tribunal rejected the brief containing the defendant's plea because it was not presented within the stipulated period (supra para. 17). The Court considered it relevant to make reference to the applicability of Article 38(2) of the Rules of Procedure, invoked by the Commission and the representatives in their final written arguments to the instant case.

35. Article 38(2) of the Rules of Procedures states:

In its answer, the respondent must state whether it accepts the facts and claims or whether it contradicts them, and the Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested.

36. This Court leaves on record that the State did respond to the application, but the Court rejected said brief because it was not presented within the period stipulated by the Rules of Procedure (supra para. 17). Also, the Court points out that the State had the opportunity to present arguments in later stages of the proceeding before the Court pursuant to the requirements made by the Tribunal when consulted on the possible realization of a public hearing (supra para. 23) and through Order of the President of March 18, 2005 in which he requested the presentation of final written pleadings (supra paras. 25 and 30). On said procedural opportunities, the State considered that it was "possible to omit the realization of a public hearing" (supra para. 24) and it insisted on the possibility of an amicable solution (supra para. 30). Therefore, this Tribunal considers that there aren't any pleas from the State on the claims of the parties to this case.

37. Pursuant to Article 38(2) of the Rules of Procedure, the Court is authorized to consider as established the facts that have not been expressly denied and the claims that have not been expressly contested. However, the Tribunal is not obliged to do so in all the cases in which a similar situation presents itself. Therefore, exercising its responsibility to protect human rights, under these circumstances the Court will determine in each case, the need to establish the facts, as they were presented by the parties or taking into account other elements from the evidence available. [FN1]

[FN1] Cfr. Case of Caesar. Judgment of March 11, 2005. Series C No. 123, para. 38.

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38. With regard to Ecuador's request that the Court "await the result of the conversations between the representatives of the alleged victim, Mr. Acosta [Calderón] and the State, seeking to achieve an amicable solution and discover the current whereabouts of [the alleged victim]" (supra para. 30), this Tribunal recalls that, taking into account the responsibility it has to protect the human rights established in Article 55 of its Rules of Procedure, it may, even in the presence of a proposal to reach an amicable solution, continue to hear the case. The Tribunal considers that, in order to effectively protect human rights, it must continue to hear the case at hand.

VI. EVIDENCE

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

40. The principle of the presence of the parties to dispute applies to evidentiary matters, and it involves respecting the parties' right to defense. This principle is contained in Article 44 of the Rules of Procedure, in what refers to the time frame in which the evidence must be submitted, in order to secure equality among the parties. [FN2]

[FN2] Cfr. Case of Caesar, supra note 1, para. 41; Case of the Serrano Cruz Sisters. Judgment of March 1, 2005. Series C No. 120, para. 31; and Case of Lori Berenson Mejía. Judgment of November 25, 2004. Series C No. 119, para. 63.

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41. According to the practices of the Tribunal, at the beginning of each procedural stage the parties must state, on the first opportunity given to them to go on record in writing, the evidence they will offer. Also, in exercise of the discretional powers contemplated in Article 45 of its Rules of Procedures, the Court or its President may request additional evidentiary elements to the parties as evidence to facilitate adjudication of the case, without this turning into a new opportunity to extend or complement the allegations, unless the Tribunal allows it expressly. [FN3]

[FN3] Cfr. Case of the Serrano Cruz Sisters, supra note 2, para. 32; Case of Lori Berenson Mejía, supra note 2, para. 63; and Case of Molina Theissen. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of July 3, 2004. Series C No. 108, para. 22.

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42. The Court has pointed out, with regard to the receipt and assessment of the evidence, that the proceeding followed before them is not subject to the same formalities as domestic judicial actions, and that the incorporation of certain elements into the body of evidence must be done paying special attention to the circumstances of the specific case and taking into account the limits imposed by the respect to legal security and the procedural balance of the parties. The Court has also taken into account that international jurisprudence, when it considers that international courts have the power to appraise and asses the evidence according to the rules of competent analysis, has not established a rigid determination of the quantum of the evidence necessary to substantiate a ruling. This criterion is valid for international human rights tribunals that have ample powers in the assessment of the evidence presented before them regarding the relevant facts, pursuant to the rules of logic and on the basis of experience. [FN4]

[FN4] Cfr. Case of Caesar, supra note 1, para. 42; Case of the Serrano Cruz Sisters, supra note 2, para. 33; and Case of Lori Berenson Mejía, supra note 2, para. 64.

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43. Based on the aforementioned, the Court will proceed to examine and assess the documentary evidence remitted by the Commission, the representatives, and the State in the different procedural opportunities or incorporated as evidence to facilitate adjudication of the case, all of which makes up the body of evidence of this case. For this the Tribunal will abide by the principles of competent analysis, within the corresponding legal framework.

A) DOCUMENTARY EVIDENCE

44. Among the documentary evidence presented by the representatives there is an expert report given before a public notary (affidavit), pursuant to that stated by the President in his Order of March 18, 2005 (supra para. 25), which the Court considers appropriate to summarize.

a) Expert report of Mr. Reinaldo Calvachi Cruz, lawyer

The expert witness is a university professor of Criminal Law and Criminal Procedural Law.
On August 10, 1979 the Political Constitution of Ecuador came into force, and in its Article 44 it introduced for the first time the acknowledgment of the incorporation of all the norms included in international instruments regarding human rights. This aspect was included in the current norm of Article 17 of the Political Constitution of Ecuador. "This constitutional text continued in force until August [9] of [1998], since on August [10] of the same year the text approved by the Constituent Assembly came into force."
The Constitution of 1979 included some precise provisions on the guarantee of a due process, additional to those considered incorporated by Article 44 of the aforementioned constitutional norm. Paragraph 16 of Article 19 of the Constitution recognized, inter alia, the following rights with regard to the due process: right to a competent judge; right to a trial prior to a conviction; right to a defense; prohibition to be obliged to declare in criminal procedures in matters that could imply criminal responsibility for oneself; right to the presumption of innocence, and guarantees to the right to personal liberty.
Also, in the section regarding the judicial function, the Constitution of 1979 recognized the principles of gratuity, oral proceedings, and promptness of the judicial procedures. It also recognized that an unjustified delay in the processing of a case must result in sanctions for those responsible. Likewise, it recognized the principle of judicial independence. With regard to the right to a defense, Article 107 stated the establishment of public counsel for the representation of any person who did not have the economic means to pay for their defense. However, in the practice, said right was seriously limited due to the lack of designation and hiring of public counsel.
On November 15, 1989 "the Codification of the Law on the Control of the Trafficking or Narcotic and Psychotropic Substances, published in the Official Newspaper number [six hundred twelve] of January [twenty seven] of [nineteen eighty seven] was in force." Title III of the mentioned law established sanctions for the sowing, harvesting, or exploitation of plants that can be used for the elaboration or production of narcotics or psychotropic substances. The production, extraction, recrystallization or synthesization of said substances was also punished, as well as the trafficking, possession or delivery of the substances subject to control. The Law established punishments for each of the conducts recognized as punishable. "Eventhough the law did not establish special norms for the judgment of said offenses, since it made reference to the Code of Criminal Procedures, it did maintain some modifications to the ordinary process for the judgment of offenses."
Article 43 of the mentioned law "stated the non-recognition of any jurisdiction." Thus, everybody should be processed by ordinary criminal judges. It also stated that bail could not be applied as a substituting measure of the confinement measures. It also prohibited that those convicted benefit from parole. It stated, as well, that the liberty of an indictee could not be executed if there was not a confirmation from the superior judge in the event of dismissals or acquittals.

The criminal action in trials related to the Law for the Control of the Trafficking of Narcotics and Psychotropic Substances was regulated by the general dispositions of the Code of Criminal Procedures. However, in what referred to the determination of the condition of narcotics and psychotropic substances, Article 46 of the Law stated that "in all criminal investigations and cases followed to determine the infractions defined in the present Law, the expert report of the National Department for the Control of Narcotics is obligatory." The purpose of this norm was that the mentioned Administration be the only institution authorized to determine the condition of the controlled substance. Also, the evidence of the infractions, due to their nature, was obligatory and irreplaceable, therefore in its absence the condition of the substance may not be determined by any other means.

With regard to the presumption of innocence, the Constitution of 1979 recognized it as a fundamental right. It was guaranteed until there was a final judgment. However, with the enactment of Law N° 108 of Narcotic and Psychotropic Substances of September 16, 1990, this principle was contradicted and affected. The Constitution Court acknowledged this situation in its Order of December 16, 1997, where it was declared unconstitutional. Article 116 of the Law stated that the Police's informative report was a "serious presumption of guilt, as long as the body of a crime was justified." Therefore the indictee was imposed the duty of proving their innocence. However, while this norm was in force, it meant the violation of the presumption of innocence of many people prosecuted for crimes related to the trafficking and possession of narcotics and psychotropic substances.

The Code of Criminal Procedures, published in the Official Newspaper No. 511 of June 10, 1983, divided the criminal process in four stages: the summary, the intermediate stage, the full trial or trial and the appeals stage. Each stage will have a term within which it must be developed. Therefore, the criminal process, without considering the appeals stage, must have an approximate duration of 126 days, that is, a little more than four months. However, in reality, no criminal process was decided in the established terms, and some even lasted several years.

Pursuant to that established in the Code of Criminal Procedures the indictee or accused had to have a defense counsel appointed by the court, specifically, by the judge when the he or she ordered the investigation of an alleged crime; the mentioned defense counsel had the obligation to represent the accused as long as they did not appoint their own defense counsel. Also, "once the trial begun, the court had to assign a defense counsel to the indictee, and this defense counsel could not decline the exercise of said defense without just cause." Without detriment to these norms, the defense counsel appointed by the court performed a very limited defense and many times this defense did not exceed the mere procedural formality without an adequate defense of the indictees.

The Political Constitution of Ecuador of 1979 acknowledged the right to equality and the principle of non-discrimination, which necessarily meant an unrestricted respect to these constitutional principles. Both in the reality and in some bodies of law, the right to equality has not been duly respected. One of the sectors that has been affected by the lack of protection of these rights, has been that of the people submitted to processes or trials related to the trafficking and possession of narcotic and psychotropic substances. Thus, both the law of 1989, and the law of 1990, in force up to this date, included norms that lead to an unequal treatment, even when the right to a presumption of innocence hangs over them. The indictees for these crimes are discriminated and it is systematically expected that there will be convictions. A stigma has been created in social, judicial, and police mediums against these people, which in many cases has also reached the defense counsel, who are afraid to defend cases related to the law on drugs.

The Constitutional Court, through an Order of December 16, 1997, recognized the unconstitutionality of several provisions of the Law on Narcotic and Psychotropic Substances. Also, following that pointed out by the Inter-American Court in the case of Suárez Rosero, it decided to declare the unnumbered article following Article 114 of the Criminal Code unconstitutional, since this rule recognized a discrimination against people indicted for crimes included in the Law on Narcotic Drugs and Psychotropic Substances.
On December 18, 1997, two days after the previously mentioned provisions were declared unconstitutional, an amendment to the Code of Execution of Judgments, with the purpose of granting the power to the directors of the social rehabilitation centers to free all detainees that do not have an arrest warrant issued by a competent judge. However, this norm established the following exception: "This stipulation will not apply for the misdemeanors included in the Law on Narcotic Drugs and Psychotropic Substances." This clearly creates a discriminatory regime against the population imprisoned based on the mentioned law and without doubt reflects the stigma that has officially been imposed on this sector.
Since the Constitution of 1998 came into force, Ecuador has recognized that their most important duty is to protect and defend human rights. The Constitution clearly develops both the content of the guaranteed rights, and the scope of the human rights international norms and their enforceability before national authorities, either administrative or judicial. However, in many cases this protection is deficient when dealing with people submitted to arrests and processes derived from crimes included in the Law on Narcotic Drugs and Psychotropic Substances.

B) EVIDENCE ASSESSMENT

Documentary Evidence Assessment

45. In this case, as in others, [FN5] the Tribunal admits the probative value of the documents presented in a timely fashion by the parties, that were not disputed or objected, and whose authenticity was not questioned.

[FN5] Cfr. Case of Caesar, supra note 1, para. 46; Case of the Serrano Cruz Sisters, supra note 2, para. 37; and Case of Lori Berenson Mejía, supra note 2, para. 77.

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46. The statement given before notary public by the expert witness Reinaldo Calvachi Cruz (supra para. 26), pursuant to that stated by the President in his Order of March 18, 2005 (supra para. 25), was not objected (supra para. 28), for which this Court admits it as consistent with its object, and it assesses it along with the body of evidence, applying the rules of sound judgment.

47. The Court has reiterated that the parties must present to the Tribunal the evidence requested by the first, either documentary, testimonial, from experts, or of any other nature. The Commission, the State, and the representatives of the alleged victim and his next of kin must present all the evidence requested to facilitate adjudication of the case, so the Tribunal can have as many judgment elements as possible to know the facts and justify their decisions. Specifically, in the proceses on human rights violations, the State must present to the Tribunal the evidence that can only be obtained with their cooperation. [FN6]

[FN6] Cfr. Case of Tibi. Judgment of September 7, 2004. Series C No. 114, para. 83; Case of 19 Merchants. Judgment of July 5, 2004. Series C No. 109, para. 77; and Case of Juan Humberto Sánchez. Request for an Interpretation of the Judgment of Preliminary Objections, Merits and Reparations. (Art. 67 American Convention on Human Rights). Judgment of November 26, 2003. Series C No. 102, para. 47.

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48. Since they have not been contested by the parties, the Tribunal admits into evidence the documentation remitted by the State as evidence to facilitate adjudication of the case, pursuant to that stated in Article 45(2) of the Rules of Procedure.

49. In the terms mentioned, the Court will weigh the evidentiary value of the documents presented to it. The evidence presented during the process has been brought together into a single body, considered a whole.

VII. PROVEN FACTS

50. Following its analysis of the evidence, the expert witness' testimony, and the statements of the Commission and the representatives, the Court finds that the following facts have been proven:

50(1) Mr. Acosta Calderon, of Colombian nationality, was born on August 20, 1962 and was 27 years old when the facts occurred. He lived in Putumayo, Colombia and was dedicated to agricultural activities. [FN7]

[FN7] Cfr. statement given on November 15, 1989 by Mr. Acosta Calderón before the Customs Military Police (dossier of annexes to the petition, annex 10, folio 106); and preliminary examination statement of October 18, 1991, given by Mr. Acosta Calderón before the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, folio 146 and 147).

Regarding the arrest and the criminal proceedings followed against Mr. Acosta Calderón

50(2) Mr. Acosta Calderón was arrested on November 15, 1989 in Ecuador by the customs military police under suspicion of drug trafficking. The police statement given that day indicates that in a suitcase seized from the alleged victim they found a substance that they assumed was "cocaine paste" [FN8].

[FN8] Cfr. police report on the arrest made on November 15, 1989 by the Customs Military Police (dossier of annexes to the petition, annex 10, leaf 105).

50(3) On the day of his arrest Mr. Acosta Calderón made a statement to the customs military police in which he pointed out, among other things, that he was aware of the content of the suitcase seized. On that same day he also made a statement before the Criminal Prosecutor of Sucumbios, in which he stated his innocence. These statements were not made in the presence of a defense counsel. [FN9]

[FN9] Cfr. statement given on November 15, 1989 by Mr. Acosta Calderón before the Customs Military Police (dossier of annexes to the petition, annex 10, leaf 106); and statement given by Mr. Acosta Calderón on November 15, 1989 before the Criminal Prosecutor of Sucumbios (dossier of annexes to the petition, annex 10, leaf 107).

50(4) Despite being a Colombian citizen, Mr. Acosta Calderón was not informed of his right to his country's consular assistance. [FN10]

[FN10] Uncontroverted fact.

50(5) On November 15, 1989 the Judge of Criminal Matters of Lake Agrio issued a court order to investigate the alleged crime in process No. 192-89 against Mr. Acosta Calderón for having been arrested "in possession [of] approximately 2 pounds and a half of cocaine paste" and since "the facts set forth are punishable crimes that may be investigated, and all the prerequisites of Article 177 of the Code of Criminal Procedures were present [Mr.] Acosta Calderón was accused with an order of preventive custody." He also ordered that a copy of said order to investigate the alleged crime be sent both to the defense counsel appointed by the court and to the alleged victim and that the latter's preliminary examination statement be received. The defense counsel appointed by the court was notified of the court order to investigate the alleged crime on that same day. [FN11]

[FN11] Cfr. court order for the investigation of the crime issued November 15, 1989 by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 109).

50(6) On November 15, 1989, the Court for Criminal Matters of Lake Agrio issued the "Constitutional ticket of imprisonment," in which it indicated that Mr. Acosta Calderón would remain as an untried prisoner for the crime of "Drug Trafficking" [FN12].

[FN12] Cfr. constitutional ticket of imprisonment of November 15, 1989 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 111).

50(7) On November 29, 1989 the Judge of Criminal Matters of Lake Agrio ordered that Mr. Acosta Calderón appear in that Court on November 30, 1989 to offer his preliminary examination statement. The Judge also ordered that the alleged drug seized be weighed at the Lake Agrio Hospital for its corresponding acknowledgment and destruction. [FN13]

[FN13] Cfr. ruling of November 29, 1989 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 112).

50(8) That same November 29, 1989 the Lake Agrio Hospital weighed, but did not analyze, the alleged cocaine paste, which weighed a total of "3.641 g". They did not indicate if said weight corresponded to the alleged paste seized from Mr. Acosta Calderón. [FN14]

[FN14] Cfr. weight Report of November 29, 1998 made by the Director of the Lake Agrio Hospital (dossier of annexes to the petition, annex 10, leaf 116).

50(9) The alleged victim remained in custody of the Customs Military Police in the "IX District 'Amazonas'", in the town of San Miguel, until on December 21, 1989 the Criminal Judge of Lake Agrio requested his transfer to the Center of Social Rehabilitation Center of Tena. [FN15]

[FN15] Cfr. ruling of December 21, 1989 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 113).

50(10) On January 12, 1990 the Treasury of the Provincial Health Authority of Napo received from the Clerk of the Court for Criminal Matters of Lake Agrio "1.175,6 g[rams]" of cocaine paste allegedly related to process No. "192-89" [FN16].

[FN16] Cfr. memorandum of January 12, 1990 made by the Provincial Health Authority of Napo (dossier of annexes to the petition, annex 10, leaf 117).

50(11) On January 18, 1990 the Judge of Criminal Matters of Lake Agrio ordered that the Provincial Health Authority of Napo practice the acknowledgment, weighing, analysis, and destruction of the alleged drug seized from Mr. Acosta Calderón, and that for this effect, in said diligence they appoint the experts that would issue the report required by Article 10 of the Law for the Control of the Trafficking of Narcotics and Psychotropic Substances and its Regulations. [FN17]

[FN17] Cfr. ruling of January 18, 1990 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 118); and Article 10 of the Law for the Control of the Trafficking of Narcotics and Psychotropic Substances (case file of the merits, volume II, leaf 375).

50(12) On May 18, 1990 the Judge ordered a fifteen-day extension of the preliminary proceedings and ordered that the Clerk of the Court inform in writing, within 48 hours, the location of the physical evidence seized from Mr. Acosta Calderón. [FN18]

[FN18] Cfr. ruling of May 18, 1990 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 119).

50(13) On June 6, 1990 Messrs. Jorge Luna, Edison Tobar, and Raúl Toapanta, who were the agents of the customs military police authors of the police report of November 15, 1989 (supra para. 50(2)), appeared before the Judge of Criminal Matters of Lake Agrio and asserted and ratified the content of the aforementioned report. [FN19]

[FN19] Cfr. statement of June 6, 1990 given by the police officer Edison Armando Tobar Imbaquingo before the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 120); and statement of June 6, 1990 given by the police officer Raúl Hernán Toapanta Unapucha before the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 120).

50(14) Mr. Acosta Calderón was transferred to the Rehabilitation Center of Ambato. On July 27, 1990, Mr. Acosta Calderón requested that his imprisonment order be revoked and that he be transferred to the city of Tena. [FN20]

[FN20] Cfr. defense brief of July 27, 1990 presented by Mr. Acosta Calderón to the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 121).

50(15) On August 20, 1990, the Judge of Criminal Matters of Lake Agrio ordered that what was stated in its court order of May 18, 1990 (supra para. 50(12)) be complied with in what referred to establishing the location of the physical evidence seized from Mr. Acosta Calderón was located. [FN21]

[FN21] Cfr. ruling of August 20, 1990 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 122).

50(16) On September 13, 1990 the Judge of Criminal Matters of Lake Agrio stated that the reversal of the imprisonment ordered requested by Mr. Acosta Calderón on July 27, 1990 (supra para. 50(14)) did not proceed, since his "legal situation" had not changed. Also, the Judge of Criminal Matters of Lake Agrio ordered that what was stated in the court orders of May 18, 1990 (supra para. 50(12)) and of August 20, 1990 (supra para. 50(15)) be complied with in order to proceed with the requirements established in Article 10 of the Law on the Control of the Trafficking of Narcotics and Psychotropic Substances and its Regulations. [FN22]

[FN22] Cfr. ruling of September 13, 1990 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 124).

50(17) On October 3, 1990 the Judge of Criminal Matters of Lake Agrio ordered that what was stated in the court orders of May 18, 1990 (supra para. 50(12)), August 20, 1990 (supra para. 50(15)), and September 13, 1990 (supra para. 50(16)) be complied with in order to establish the whereabouts of the physical evidence seized from Mr. Acosta Calderón. In this order, the Secretary of the Court stated that the previous Secretary of the Court did not give him the inventory of criminal cases, nor did he inform him of where the physical evidence of the processes was located. [FN23]

[FN23] Cfr. ruling of October 3, 1990 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 126).

50(18) On October 10, 1990 the Director of the Social Rehabilitation Center of Tena informed the Judge of Criminal Matters of Lake Agrio that Mr. Acosta Calderón had been transferred from that center to the Social Rehabilitation Center of Ambato. [FN24]

[FN24] Cfr. official letter of October 10, 1990 addressed by the Director of the Social Rehabilitation Center of Tena to the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 127).

50(19) On November 27, 1990 the Judge of Criminal Matters of Lake Agrio once again ordered that what was stated in the court orders of May 18, 1990 (supra para. 50(12)), August 20, 1990 (supra para. 50(15)), September 13, 1990 (supra para. 50(16)), and October 3, 1990 (supra para. 50(17)) be complied with in order to establish the whereabouts of the physical evidence seized from Mr. Acosta Calderón. They also ordered that the Secretary of the Court get in contact with the previous Secretary of the Court so that the latter could respond for the mentioned evidence. The Judge also ordered that a request be presented to the Director of the Provincial Health Authority of Napo, in the city of Tena, so that he may certify if certain physical evidence was at that health authority. Finally, the Judge ordered the appearance, before this Court, of Messrs.

Jorge Luna, Edison Tobar, and Raúl Toapanta, the agents that captured Mr. Acosta Calderón. [FN25]

[FN25] Cfr. ruling of November 27, 1990 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 128).

50(20) On August 26, 1991 the Judge of Criminal Matters of Lake Agrio reiterated his order that what was stated in the court orders of May 18, 1990 (supra para. 50(12)), August 20, 1990 (supra para. 50(15)), September 13, 1990 (supra para. 50(16)), October 3, 1990 (supra para. 50(17)), and November 27, 1990 (supra para. 50(19)) be complied with in order to establish the whereabouts of the physical evidence seized from Mr. Acosta Calderón. [FN26]

[FN26] Cfr. ruling of August 26, 1991 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 132).

50(21) On October 8, 1991 Mr. Acosta Calderón presented a brief to the Judge of Criminal Matters of Lake Agrio, through which he stated that no evidence of drugs had been found to substantiate his detention. He also requested that his preliminary examination statement be received pursuant to Article 127 of the Code of Criminal Procedures regarding preventive detention, and that all evidence existing against him be considered objected. At the same time he pointed out that the cause followed against him was completely altered and flawed, since it contained testimonies foreign to it, as well as information regarding other cases. [FN27]

[FN27] Cfr. brief of the defense of October 8, 1991 presented by Mr. Acosta Calderón to the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 133).

50(22) Given this situation, Mr. Acosta Calderón requested the filing of the cause as well as the reversal of the order of detention against him, since there was not material evidence of the alleged infraction, which made his detention an illegal one. Finally, he appointed Dr. Gino Cevallos as his defense counsel. [FN28]

[FN28] Cfr. brief of the defense of October 8, 1991 presented by Mr. Acosta Calderón to the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 133).

50(23) On October 8, 1991 the Judge of Criminal Matters of Lake Agrio ordered that the preliminary proceedings be extended for fifteen days and that Mr. Acosta Calderón's preliminary examination statement be taken within a 24 hour period, since it is not recorded in the process, "presuming that the clerk of the court of that time had not incorporated this proceeding in the

file." [FN29] The Judge also pointed out that the case file included testimonies that did not belong to the process against Mr. Acosta Calderón. In the same manner, once again he ordered that it be specified if within the criminal cause there was proof of the physical evidence seized from Mr. Acosta Calderón. Finally, the Judge ordered again the appearance of Messrs. Jorge Luna Edison Tobar, and Raúl Toapanta, agents that arrested Mr. Acosta Calderón. [FN30]

[FN29] Cfr. ruling of October 8, 1991 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 139).
[FN30] Cfr. ruling of October 8, 1991 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 137).

50(24) On October 17, 1991 the Secretary of the Social Rehabilitation Center of Ambato certified that Mr. Acosta Calderón had presented excellent behavior and discipline during his detention in this center. [FN31]

[FN31] Cfr. certificate of good behavior of October 17, 1991 issued by the Social Rehabilitation Center of Ambato (dossier of annexes to the petition, annex 10, leaf 142).

50(25) In his preliminary examination statement of October 18, 1991 Mr. Acosta Calderón reiterated his innocence, he pointed out that he had been imprisoned since November 15, 1989 and that up to the date of his statement no physical evidence had been presented against him. Therefore, he requested that the corresponding procedure by started with the urgency required by his situation. [FN32]

[FN32] Cfr. preliminary examination statement of October 18, 1992 given by Mr. Acosta Calderón before the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leafs 146 and 147).

50(26) Later, Mr. Acosta Calderón requested that his preliminary examination statement be included in the record and considered evidence in his favour. He also claimed that the irregularities in the process were cause for its complete nullity and he challenged the statements offered by the police officers Jorge Luna, Edison Tobar, and Raúl Toapanta (supra para. 50(13)) and he requested that when they offered their statements they be "cross-examined as per the question sheet" he presented to the Court. Finally, he insisted on the reversal of the arrest warrant due to non-compliance with the requirements demanded by Article 177 of the Code of Criminal Procedures. [FN33]

[FN33] Cfr. brief of defense (undated) presented by Mr Acosta Calderón to the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 141).

50(27) On November 19, 1991 the Judge of Criminal Matters of Lake Agrio resolved that Mr. Acosta Calderón's preliminary examination statement be entered as evidence. [FN34]

[FN34] Cfr. ruling of November 19, 1991 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 144).

50(28) On December 10, 1991 the Criminal Prosecutor of Sucumbios set forth his opinion that the drug seized should be destroyed. [FN35]

[FN35] Cfr. record of December 10, 1991 issued by the Criminal Prosecutor of Sucumbios (dossier of annexes to the petition, annex 10, leaf 149).

50(29) On December 17, 1991 the Judge of Criminal Matters of Lake Agrio ordered that the opinion of the prosecutor be added to the process and that the Provincial Health Authority of Napo, in the city of Tena, certify if the physical evidence seized was located at that institution in order to proceed with its destruction. [FN36]

[FN36] Cfr. ruling of December 17, 1991 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 150).

50(30) On January 24, 1992 Mr. Acosta Calderón's defense presented a brief to the Judge of Criminal Matters of Lake Agrio, through which they stated that he continued to be imprisoned despite the lack of requirements for preventive detention included in Article 177 of the Code of Criminal Procedures, since there was not any evidence that established the existence of any infraction on his part. Therefore, they requested that the preliminary proceedings be declared as concluded and that the order of detention against him be revoked. [FN37]

[FN37] Cfr. brief of defense of January 24, 1992 presented by Mr Acosta Calderón to the Judge of Criminal Matters of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 154).

50(31) On January 31, 1992 the Criminal Judge of Lake Agrio insisted that what was ordered in his official letter of December 17, 1991 (supra para. 50(29)) be complied with. [FN38]

[FN38] Cfr. ruling of January 31, 1992 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 155).

50(32) On March 27, 1992 Mr. Acosta Calderón's defense presented a writ to the Criminal Judge of Lake Agrio through which they reiterated their request that the preliminary proceedings be concluded, since Mr. Acosta Calderón had been in prison for more than three years, without this procedural stage having finished. [FN39] On that same day the Criminal Judge of Lake Agrio insisted to the Secretary of that Court that what had been ordered in his official letters of of December 17, 1991 (supra para. 50(29)) and January 31, 1992 (supra para. 50(31)) be complied with. [FN40]

[FN39] Cfr. brief of defense of March 27, 1992 presented by Mr Acosta Calderón to the Judge of Criminal Matters of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 156).
[FN40] Cfr. ruling of May 27, 1992 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 157).

50(33) On May 25, 1993 the Court of Criminal Matters of Lake Agrio requested that the Health Director of the Province of Napo present certified copies of the official letters of delivery and receipt of the seized drug. [FN41]

[FN41] Cfr. official letter of May 25, 1993 addressed by the Judge of Criminal Matters of Lake Agrio to the Health Director of the Province of Napo (dossier of annexes to the petition, annex 10, leaf 165).

50(34) On July 1, 1993 Mr. Acosta Calderón's defense counsel presented a brief to the Judge of Criminal Matters of Lake Agrio, through which he reiterated that he was still imprisoned, despite the lack of evidence of any drug in his cause, due to the negligence of one of the previous secretaries of the Court of Criminal Matters of Lake Agrio. He also requested that the preliminary proceedings be concluded, since it had already lasted years without the cause being substantiated, and that the arrest warrant be revoked. [FN42]

[FN42] Cfr. brief of defense of July 1, 1993 presented by Mr Acosta Calderón to the Judge of Criminal Matters of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 166).

50(35) On July 15, 1993 the Judge of Criminal Matters of Lake Agrio ordered that the Prosecutor issue his opinion on the closing of the preliminary proceedings. He also decided that the reversal of the arrest warrant did not proceed since the conditions of Article 177 of the Code of Criminal Procedures had not been disproved. Finally, he once again ordered that the Health Director of the Province of Napo indicate if said Health Authority had the alleged drug seized from Mr. Acosta Calderón in deposit. [FN43]

[FN43] Cfr. ruling of July 15, 1993 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 168).

50(36) On August 13, 1993 the National Council for the Control of Narcotic and Psychotropic Substances (hereinafter "CONSEP") informed the Criminal Judge of Lake Agrio that the drug seized from Mr. Acosta Calderón was not found in the Northeastern Zonal Headquarters of the CONSEP. [FN44]

[FN44] Cfr. official letter of August 13, 1993 addressed by the National Council for the Control of Narcotic and Psychotropic Substances (CONSEP) to the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 170).

50(37) On August 13, 1993 the Judge of Criminal Matters of Lake Agrio ordered the closing of the preliminary proceedings since all the actions of that procedural stage had been complied with. [FN45]

[FN45] Cfr. ruling of August 13, 1993 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 171).

50(38) On November 16, 1993 the Prosecutor abstained from accusing Mr. Acosta Calderón since the alleged drug seized no longer existed, reason for which his criminal responsibility was not present. [FN46]

[FN46] Cfr. opinion of November 16, 1993 presented by the Prosecutor to the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 174).

50(39) On December 3, 1993, the First Court of Criminal Matters of Lake Agrio issued a ruling of provisional discontinuance of the cause, since the existence of the infraction could not be proven, and therefore the Mr. Acosta Calderón's criminal responsibility did not exist. It also ordered that it be referred to the Supreme Court of Quito for their opinion "as ordered by law" established with the purpose of determining the legality of the mentioned ruling of provisional discontinuance. [FN47] Despite the dismissal of the charges against him, Mr. Acosta Calderón continued to be imprisoned.

[FN47] Cfr. ruling of provisional discontinuance of December 3, 1993 issued by the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 179-180).

50(40) On July 22, 1994 the First Chamber of the Supreme Court of Quito revoked the ruling of provisional discontinuance of the cause and issued an order to commence the full trial against Mr. Acosta Calderón, ordering that the latter continue imprisoned, since he was considered the perpetrator of the crime he was charged with. [FN48] The Court considered that the existence of the crime had been demonstrated through the report of the customs military police, the alleged weighing of the drugs at the Hospital of Lake Agrio and a memorandum of the Health Authority of the Province of Napo. This Court also stated that Mr. Acosta Calderón's confession to the customs military police and the prosecutor were probable cause to presume his responsibility. The Judge Gonzalo Serrano Vega, in a dissenting opinion, stated that neither the existence of an infraction or the presumptions that established Mr. Acosta Calderón's responsibility had been proven. [FN49]

[FN48] Cfr. ruling of reversal of the provisional discontinuance and of opening of the full trial of July 22, 1994 issued by the First Chamber of the Supreme Court of Quito (dossier of annexes to the petition, annex 10, leaf 183).
[FN49] Cfr. dissenting Opinion of July 22, 1994 presented by Doctor Gonzalo Serrano Vega, Judge of the First Chamber of the Superior Court of Quito (dossier of annexes to the petition, annex 10, leaf 184).

50(41) On December 1, 1994 the Criminal Court of Napo set December 7, 1994 as the date for Mr. Acosta Calderón's prosecution hearing. [FN50]

[FN50] Cfr. ruling of December 1, 1994 issued by the Criminal Court of Napo (dossier of annexes to the petition, annex 10, leaf 190).

50(42) On December 7, 1994 the prosecution hearing was held; here the Prosecution accused Mr. Acosta Calderón of being the perpetrator of the crime defined and repressed in Article 33 subparagraph c) of the Law on the Control of the Trafficking of Narcotic and Psychotropic Substances, which stated that they will "repress with extraordinary imprisonment from twelve to sixteen years and a fine of fifty to one hundred Sucres all those that: [...] c) illegally deal the narcotics or psychotropic drugs mentioned in List No. 1 of the III Part of the Annex of the present Law. Illegal trafficking will be considered as all commercial transaction, possession or delivery of any title over narcotic medications or drugs made against the stipulations included in this law." The Judge also requested that the sentences established by the law for these effects be imposed. In this hearing Mr. Acosta Calderón requested that an acquittal be issued in his favor. [FN51]

[FN51] Cfr. transcript of the prosecuting hearing of Mr. Acosta Calderón held on December 7, 1994 before the Criminal Court of Napo (dossier of annexes to the petition, annex 10, leafs 191-192).

50(43) On December 8, 1994, the Criminal Court of Napo in Tena convicted Mr. Acosta Calderón under article 33 subparagraph c) of the Law on the Control of the Trafficking of Narcotics and Psychotropic Substances and sentenced him to nine years in prison at the Social Rehabilitation Center in Quito, and they ordered Mr. Acosta Calderón to pay a fine of 50,000 Sucres. [FN52] There is no evidence that this conviction was appealed.

[FN52] Cfr. conviction of December 8, 1994 issued by the Criminal Court of Napo in Tena against Mr. Acosta Calderón (dossier of annexes to the petition, annex 10, leafs 214-216).

50(44) On July 29, 1996, the Criminal Court of Napo ordered that Mr. Acosta Calderón be freed for having served his sentence given a reduction made to it for good behavior. [FN53]

[FN53] Cfr. ruling of release from prison of July 29, 1996 issued by the Criminal Court of Napo in Tena (dossier of annexes to the petition, annex 10, leaf 241); and official letter of July 18, 1996 addressed by the National Authority of Social Rehabilitation to the Head of the Social Rehabilitation Center of Ambato (dossier of annexes to the petition, annex 10, leaf 225).

50(45) Mr. Acosta Calderón remained under the State's custody for six years and eight months, including the five years and one month he remained in preventive detention.

Regarding the damages caused to Mr. Acosta Calderón

50(46) The delay in the proceedings against him caused in Mr. Acosta Calderón a feeling of frustration and injustice. [FN54]

[FN54] Cfr. preliminary examination statement of October 18, 1992 given by Mr. Acosta Calderón before the Criminal Judge of Lake Agrio (dossier of annexes to the petition, annex 10, leaf 147).

Regarding expenses and costs

50(47) Mr. Acosta Calderón was represented by CEDHU and be Messrs. César Duque and Alejandro Ponce Villacís before the courts of the Inter-American system of human rights protection, and they have incurred in expenses related to these procedures.

VIII. VIOLATION OF ARTICLE 7 OF THE AMERICAN CONVENTION (Right to Personal Liberty)

Arguments of the Commission

51. Regarding Article 7 of the American Convention the Commission stated that:

a) Mr. Acosta Calderón's arrest "was carried out in flagrante delicto, when the Customs Military Police found a substance that possibly had the appearance of a prohibited drug, in which case the Commission could not say that the arrest itself was arbitrary;"
b) the consideration of the evidence collected during the police investigation was done "with complete disregard to the procedural requirements of verification and constitution of the fact as material evidence of the crime, in complete detriment of constitutional guarantees and procedural laws, [which] implied an arbitrary detention;"
c) the detention "became arbitrary due to its continuation without presenting evidence that the alleged crime was actually perpetrated;"
d) "the first judicial action started with regard to his detention was adopted two years later, in October of 1991, despite that the Criminal Code requires that the person not remain in preventive detention more than six months;"
e) the alleged victim "remained under arbitrary imprisonment for more than five years [without] a judicial conviction that justified [his] detention. The excessive continuation of the arbitrary detention disavowed its exceptional nature and turned it into punishment;"
f) the alleged victim remained in preventive detention "while the State tried to find evidence to substantiate the cause against him." At no time did the State prove "the existence of exceptional circumstances that justified the order of preventive detention;" and
g) the unjustified and extended application of the preventive detention violates the principle of presumption of innocence.

Arguments of the representatives

52. Regarding Article 7 of the American Convention, the representatives considered the arguments of the Commission as their own and also indicated that:

a) the alleged victim was arrested without "an order of preventive detention or an arrest warrant issued by a judge. [...] The Police could not carry out an arrest based on a presumption, [...] they could not 'presume' that it was a substance subject to control, the Police's duty was to determine, in the same act, that the [alleged] substance [seized from the alleged victim] was illegal;"
b) not existing any evidence against Mr. Acosta Calderón "there could never be flagrancia[,] which would have been the legal cause for the arrest;"
c) "the domestic law does not establish that the mere possibility of a possible infraction be sufficient cause to carry out an arrest, on the contrary [,] the crime must be carried out at the moment of the arrest or immediately before it. All arrest that does not comply with this requirement is arbitrary;"
d) the legality of the arrest must be "legally sustainable for its entire duration. Thus, an arrest that was originally legal can become arbitrary, [...] without the initial legality being able to make up for the later arbitrariness. Likewise, an arrest with an arbitrary origin cannot be later corrected;"

e) "the arbitrariness of the arrest was not only present when it occurred, but on the contrary, the arbitrariness continued perpetuating itself, both due to the extensive and excessive preventive detention as well as the conviction imposed, despite the fact that the material existence of the infraction was never proven;"

f) Ecuador violated Article 7.4 of the Convention, "since the State summoned Mr. [...] Acosta Calderón with the court order to investigate an alleged crime on October 18, 1991, that is almost two years after the date of his arrest;"

g) there were "serious procedural inconsistencies, that put in doubt the reality of the facts that surrounded the arrest and later processing of Mr. Acosta Calderón" and that constituted a violation of Article 7(5) of the Convention. Mr. Acosta Calderón "was not taken immediately before the Criminal […] Judge of Lake Agrio and, on the contrary, there was an unusual handling [in the case file] of the hours and eventually even of the dates in order to make it appear that there was a prompt appearance before the Criminal Judge;"

h) the State violated Article 7(5) of the Convention by having wrongfully extended Mr. Acosta Calderón's preventive detention for more than five years. The preventive detention became, in this case, a "pre-conviction or [...] conviction without a prior trial;"

i) the present case was not complex or large, "the legal problem came down to determining the existence or non-existence of the criminal behavior of which he was accused, which should have been limited to establishing if the substance that lead to his arrest was or not the [alleged] drug. There was not a plurality of procedural subjects [...]. There weren't any evidentiary procedural difficulties [...] the case file only had ninety sheets for when the conviction was delivered;"

j) the alleged victim's behavior "was never directed to extending the process;"

k) the judicial authorities "simply limited themselves to deny the requests of liberty or reversal of the order of preventive detention [, in which] they even stated that there was not any material evidence of the infraction that could have served as a basis to keep him in preventive detention;"

l) there was not any legal basis for Mr. Acosta Calderón to continue under arrest after the Judge of Criminal Matters of Lake Agrio ordered the dismissal of the case. Mr. Acosta Calderón "was judged pursuant to the Law on the Control of the Trafficking of Narcotics [and Psychotropic Substances], which was the valid law at the time when the infraction was committed and the criminal procedures were begun." In the mentioned law "there was not any rule regarding the obligatory request of an opinion or any legal stipulation that prevented the liberty of a person whose liberty was ordered by the competent judge. The norm that is said to have prevented the granting of Mr. Acosta Calderón's freedom became valid after the criminal proceedings against him had begun. Therefore, the mentioned law could not have been applied to [the alleged victim] and even less so to restrict his right to personal liberty [through] an arbitrary […] preventive detention;" and

m) "the violation of any of the rights set forth in Art[icle] 7 [of the Convention] necessarily lead to the violation of the right included in Art[icle] 7(1) of the same, since it recognizes, in a general manner, the rights to personal liberty and security."

Considerations of the Court

53. Article 7 of the American Convention states that:

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

54. The second Principle of the United Nations' Body of Principles for the Protection of All People Submitted to Any Form of Detention or Imprisonment states that

the arrest, detention, or imprisonment will only be carried out in strict compliance of the law and by the competent officials or the people authorized to do so. [FN55]

[FN55] U.N., Body of Principles for the Protection of All People Submitted to Any Form of Detention or Imprisonment, Adopted by the General Assembly in its determination 43/173, of December 9, 1998, Principle 2.

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55. On its part, the fourth Principle of the same international instrument states that

[a]ll form of detention or imprisonment and all measures that affect the human rights of the people submitted to any form of detention or imprisonment must be ordered by a judge or other authority, or remain subject to the effective control of a judge or another authority. [FN56]

[FN56] U.N., Body of Principles for the Protection of All People Submitted to Any Form of Detention or Imprisonment, supra note 55, Principle 4.

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56. This Court has indicated that the protection of freedom safeguards "both the physical liberty of the individual and his personal safety, in a context where the absence of guarantees

may result in the subversion of the rule of law and deprive those detained of the minimum legal protection." [FN57]

[FN57] Cfr. Case of Tibi, supra note 6, para. 97; Case of the Gómez Paquiyauri Brothers. Judgment of July 8, 2004. Series C No. 110, para. 82; and Case of Maritza Urrutia. Judgment of November 27, 2003. Series C No. 103, para. 64.

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57. The Court has also stated, regarding subparagraphs 2 and 3 of Article 7 of the Convention, related to the prohibition of illegal detentions or arrests, that:

[a]ccording to the first of these regulatory provisions [Article 7(2) of the Convention], no one shall be deprived of his personal liberty except for reasons, cases or circumstances specifically established by law (material aspect) but, also, under strict conditions established beforehand by law (formal aspect). In the second provision [Article 7(2) of the Convention], we have a condition according to which no one shall be subject to arrest or imprisonment for causes or methods that – although qualified as legal – may be considered incompatible with respect for the fundamental rights of the individual, because they are, among other matters, unreasonable, unforeseeable or out of proportion. [FN58]

[FN58] Cfr. Case of Tibi, supra note 6, para. 98; Caso of the Gómez Paquiyauri Brothers, supra nota 57, para. 83; and Case of Maritza Urrutia, supra note 57, para. 65.

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58. The Ecuadorian Constitution in force at the time of the arrest of the alleged victim indicated in its Article 19(17)(h) that:

nobody would be imprisoned except in virtue of a written order from a competent authority, in the cases, for the time, and with the formalities established by law, except in the case of a crime detected in the act, in which case they may not be held without form of trial for more than 24 hours […]

59. On its part, the Code of Criminal Procedures of Ecuador of 1983, in force at the time of the facts, indicated in its Article 174 that:

[i]n case of a crime detected in the act any person could capture the perpetrator and take him before the Competent Judge or an Agent of the National Police or Judicial Police. In this last case, the Agent will immediately place the detainee in the custody of the Judge, along with the corresponding report.
[…]

60. Likewise, Article 175 of the same Code of Criminal Procedures indicated that the crime detected in the act (flagrante delicto) occurs when a crime:

[…] is committed in the presence of one or more people or when it is discovered immediately after it is committed, if the perpetrator is caught with weapons, instruments, or documents related to the crime that has just been committed.

61. Pursuant to Articles 19(17)(h) of the Political Constitution and 174 and 175 of the Code of Criminal Procedures of Ecuador in force at the time of the facts, a judicial order was required for the arrest of an individual, unless they were arrested for a crime committed in the act. As stated by the Commission and, contrary to that indicated by the representatives, Mr. Acosta Calderón's arrest was made under the supposition of flagrante delicto, as established in Ecuador's internal law. The customs military police made the arrest after finding Mr. Acosta Calderón with a substance that had the appearance of an illegal drug, thus the arrest itself was not illegal.

62. This Court recalls that, pursuant to the same internal legislation, the procedures regarding the verification of the elements of the crime applied should have been followed so they could justify the continuance of the causes for the arrest in alleged flagrancia and the initiation of a criminal process against the detainee. The Court will proceed to analyze the formal aspect of the arrest of the alleged victim in order to determine the existence or not of the alleged violations.

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63. The Code of Criminal Procedures of Ecuador of 1983, in force at the time of the facts, stated in its Article 170 that:

[in] order to guarantee the immediacy of the defendant with the process, payment of the compensation and damages to the victim, as well as the procedural costs, the Judge may order precautionary measures of personal or real nature.

64. Article 172 of the same legal code indicated that:

[w]ith the object of investigating the commission of a crime, before the corresponding criminal action is initiated, the competent Judge may order a person's arrest, either by personal knowledge or by oral or written reports of the National Police or Judicial Police agents or of any other person, that can establish proof of the crime and the corresponding presumptions of responsibility.

This arrest will be ordered through a ticket that must include the following requirements:

1. The reasons for the arrest;
2. the place and date on which it is issued; and
3. the Competent Judge's signature.

For the compliance of the arrest warrant this ticket will be handed over to a National Police or Judicial Police Agent.

65. Article 173 of the mentioned legal code stated that:

[t]he arrest referred to in Article [172] may not exceed forty eight hours and within this term if it is proven that the detainee has not participated in the crime under investigation, they will be released immediately. If the contrary occurs, the corresponding criminal procedures will be initiated and if it proceeds, a preventive detention order will be issued.

66. Article 177 of the same Ecuadorian Code indicated that a judge could order a preventive arrest when there was evidence that a crime that deserved an arrest had been committed. Article 177 of the mentioned Code stated:

[e] the judge may issue an order of preventive detention when he considers it necessary, as long as the following procedural data is present:
1. Evidence that leads to the assumption of the existence of a crime that deserves an imprisonment penalty; [and]
2. Evidence that leads to the assumption that the defendant is the perpetrator or an accomplice of the crime object of the process.

67. The Law on the Control of the Trafficking of Narcotics and Psychotropic Substances in force at the time of the arrest of the alleged victim, stated in its Article 9(i) that the National Department for the Control of Narcotics was in charge of:

[p]resenting expert reports in all the investigations and trials for the illegal sowing, possession, and trafficking of drugs prohibited by this Law, having to perform the laboratory tests and the corresponding analysis.

68. The mentioned Law on the Control of the Trafficking of Narcotics and Psychotropic Substances indicated in its Article 10, inter alia, that:

[a]ll narcotics and psychotropic drugs […] that have been seized and that make up the evidence in each case under investigation will be destroyed once the necessary tests have been recollected for the corresponding analysis and its weight and characteristics have been verified. This procedure must be, necessarily and obligatorily, carried out before the Head of the National Police or his representative, and the Provincial Health Authority. Only a sample of the drug destroyed will be kept, which along with the corresponding report will justify the existence of the body of the crime in the procedure […]."

69. It has been proven (supra paras. 50(7), 50(8), 50(11), 50(12), 50(15), 50(17), 50(19), 50(23), 50(36), 50(38) and 50(40)) that an expert report of the alleged cocaine paste seized from Mr. Acosta Calderón was not issued in the present case, in order to comply with the requirement of the internal legislation to justify "in the procedure the existence of the body of the crime," as established in Article 10 of the Law on the Control of the Trafficking of Narcotics and Psychotropic Substances.

70. Consequently, the State had the obligation, according to its internal legislation, to prove, through chemical analysis, that the substance in question was cocaine paste. Ecuador never performed those chemical analyses and also lost all the alleged cocaine paste (supra paras.

50(36), 50(38) and 50(40)). Despite the fact that the State never presented this report and, therefore, the existence of the substance whose possession was imputed to Mr. Acosta Calderón could not be proven, he remained imprisoned for more than five years. The above constituted an arbitrary arrest in his detriment.

71. Based on the above, this Court considers that the State violated Mr. Acosta Calderon's right to not be submitted to arbitrary arrests or imprisonments, recognized in Article 7(3) of the American Convention, in connection with Article 1(1) of the same.
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72. The representatives of the alleged victim alleged that the State violated Article 7(4) of the Convention because at the moment of his arrest Mr. Acosta Calderón was not informed of the reasons for it, nor was he notified of the charge or charges made against him, "since the State summoned Mr. […] Acosta Calderón with the court order for the investigation of the crime on October 18, 1991, that is, nearly two years after the date of his arrest" (supra para. 52(f)). The Commission did not allege the violation of subparagraph 4 of the mentioned Article.

73. The Court did not consider that there was a violation of Article 7(4) of the Convention since the arrest of the alleged victim was done based on the supposition that it was a crime detected in the act. Under said circumstance it assumed that Mr. Acosta Calderón knew the reason for his arrest was the alleged drug trafficking.

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74. The Court considers that it is essential to point out that preventive detention is the most severe measure that can be applied to the persona accused of a crime, reason for which its application must have an exceptional nature, since it is limited by the principles of legality, the presumption of innocence, need, and proportionality, all of which are strictly necessary in a democratic society. [FN59]

[FN59] Cfr. Case of Tibi, supra note 6, para. 106; and Case of "Children's Rehabilitation". Judgment of September 2, 2004. Series C No. 112, para. 228.
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75. The Tribunal also considers that preventive detention is a precautionary measure, not a punitive one. [FN60] The arbitrary extension of a preventive detention turns it into a punishment when it is inflicted without having proven the criminal responsibility of the person to whom this measure is applied.

[FN60] Cfr. Case of Tibi, supra note 6, para. 180; and Case of Suárez Rosero. Judgment of November 12, 1997. Series C No. 35, para. 77.
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76. Article 7(5) of the Convention states that any person detained is entitled to have a judicial authority revise said arrest, without delay, as a suitable means of control in order to avoid arbitrary and illegal arrests. The prompt judicial control seeks to avoid arbitrary or illegal arrests, taking into account that, in a Constitutional State, a judge must guarantee the rights of the person detained, authorize the adoption of precautionary or coercive measures, when these are strictly necessary and, in general, ensure that the accused receive a treatment consequent with the presumption of innocence. [FN61]

[FN61] Cfr. Case of Tibi, supra note 6, para. 114; Case of the Gómez Paquiyauri Brothers, supra note 57, para. 96; and Case of Maritza Urrutia, supra note 57, para. 66.

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77. Both the Inter-American Court and the European Court of Human Rights have accorded special importance to the prompt judicial supervision of detentions. A person deprived of his freedom without any type of judicial supervision must be released or immediately brought before a judge. [FN62] The European Court of Human Rights has stated that although the word "immediately" should be interpreted according to the special characteristics of each case, no situation, however serious, grants the authorities the power to unduly prolong the period of detention, because this would violate Article 5(3) of the European Convention. [FN63]

[FN62] Cfr. Case of Tibi, supra note 6, para. 115; Case of the Gómez Paquiyauri Brothers, supra note 57, para. 95; and Case of Maritza Urrutia, supra note 57, para. 73; and, in the same sense, Eur. Court H.R., Brogan and Others, judgment of 29 November 1988, Series A no. 145-B, pars. 58-59, 61-62; and Kurt v. Turkey, No. 24276/94, pars. 122, 123 and124, ECHR 1998-III.
[FN63] Cfr. Eur. Court H.R., Brogan and Others. Judgment of 29 November 1988, Series A no. 145-B, pars. 58-59, 61-62; see also Case of Tibi, supra note 6, para. 115; Case of Maritza Urrutia, supra note 57, para. 73; and Case of Juan Humberto Sánchez, supra note 6, para. 84.

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78. As pointed out in other cases, this Tribunal considers that it is necessary to make some points regarding this subject. [FN64] In first place, the terms of the guarantee established in Article 7(5) of the Convention are clear in what refers to the fact that the person arrested must be taken before a competent judge or judicial authority, pursuant to the principles of judicial control and procedural immediacy. This is essential for the protection of the right to personal liberty and to grant protection to other rights, such as life and personal integrity. The simple awareness of a judge that a person is detained does not satisfy this guarantee, since the detainee must appear personally and give his statement before the competent judge or authority.

[FN64] Cfr. Case of Tibi, supra note 6, para. 118.

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79. In the case under analysis, Mr. Acosta Calderón, at the time of his arrest only offered his statement before the Police and a Prosecutor, without the presence of his defense counsel. There

is no evidence in the case file that Mr. Acosta Calderón gave any statement before a judge until almost two years after his arrest. In this sense, on October 8, 1991 the same Tribunal of Lake Agrio expressed that "within the process there was not [any preliminary examination statement from the alleged victim], presuming that the clerk of the court of that moment had not included said diligence in the case file," reason for which it was received on October 18, 1991 (supra paras. 50(23), 50(25), and 50(27)).

80. In second place, a "judge or other official authorized by law to exercise judicial functions" must comply with the requirements established in the first paragraph of Article 8 of the Convention. [FN65] Under the circumstances of the present case, the Court understands that the Prosecutor from the Public Prosecution Service that received the pre-procedural statement from Mr. Acosta Calderón did not have the attributes to be considered an "officer authorized to carry out judicial functions," in the sense of Article 7(5) of the Convention, since the Political Constitution of Ecuador itself, in force at that time, stated in its Article 98 which were the bodies that had the power to carry out judicial function and it did not grant that competence to prosecutors. Therefore, the prosecutor that acted in this case did not have sufficient powers to guarantee the alleged victim's right to freedom and personal integrity.

[FN65] Cfr. Case of Tibi, supra note 6, para. 119; and Case of Cantoral Benavides. Judgment of August 18, 2000. Series C No. 69, paras. 74 y 75.

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81. Because of this, the Court considers that the State violated, in detriment of Mr. Acosta Calderón the right to be taken, without delay, before a judge or other official authorized by law to exercise judicial power, as required by Article 7(5) of the Convention in relation to Article 1(1) of the same.

82. On the other hand, Article 7(5) of the American Convention states that the detainee "shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings." Since the arrest of Mr. Acosta Calderón turned arbitrary, the Tribunal does not consider it necessary to analyze if the time that went by between his arrest and the definitive judgment surpassed the limits of what was reasonable.

83. The Commission's argument that Mr. Acosta Calderón's preventive detention violated the principle of presumption of innocence (supra para. 51(g)) will be discussed when analyzing Article 8(2) (infra pars. 109 through 115).

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84. As a result, the Court concluded that the State violated Articles 7(1), 7(3), and 7(5) of the American Convention, in conjunction with Article 1(1) of the same in detriment of Mr. Acosta Calderón.

IX. Violation of Articles 7.6 and 25 of the American Convention (Right to Personal Liberty and Judicial Protection)

85. Despite that neither the Commission nor the representatives expressly stated a violation to Article 7(6) of the Convention, this does not prevent this Court from applying it, since this precept is one of the basis for the protection of the right to personal liberty by a judicial body and it would be applicable in virtue of a general Legal principle, iura novit curia, which international jurisprudence has recently used repeatedly in the sense that the judge has the power and even the obligation to apply the judicial appropriate stipulations in a cause, even when the parties have not invoked them expressly. [FN66]

[FN66] Cfr. Case of the "Mapiripán Masacre". Preliminary Objections and Acknowledgment of State Responsibility. Judgment of March 7, 2005. Series C No. 122, para. 28; Case of Tibi, supra note 6, para. 87; and Case of "Children's Rehabilitation" Case, supra note 59, para. 126.

ARGUMENTS OF THE COMMISSION

86. Regarding Article 25 of the Convention, the Commission indicated that:

a) the preventive detention or Mr. Acosta Calderón was not judicially revised for more than five years. "Article 458 of the Ecuadorian Code of Criminal [Procedures] states that every time a detainee appears before a competent judge to request his release, the judge must immediately order the appearance of the [detainee] and, after evaluating the necessary information, he must issue a ruling regarding the request within the following 48 hours. Mr. Acosta Calderón repeatedly requested the reversal of his arrest warrant and his release, since the tribunal had not been able to substantiate the crime. Despite these requests, the criminal judges kept looking for the lost evidence and kept him in preventive detention;"

b) the guarantee of access to a simple and effective recourse established in the Convention does not materialize itself through the mere formal existence of adequate recourses to obtain a release order. These remedies must be effective, since their purpose is to obtain a decision regarding the legality of the arrest or detention without delay;

c) in the case of Suarez Rosero, [FN67] the Court concluded that Ecuador had violated Articles 7 and 8 of the Convention and ordered that the necessary measures be adopted in order to guarantee that these violations never occur again in their jurisdiction. However, the present case refers specifically to the reiteration of these same violations; and

d) the State is responsible for the violation of Mr. Acosta Calderón's right to judicial protection, stated in Article 25 of the Convention, and for the non-compliance of the obligations imposed by Article 2 of the same instrument, since they did not adopt the measures necessary to avoid the reiteration of these violations, all in connection with Article 1(1) of the Convention.

[FN67] The case of Suarez Rosero was decided by the Tribunal on November 12, 1997, that is, more than a year after the release of Mr. Acosta Calderón.

ARGUMENTS OF THE REPRESENTATIVES

87. Regarding Article 25 of the Convention the representatives adopted the arguments presented by the Commission as their own and also stated that:

a) Mr. Acosta Calderón on different opportunities presented requests in which he asked that the order of preventive detention issued against him by the Judge of Criminal Matters of Lake Agrio be revoked, however, this authority did not issue a ruling regarding these requests or he simply denied the appeal for reversal. Second, […] the denials lacked an explanation. Therefore, they affirmed that the State did not grant judicial protection to the rights [of Mr] Acosta Calderón, in the terms established by [Article] 25 and 25(2)(b);"

b) "the remedies must be adequate and effective, in such a manner that they are capable of producing the effect for which they were created and […] they protect the rights that are allegedly being violated." In the present case, "the reversal as a horizontal appeal was adequate, but obviously not effective;"

c) "even when the Code of Criminal Procedures of 1983, in force at the time in which Mr. Acosta Calderón was prosecuted, included the rule of Art[icle] 458 that acknowledged the judicial habeas corpus remedy (or legal protection of freedom as it was called), it is also true that the judicial authorities systematically denied the granting of remedies, or there mere processing, […] which along with the existing systematic delay lead to the loss of all efficiency of the recourse;"

d) in Ecuador at the time when the facts occurred, "there was not an appeal for legal protection, different to the habeas corpus remedy, since the appeal for legal protection was introduced in Ecuador through the constitutional amendments of January of 1996." "Under these circumstances Mr. […] Acosta Calderón could not present appeals for his legal protection to protect himself from the different violations due to actions and omissions that occurred during the processing of the preliminary procedures of the trial followed against him, as well as in the intermediate stage of the process;"

e) according to the Code of Criminal Procedures of 1983, "no act was appealable even when it violated human rights, unless the law established that possibility," which violates Article 25(2)(b) of the Convention; and

f) even "with the constitutional amendments of 1996 and 1998, the exercise of the guarantee of legal protection is not regulated in accordance with the rule of [Article] 25 of the Convention, since it expressly prohibits that appeals for legal protection be presented against judicial orders".

CONSIDERATIONS OF THE COURT

88. Article 7(6) of the American Conventions states that:

[a]nyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

89. Article 25 of the same Convention states that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
b) to develop the possibilities of judicial remedy; and
c) to ensure that the competent authorities shall enforce such remedies when granted.

90. The Court has considered that "the proceedings of habeas corpus and legal protection are judicial guarantees essential for the protection of several rights whose suspension is reserved by Article 27(2) [of the Convention] and they also help to preserve legality in a democratic society." [FN68]

[FN68] Habeas Corpus in Emergency Situations. Series A. Advisory Opinion OC-8/87 of January 30, 1987, para. 42; and cfr. Case of Tibi, supra, note 6, para. 128; Case of the Gómez Paquiyauri Brothers, supra note 57, para. 97; Case of Durand and Ugarte. Judgment of August 16, 2000. Series C No. 68, para. 106; and Judicial Guarantees in States of Emergency (arts. 27.2, 25, and 8 American Convention on Human Rights). Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9. para. 33.

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91. These guarantees, which seek to avoid the arbitrariness and illegality of the arrests carried out by the State, are also reinforced by its condition of guarantor, regarding the rights of the detainees, in virtue of which, as has been indicated by the Court, the State "has both the responsibility of guaranteeing the rights of the individuals under their custody as well as providing the information and evidence related to what happens to the detainee." [FN69]

[FN69] Cfr. Case of Tibi, supra note 6, para. 129; Case of the Gómez Paquiyauri Brothers, supra note 57, para. 98; and Case of Bulacio. Judgment of September 18, 2003. Series C No. 100, para. 138.

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92. This Tribunal has established that the protection of the person before the arbitrary exercise of public power is the main objective of international human rights protection. [FN70] In this sense, the non-existence of effective internal recourses makes a person defenseless. Article 25(1) of the Convention establishes, in ample terms, the obligation of the States to offer all people submitted to its jurisdiction an effective judicial recourse against acts that violate their fundamental rights. [FN71]

[FN70] Cfr. Case of Tibi, supra note 6, para. 130; Case of "Children's Rehabilitation" Case, supra note 59, para. 239; and Case of Baena Ricardo et al. Competence. Judgment of November 28, 2003. Series C No. 104, para. 78.
[FN71] Cfr. Case of Tibi, supra note 6, para. 130; Case of 19 Merchants, supra note 6, para. 194; and Case of Maritza Urrutia, supra note 57, para. 116.

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93. Under this perspective, it has been indicated that in order for the State to comply with that stated in the aforementioned Article 25(1) of the Convention it is not enough for the recourses to exist formally, but it is necessary that they be effective, [FN72] that is, the person must be given a real opportunity to present a simple and prompt recourse that allows them to obtain, in their case, the judicial protection required. This Court has repeatedly stated that the existence of these guarantees "represents one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society in the sense set forth in the Convention." [FN73]

[FN72] Cfr. Case of Tibi, supra note 6, para. 131; Case of Maritza Urrutia, supra note 57, para. 117; Case of Juan Humberto Sánchez. Judgment of June 7, 2003. Series C No. 99, para. 121.
[FN73] Cfr. Case of Tibi, supra note 6, para. 131; Case of Maritza Urrutia, supra note 57, para. 117; Case of Juan Humberto Sánchez. Judgment of June 7, 2003. Series C No. 99, para. 121.

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94. The Political Constitution of Ecuador, codified in 1984, in force at the time of Mr. Acosta Calderón's arrest, in its Article 19(17)(j) includes the following stipulation:

everybody who believes to be illegally arrested may avail oneself of the habeas corpus. This right will be exercised on their own behalf or through a third party, without the need of a written mandate before the Mayor or President of the Council under which jurisdiction they are or their equal. The municipal authority will immediately order that the petitioner be taken before them and that the arrest warrant be presented. Their mandate will be obeyed without observations or excuses by those in charge of the social rehabilitation center or prison.
[…]

95. Article 458 of the Code of Criminal Procedures stated that:

[a]ny defendant that is arrested with infractions to the stipulations included in the [mentioned] Code, may turn to the Superior Judge of whoever has ordered his arrest in order to demand their freedom.
[…]
The request will be made in writing.
The Judge that must hear the request will order the presentation of the detainee immediately after he receives said request and will hear their exposition, spreading it upon a record that will be signed by the Judge, the Secretary, and the complainant, or by a witness in his place, if they do not know how to sign. With the mentioned exposition, the Judge will request all data considered

necessary to form a criteria and ensure the legality of his decision, and within forty eight hours will issue a judgment with what he considers legal […]
[…]

96. Ecuador kept Mr. Acosta Calderón in preventive detention for more than five years, without presenting at any time during the process the corresponding report, which would procedurally justify the existence of the substance whose property was attributed to Mr. Acosta Calderón and required by internal legislation in order to be able to convict him (supra paras. 50(8), 50(11), 50(12), 50(15), 50(16), 50(17), 50(19), 50(20), 50(23), 50(31), 50(32), 50(36), 50(38), 50(39), 50(40), and 67). In view of this situation, Mr. Acosta Calderon presented several appeals for legal protection of his freedom before the corresponding judicial authorities requesting the reversal of his arrest warrant and his release (supra paras. 50(14), 50(21), 50(22), 50(25), 50(26), 50(30), 50(32), and 50(34)). However, despite the fact that they could not find the alleged drug that was lost, the State did not grant Mr. Acosta Calderón his freedom, either conditional or of any other nature (supra para. 50(40)).

97. The Tribunal warns that Article 7(6) of the Convention demands that recourses like the present must be decided by a competent judge or tribunal without delay. In this case, this prerequisite was not fulfilled since the recourses presented by the alleged victim, inter alia, on October 8, 1991, October 18, 1991, January 24, 1992, March 27, 1992, and July 1, 1993 (supra paras. 50(21), 50(22), 50(25), 50(26), 50(30), and 50(34)) were not ruled on after their presentation. In the recourses in which the State decided on the repeated requests of Mr. Acosta Calderón, such as the request of July 27, 1990 (supra para. 50(14)), Ecuador did not do so within the 48-hour period established in Article 458 of the Code of Criminal Procedures of 1973, since the decision was issued on September 13, 1990, 44 days later (supra para. 50(16)). That is, even when the recourse of legal protection of freedom does exist formally, it was not effective in the present case, since it was not fulfilled with the objective of obtaining, without delay, a decision regarding the legality of the arrest or detention of the alleged victim.

98. Regarding the allegations presented by the representatives in relation with the constitutional amendments of 1996 and 1998, with reference to the exercise of the guarantee of legal protection (supra para. 87(f)), the Tribunal will not issue a decision since these amendments are not within the conditions of the present case.

99. Based on the aforementioned considerations, the Court considers that the requests of the alleged victim for legal protection to his freedom did not receive a treatment pursuant to the standards of access to justice included in the American Convention (supra paras. 50(21), 50(22), 50(25), 50(26), 50(30), and 50(34)). The process was not carried out in a diligent manner that would permit its effectiveness to determine the legality of Mr. Acosta Calderón's arrest.

100. Due to all the above, the Court concludes that the State violated in detriment of Mr. Acosta Calderon the right to resort to a competent judge or tribunal, so that they may decide, without delay, on the legality of his arrest or detention and order his release if the arrest or detention were illegal, as well as the right to judicial protection, enshrined in Articles 7(6) and 25 of the American Convention, in relation with Article 1(1) of the same.

X. Violation of Article 8 of the American Convention (Right to a Fair Trial)

ARGUMENTS OF THE COMMISSION

101. Regarding Article 8 of the Convention the Commission stated that:

a) the Ecuadorian authorities did not respect the terms established by law for the processing of this case. The internal regulations state that the indictment, which is the first stage of the criminal process, cannot last more than sixty days, and that the intermediate stage cannot surpass twenty one days. The legislation also establishes that the opinion must be requested within a maximum of fifteen days, and that the full trial may not last more than fourteen. "[T]he criminal process in its totality shouldn't have lasted more than 100 days, however in the case of Mr. Acosta [Calderón] it took five years and a month;"
b) due to the delay caused by the reiterated intents of the tribunals to obtain incriminating evidence and, finally, of the impossibility to present physical evidence of the crime, Mr. Acosta Calderon remained in preventive detention during five years and one month;
c) the case in question was not complex "especially because the evidence that arises from the case file […] is little and it goes back to the date of the arrest." The case file included documents that had no relationship whatsoever with the case in question. Mr. Acosta Calderón's statement was lost and had to be received again two years later. Likewise, there is no evidence that the alleged victim carried out activities that delayed the actions. On the contrary, "the procedural activities carried out by Mr. Acosta [Calderón] looked to accelerating the process by urging the judicial authorities to reach a conclusion." Finally, the loss of the alleged drug is attributable to the State, reason for which the delay in concluding the process results unreasonable and a violation of Article 8(1) of the Convention in connection with Article 1(1) of the same;
d) the State violated Article 8(2)(d) and (e) of the Convention, in connection with Article 1(1) of the same instrument, by not granting Mr. Acosta Calderon access to a defense counsel when being questioned by the police. Pursuant to Ecuadorian legislation the statement made by the alleged victim without the presence of a defense counsel is inadmissible in any legal criminal process. In this case, "the [mentioned] statement was used to convict [the alleged victim] to nine years in prison;"
e) the State did not observe the principle of presumption of innocence included in Article 8(2) of the Convention since the High Court "which is legally obliged to check all the dismissals of the criminal courts, […] presumed the guilt of [the alleged victim] and ignored numerous norms of the Ecuadorian legislation as per which the confession [given by Mr. Acosta Calderón before the police was] flawed and the process was legally unsustainable;"
f) "not having presented any physical evidence in the process Mr. Acosta [Calderón] was denied the possibility to contest the legality of the substance he was allegedly carrying." "The impossibility faced by Mr. Acosta [Calderón] to defend himself or dispute the charges of which the High Court presumed his responsibility, in the absence of all contradicting process, violated his right to the presumption of innocence since his guilt had not been proven by law;" and
g) the fact that the State did not inform Mr. Acosta Calderón of his right to contact the Colombian Consulate to receive assistance, once he was arrested, and thus deprive him of his rights enshrined in Article 36(1)(b) of the Vienna Convention on Consular Relations, constitutes

a violation of Article 8 of the American Convention, in what refers to the right of the alleged victim to a due process in criminal actions.

ARGUMENTS OF THE REPRESENTATIVES

102. Regarding Article 8 of the American Convention, the representatives adopted the arguments presented by the Commission as their own and also indicated that:

a) the five year delay in the processing of the case against Mr. Acosta Calderón is unreasonable and therefore violates the Convention. The criminal process, pursuant to that stated in the Code of Criminal Procedures of 1983 should not exceed 100 days, however, in Mr. Acosta Calderón's case it lasted more than five years without the existence of reasons that could justify this delay;
b) "the right to be heard by a judge implies that the judicial authority deal with and issue a ruling regarding the requests made by the procedural part." This ruling must indicate the reasons why the request has been considered in order or out of order. Mr. Acosta Calderón presented, on different occasions, several briefs requesting, among other things, the reversal of the order of preventive detention issued against him. However, neither the Judge of Lake Agrio nor the Superior Court of Quito issued a ruling in this sense, thus violating the right to be heard by a judge, acknowledged in Article 8(1) of the Convention.
c) the State violated Mr. Acosta Calderón's right to the presumption of innocence. According to the national legislation, "a verification conducted by law" of the existence of the infraction was necessary. The domestic legislation required that said verification be done through the obligatory report of the National Department for the Control of Narcotics. The mentioned report, if necessary, would prove the existence of any narcotic and would include a sample of the drug that was destroyed;
d) Mr. Acosta Calderón "was officially summoned with the court order to investigate the alleged crime on October 18, 1991, that is[,] almost two years after his arrest. Therefore, the State did not fulfill its obligation to give 'prior notification in detail to the accused of the charges against him', pursuant to Art[icle] 8(2)(b) of the Convention. Likewise, there is no procedural evidence that Mr. Acosta Calderon or his defense counsel were notified with the order to the full trial, which was issued by the First Chamber of the Superior Court of Quito;"
e) the State did not comply with its obligation to provide Mr. Acosta Calderon with a defense counsel during the process of request of the opinion of the First Chamber of the Superior Court of Quito. In the same manner, Mr. Acosta Calderón did not have a defense counsel present with him during the initial interrogation before the police, nor was one appointed to him. The evidence used to convict Mr. Acosta Calderon was performed without a real and effective guarantee of his right to a defense. The above is a violation to Articles 8(2)(b), (c), (d), and (e) of the Convention; and
f) Mr. Acosta Calderon was not informed of his right to be assisted by consulate officials from his country of origin or nationality.

CONSIDERATIONS OF THE COURT

a) Regarding the principle of a reasonable time-period for the criminal process against Mr. Acosta Calderon.

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

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

104. The reasonability of the time period referred to in this precept must be analyzed with regard to the total duration of the process, from the first procedural act up to the issuing of a definitive judgment, including the recourses that could be presented. [FN74] In this sense, the Court has ruled that, in criminal matters, the term starts on the date of the arrest of the individual. [FN75] Mr. Acosta Calderón's arrest occurred on November 15, 1989. Therefore, the time period must be counted as of that moment. Mr. Acosta Calderón was convicted on December 8, 1994 (supra para. 50(43)).

[FN74] Cfr. Case of Tibi, supra note 6, para. 168; and Case of Suárez Rosero, supra note 60, para. 70.

[FN75] Cfr. Case of Tibi, supra note 6, para. 168; Case of Suárez Rosero, supra note 60, para. 70; and in the same sense, Henning v. Austria, No. 41444/98, para. 32, ECHR 2003-I; and Reinhardt and Slimane-Kaid v. France, 23043/93, para. 93, ECHR 1998-II.

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105. To examine the reasonability of this process pursuant to the terms of Article 8(1) of the Convention, the Court takes into account three elements: a) the complexity of the matter, b) the procedural activity of the interested party, and c) the behavior of the judicial authorities. [FN76]

[FN76] Cfr. Case of the Serrano Cruz Sisters, supra note 2, para. 67; Case of Tibi, supra note 6, para. 175; and Case of Ricardo Canese. Judgment of August 31, 2004. Series C No. 111, para. 141.

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106. The case was not complex. There was not a plurality of procedural subjects. From the case file we cannot infer that Mr. Acosta Calderón acted in any way to delay the cause. From the evidence in this case we can conclude that the delay of more than five years in the processing of the case was due to the judicial authority's behavior. The case file included documents that had no relationship whatsoever with the process, which demonstrates a lack of care. It seems that Mr. Acosta Calderón's statement, if there ever was one, was lost and was taken two years after the court order for the investigation of the alleged crime on November 15, 1989. What is even more serious is that the procedure of proving if the substance that led to the arrest and processing of Mr. Acosta Calderón was or wasn't a controlled substance, essential to constitute the crime, was never carried out, even though it was first ordered by the Judge on November 29, 1989, because the substance was not found by the corresponding authority (supra paras. 50(7) and 50(36))

107. It is also important to point out that a criminal process, pursuant to that established in the Code of Criminal Procedures of 1983, which was applicable to the alleged victim, should not exceed one hundred days. However, in the case of Mr. Acosta Calderón, it lasted more than five years without any justification for such a delay.

108. In view of the foregoing, the Court concludes that the State violated, to the detriment of Mr. Acosta Calderón, the right to be tried within a reasonable time, as established in Article 8(1) of the American Convention.

b) Regarding the right to be presumed innocent

109. Article 8(2) of the Convention provides that:

Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law

110. Likewise, the 36th principle of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment of the United Nations, states that:

[a] detained person suspected of or charged with a criminal offense shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense. [FN77]
[…]

[FN77] U.N., Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, supra note 55, Principle 36.
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111. This Court has stated that the principle of presumption of innocence constitutes a foundation for judicial guarantees. The obligation of the State to not restrict the detainee's liberty beyond the limits strictly necessary to ensure that he will not impede the efficient development of the investigations and that he will not evade justice derives from that established in Article 8(2) of the Convention. In this sense, the preventive detention is a cautionary measure and not a punitive one. This concept is laid down in multiple instruments of international human rights law. The International Convenant on Civil and Political Rights provides that preventive detention should not be the normal practice in relation to persons who are to stand trial (Article 9(3)). It would constitute a violation to the Convention to keep a person whose criminal responsibility has not been established detained for a disproportionate period of time. This would be tantamount to anticipating a sentence, which is at odds with universally recognized general principles of law. [FN78]

[FN78] Cfr. Case of Tibi, supra note 6, para. 180; and Case of Suárez Rosero, supra note 60, para. 77.
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112. It has been proven that Mr. Acosta Calderón remained imprisoned from November 15, 1989 to December 8, 1994 (supra paras. 50(2) and 50(43)). This detention was arbitrary and excessive (supra paras. 70 and 81), since there weren't any reasons that could justify Mr. Acosta Calderón's preventive detention for more than five years.

113. The Law on the Control of the Trafficking of Narcotics and Psychotropic Substances indicated in its Articles 9 and 10 that any infraction to this law had to be proven through an obligatory report from the National Department for the Control of Narcotics (supra paras. 67 and 68). This report, if it were the case, would prove the existence of any narcotic and would include a sample of the drug that was destroyed. The State never complied with the proceedings established in the national legislation in relation to the report of reference.

114. Despite that it was not proven by technical or scientific means, as demanded by law, that the substances which were allegedly in Mr. Acosta Calderón's possession were narcotics, the courts continued with the process against the accused based on the statement made by the police (supra para. 50(2)) who performed the arrest. This proves that they tried to incriminate Mr. Acosta Calderón without enough evidence to do so, presuming that he was guilty and violating the principle of presumption of innocence.

115. For the above reasons, the Court declares that the State violated in detriment of Mr. Acosta Calderón the right to the presumption of innocence, recognized in Article 8(2) of the American Convention, in connection with Article 1(1) of the same instrument.

c) Regarding the right of the accused to receive prior notification in detail of the charges against him

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

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

117. In this sense, in General Observation No. 13 regarding the "Equality before the Courts and the right of every person to be heard publicly by a competent tribunal established by law (Art. 14)", the Human Rights Committee of the United Nations stated that:

the right to be informed "without delay" of the charges requires that the information be provided in the form described as soon as the accusation is formulated by a competent authority, In the Committee's opinion, this right must appear when, during the course of an investigation, a tribunal or an authority of the Office of the Public Prosecutor decides to adopt procedural measures against a person suspicious of having committed a crime or designated publicly as such. The specific demands of section a) of paragraph 3 may be satisfied by formulating the accusation either verbally or in writing, as long as they include both the law and the alleged facts on which the information is based.

118. Article 8(2)(b) of the American Convention orders that the competent judicial authorities notify the accused of the charges presented against him, their reasons, and the crimes or offenses he is charged with, prior to the execution of the process. [FN79] In order for this right to fully operate and satisfy its inherent purposes, it is necessary that this notification be given before the accused offers his first statement. Without this guarantee, the latter's right to duly prepare his defense would be infringed.

[FN79] Cfr. Case of Tibi, supra note 6, para. 187; and Eur. Court HR. Case of Péllissier and Sassi v France. Judgment of 25 March 1999, para. 51.

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119. In the sub judice case it was proven that the alleged victim did not have opportune knowledge of the accusation presented against him, since the legislation that included in the elements of the crime applicable to his case was not mentioned in the court order to investigate the alleged crime (supra para. 50(5)). Therefore, the Tribunal considers that Mr. Acosta Calderón was not notified of the charges presented against him, since the legislation that was allegedly violated was not specified in the court order to investigate the alleged crime of November 15, 1989, issued by the Tribunal of Lake Agrio, instead it simply specified the factual basis for the arrest.

120. Consequently, this Tribunal states that the State violated in detriment of Mr. Acosta Calderón the right to receive a prior notification in detail of the accusation presented against him, enshrined in Article 8(2)(b) of the American Convention, in connection with Article 1(1) of the same.

d) Regarding the right of defense

121. Articles 8(2)(d) and 8(2)(e) of the Convention establish that:

[d]uring the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[…]

d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;

[…]

122. The seventeenth Principle of the United Nations' Body of Principle for the Protection of All Persons Under Any Form of Detention or Imprisonment declares that:

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.

2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay [FN80].

[FN80] U.N., Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, supra note 55, Principle 17.

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123. Ecuador's Political Constitution in force at the moment in which the facts occurred established that "any person brought to trial for a criminal infraction would have the right to a defense counsel" (Article 19(17)(e)).

124. Despite the previously mentioned constitutional rule, Mr. Acosta Calderón did not have a defense counsel present when answering his initial questioning before the police (supra para. 50(3)).

125. At the same time, the Court observes that Mr. Acosta Calderón, as a foreign detainee, was not notified of his right to communicate with a consular official from his country with the objective of offering the assistance recognized in Article 36(1)(b) of the Vienna Convention on Consular Relationships. The foreign detainee, when arrested and before offering his first statement before the authorities, must be notified of his right to establish contact with a third party, for example, a family member, a lawyer, or a consular official, as corresponds, to inform them that he is in the State's custody. [FN81] In the case of the consular notice, the Court has stated that the consul may assist the detainee in different acts of defense, such as the granting or hiring of legal representation, the obtainment of evidence in the country of origin, the verification of the conditions in which the legal assistance is exercised, and the observation of the defendant's situation while he is imprisoned. [FN82] In this sense, the Court has also affirmed that the individual right to request consular assistance from his country of nationality must be recognized and considered within the framework of the minimum guarantees to offer foreigners the opportunity to adequately prepare their defense and have a fair trial. [FN83] The non-observance of this right affected Mr. Acosta Calderón's right to defense, which forms part of the guarantees of the due legal process.

[FN81] Cfr. Case of Tibi, supra note 6, para. 112; Case of the Gómez Paquiyauri Brothers, supra note 57, para. 93; and Case of Bulacio, supra note 69, para. 130; and The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 106.

[FN82] Cfr. Case of Tibi, supra note 6, para. 112; Bulacio Case, supra note 69, para. 130; The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. supra note 81, para. 86; and U.N., Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, supra note 55, Principles 13 and 16.

[FN83] Cfr. Case of Tibi, supra note 6, para. 195; and The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law. supra note 81, para. 122.

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126. From the aforementioned, the Court concludes that the State violated, in detriment of Mr. Acosta Calderón the right to a defense, established in Articles 8(2)(d) and 8(2)(e) of the American Convention, in connection with Article 1(1) of the same.

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127. Due to all of the above, this Court considers that the State violated Article 8(1), 8(2), 8(2)(b), 8(2)(d), and 8(2)(e) of the American Convention, in connection with Article 1(1) of the same, in detriment of Mr. Acosta Calderón.

XI. Article 2 of the American Convention (Domestic Legal Effects)

ARGUMENTS OF THE COMMISSION

128. Regarding Article 2 of the Convention the Commission alleged that:

a) the State violated Articles 24 and 2 of the Convention due to the discriminatory treatment against Mr. Acosta Calderón as a person accused of violations to the law on narcotics; and
b) once the charges presented against Mr. Acosta Calderón were dismissed in December of 1993, he could not recover his freedom because Article 121 of the Law on Narcotic and Psychotropic Substances did not permit the release of a person after the dismissal of the charges "until the report is confirmed by the Superior Tribunal within the framework of an obligatory 'request of opinion'. Also, the fact that, after the conviction, he was not freed under his word due to a legal prohibition, constituted a discriminatory treatment, since the other members of the prison population, detained for crimes not classified in the drug law, could be freed immediately after the dismissal of the accusations."

ARGUMENTS OF THE REPRESENTATIVES

129. Regarding Article 2 of the Convention the representatives adopted the arguments presented by the Commission as their own and also indicated that:

a) the order of the Judge to immediately release the alleged victim derived from the dismissal of the accusations presented against him on December 3, 1993, "was not executed, since Article 121 of the Law on Narcotic and Psychotropic Substances stated that the release order could not be complied with until the prior proeeding of request of the opinion of the [Superior Court] is fulfilled. This provision was applied only and exclusively to the persons processed for crimes related to drug trafficking;"
b) "the judiciary branch and the State through the Judge of Criminal Matters of Lake Agrio decided to apply against [the alleged victim] a [l]aw that was not applicable to him. In effect, with the objective of a[voiding] that Mr. Acosta [Calderón] recover his freedom, the cause was

referred to a Higher Court for their opinion and the release order was suspended. The request of opinion and suspension of the release set forth in the order of dismissal was not applicable to a process initiated before the Law on Narcotic and Psychotropic Substance (the same that came into force in September of 1990) came into force;"

c) "in Ecuador there is a political determination to discriminate the detainees for crimes related with drug trafficking and under this context Mr. […] Acosta Calderón was a victim of this policy and of laws that permit discrimination;"

d) the State violated Article 2 of the Convention in detriment of Mr. Acosta Calderón "by enacting and maintaining legislation that causes inequality before the law and imposes a regimen of discrimination in detriment of a category of defendants;"

e) the laws in force at the time of the facts, as well as Law 04, which introduced an additional Article after Article 114 of the Criminal Code (hereinafter "Article 114 bis") established that those tried for crimes determined in the Law of Narcotic and Psychotropic Substances were to be excluded of the benefits of this law;

f) the Constitutional Court of Ecuador declared the unconstitutionality of Article 114 bis of the Criminal Code of December 16, 1997. However, even when this rule was declared unconstitutional, on December 18, 1997 an amendment was introduced in the Code of the Execution of Judgments in which a discriminatory stipulation in detriment of the same "category of defendants" was included;

g) on one hand Ecuador established "limitations to the right to a judicial recourse and the development of the recourse outside of the limits established in the Convention […] and, on the other hand, when the facts occurred, […] it had not established and recognized the procedural institution of the protection of civil rights. These two circumstances prevented an adequate protection of the right to judicial guarantees;"

h) "procedural acts and decisions issued within the processing of the preliminary proceedings, like those in which they kept silent regarding the requests of Mr. […] Acosta Calderón, were not susceptible to be appealed before any judge or higher court, since they were not identified as appealable decisions;"

i) the current legislation, included in Article 324 of the Code of Criminal Procedures of 2000, in force since July 2001 "is identical to the Code of 1983 in what refers to its effects," limiting the possibility to appeal to, in some circumstances, a judicial revision by a higher judge or tribunal;

j) "even though it's true that the Constitution[,] with the [amendments made in] 1996 and the enacting of a new constitutional text in 1998[,] acknowledges the institution of the writ of amparo, it is also true that it has limitations that exceed the limitations permitted by the American Convention;" and

k) in virtue of the norms of the Code of Criminal Procedures and the Constitution, "in the practice, protection when faced with any act that derives from the judicial function and that violates human rights is prevented, unless it is susceptible of a specific recourse." This "leaves open the possibility, as in fact occurs, that persons[,] such as procedural subjects[,] not always have simple and prompt recourses that protect their rights and[,] specifically[,] that protect the right to judicial guarantees and the due process."

CONSIDERATIONS OF THE COURT

130. Article 2 of the Convention establishes that

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

131. Article 114 bis of the Criminal Code under study provides that

[p]ersons who, having been kept in detention for a time equal or greater than one-third of the period established in the Criminal Code as the maximum sentence for the offense with which they are charged, have neither had their case discontinued nor been committed to trial, shall be immediately released by the judge hearing the case.
Likewise, persons, who have been kept in detention without sentence for a time equal to or greater than half the period established by the Criminal Code as the maximum sentence for the offense with which they are charged, shall be released by the Criminal Court hearing the case.
These provisions do not include persons charged with offenses punished under the Law on Narcotic Drugs and Psychotropic Substances.

132. As the Court has maintained, the States Parties to the Convention may not order measures that violate the rights and freedoms recognized therein. [FN84]

[FN84] Cfr. Case of Suárez Rosero, supra note 60, para. 97; and International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94 of December 9, 1994. Series A No. 14, para. 36.

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133. Whereas the first two provisions of Article 114 bis of the Ecuadorian Criminal Code granted detained persons the right to be released when the conditions indicated exist, the last paragraph of the same article contains an exception to that law.

134. In previous cases, it has been proven before the Court that on December 16, 1997 the Constitutional Court of Ecuador declared Article 114 bis of the Criminal Code unconstitutional. [FN85] This decision was published on December 24, 1997. However, pursuant to that alleged by the representatives, on December 18, 1997 an amendment was introduced to the Code of the Execution of Judgments in which allegedly a discriminatory provision was included (supra para. 129(f)). In this regard, this Tribunal considers that the examination within the present Judgment of the scope of the amendments of December 18, 1997 alleged by the representatives does not proceed, because they came into force after the facts of the present case had occurred, since Mr. Acosta Calderón was released on July 29, 1996.

[FN85] Cfr. Case of Suárez Rosero. Reparations. Judgment of January 20, 1999, para. 82.

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135. The Court considers, as it has maintained in other cases, [FN86] that the exception stated in Article 114 bis of the Criminal Code, in force when the facts occurred, did not grant a certain category of defendants access to a right enjoyed by the majority of the prison population. In the specific case of Mr. Acosta Calderón this rule caused him undue harm. The Court further observes that, in its opinion, this law violates per se Article 2 of the American Convention, whether or not is was enforced in the instant case.

[FN86] Cfr. Case of Suárez Rosero, supra note 60, para. 98.

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136. This Tribunal considers that, contrary to that stated by the Commission and the representatives, enforcement of Article 121 of the Law of Narcotic Drugs and Psychotropic Substances, that came into force on September 17, 1990 in the sense that "the ruling in which the preventive detention was reversed would not have effects […] if it is not confirmed by a higher court, prior obligatory and favorable report of the Office of the Public Prosecutor," is not within the framework of the facts of the instant case. When the First Court of Criminal Matters of Lake Agrio referred the dismissal in favor of Mr. Acosta Calderón to a higher court for their opinion it did not specify which Law was applicable, stating only "[t]o be consulted as ordered by Law to the H. Superior Court of Quito regarding the validity of this ruling of temporary dismissal of the process and the mentioned accused party." Because of the above, this Court will not issue a ruling on this argument.

137. This Tribunal also is aware that the Ecuadorian Political Constitution of 1998 in its Article 24(8) established that "[I]n any case, and without any exception, having issued the ruling of dismissal or acquittal, the detainee will immediately recover his freedom, without detriment to any pending consultation or recourse," reason for which it does not consider it necessary to offer additional consideration to the arguments of the Commission and the representatives regarding Article 121 of the Law of Narcotic Drugs and Psychotropic Substances.

138. In conclusion, the Court points out that, when the facts occurred, the exception contained in Article 114 bis of the Criminal Code violates Article 2 of the Convention since Ecuador had not adopted adequate measures under its domestic law to give effect to the right enshrined in Article 7(5) of the Convention.

XII. Article 5 of the American Convention (Right to Humane Treatment)

ARGUMENTS OF THE COMMISSION

139. The Commission did not present any arguments regarding Article 5 of the Convention.

ARGUMENTS OF THE REPRESENTATIVES

140. Regarding Article 5 of the Convention the representatives stated that:

a) the State violated Mr. Acosta Calderón's right to humane treatment recognized in Article 5(1) and 5(2) of the Convention;
b) "[e]ven though there isn't any evidence that Mr. […] Acosta Calderón has been tortured, we do consider that his psychic and moral integrity were not respected. Likewise, we consider that there was no respect to the inherent dignity of human beings in the terms provided in the Convention;"
c) "submitting a person to an arbitrary detention, to the deprivation of judicial guarantees and [to the] right [to a] due process and to a judicial lack of protection under clear discriminatory conditions, necessarily produces moral suffering, without it being necessary to present evidence regarding this suffering[,] since it results evident from human nature itself;" and
d) "all form of reduction or non-recognition of human dignity, the basis itself of human rights, is a form of cruel treatment, since it implies a partial, or even total, non-recognition of the person's human condition. Everybody evidently suffers when they are deprived in any way of one of the prerogatives or rights that must be recognized constantly by everybody. Any dwindling in what it means to be a person necessarily leads to a violation to humane treatment, since the individual would no longer be a whole."

CONSIDERATIONS OF THE COURT

141. Article 5 of the Convention determines that:

1. [e]very person has the right to have his physical, mental, and moral integrity respected.
2. [n]o one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
[…]

142. The alleged violation of Article 5 of the Convention was argued by the representatives but not by the Inter-American Commission. As per that established by this Tribunal, the representatives may claim violations of rights different to those already included in the application presented by the Commission. All the rights enshrined in the American Convention are vested in them, and to not permit this would be a wrongful restriction to their condition of subjects of the International Human Rights Law. It is understood that the above, regarding other rights, complies with the rights already included in the application. [FN87]

[FN87] Cfr. Case of the "Mapiripán Massacre", supra note 66, para. 28; Case of "Children's Rehabilitation", supra note 59, para. 125; and Case of the Gómez Paquiyauri Brothers, supra note 57, para. 179.
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143. The arbitrary arrest and the repeated non-recognition of Mr. Acosta Calderón's right to a due process constitutes a situation in which the psychic and moral integrity could have been affected. However, in the present case, the Court does not have enough elements to issue a ruling on the violation of Article 5 of the Convention.

XIII. REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)

OBLIGATION TO REPAIR

144. In accordance with the analysis set forth in previous chapters, the Court declared, based on the facts of this case, that the State violated Articles 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), and 25 (Right to Judicial Protection) of the American Convention, all of them in conjunction with Article 1(1) of the same instrument, and it did not comply with the obligation to adopt rules of domestic legislation pursuant to Article 2 of the American Convention in detriment of Mr. Acosta Calderón in the terms of paragraphs 70, 71, 81 through 84, 99, 100, 107, 108, 114, 115, 119, 120, 124 through 126, 135, and 138 of this Judgment.

145. This Court has held, on a number of occasions, that it is a principle of International Law that any violation of an international obligation resulting in harm carries with it an obligation to repair it adequately. [FN88] To these effects, the Court has used Article 63(1) of the American Convention as a basis, according to which,

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

Therefore, the Tribunal goes on to consider the measures necessary to repair the damages caused to Mr. Acosta Calderón for the mentioned violations of the Convention.

[FN88] Cfr. Case of Caesar, supra note 1, para. 120; Case of Huilca Tecse. Judgment of March 3, 2005. Series C No. 121, para 86; and Case of the Serrano Cruz Sisters, supra note 2, para. 133.

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146. As has been indicated by the Court, Article 63(1) of the American Convention constitutes a rule of customary law that enshrines one of the fundamental principles on contemporary international law on state responsibility. Thus, when an illicit act is imputed to the State, there immediately arises a responsibility on the part of the state for the breach of the international norm involved, together with the subsequent duty of reparation and put an end to the consequences of said violation. [FN89]

[FN89] Cfr. Case of Caesar, supra note 1, para. 121; Case of Huilca Tecse, supra note 88, para. 87; and Case of the Serrano Cruz Sisters, supra note 2, para. 134.

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147. The reparation of the damage caused by a violation of an international obligation requires, whenever possible, full restitution (restitutio in integrum), which consists in the

restoring the situation that existed before the violation occurred. When this is not possible, as in the present case, it is the task of the International tribunal to order the adoption of a series of measures that, besides guaranteeing respect for the rights violated, will ensure that the damage resulting from the infractions is repaired, as well as establish payment of an indemnity as compensation for the harm caused. [FN90] It is necessary to add measures of a positive nature that the State must adopt in order to ensure that detrimental acts like those of the present case do not occur again. [FN91] The obligation to repair, which is regulated in all its aspects (scope, nature, modalities, and designation of beneficiaries) by international law, cannot be altered or eluded by the State's invocation of its domestic law. [FN92]

[FN90] Cfr. Case of Caesar, supra note 1, para. 122; Case of Huilca Tecse, supra note 88, para. 88; and Case of the Serrano Cruz Sisters, supra note 2, para. 134.
[FN91] Cfr. Case of the Serrano Cruz Sisters, supra note 2, para. 135; Case of Carpio Nicolle and others, Judgment of November 22, 2004. Series C No. 117, para. 88; and Case of Plan de Sánchez Masacre. Reparations (Art. 63(1) of the American Convention on Human Rights). Judgment of November 19, 2004. Series C No. 116, para. 54.
[FN92] Cfr. Case of Caesar, supra note 1, para. 122; Case of Huilca Tecse, supra note 88, para. 88; and Case of the Serrano Cruz Sisters, supra note 2, para. 135.
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148. Reparations, as the term indicates, consist in those measures necessary to make the effects of the committed violations disappear. Their nature and amount depend on the harm caused at both material and moral levels. Reparations cannot entail either enrichment or impoverishment of the victim or his or her family. [FN93] In this sense, reparations established must be coherent with the violations stated in the previous paragraphs.

[FN93] Cfr. Case of Caesar, supra note 1, para. 123; Case of Huilca Tecse, supra note 88, para. 89; and Case of the Serrano Cruz Sisters, supra note 2, para. 136.
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149. Based on the evidence recollected during the process and in light of the aforementioned criteria, the Court will proceed to analyze the submissions presented by the Commission and the representatives regarding reparations, in order to determine, first of all, who are the beneficiaries of the reparations, and then determine the pertinent remedial measures for the reparation of the pecuniary and non-pecuniary damages, as well as regarding other forms of reparation, and finally, that regarding costs and expenses.

A) BENEFICIARIES

150. The Court will proceed to summarize the arguments of the Inter-American Commission and the representatives regarding who should be considered as beneficiaries of the reparations ordered by the Court.

ARGUMENTS OF THE COMMISSION

151. The Commission contended that it does not consider that "the inability of the petitioners to locate the alleged victim in Colombia […] is a problem that cannot be overcome [since] with the constant efforts of the Colombian Church, there is a very high possibility that the whereabouts of [Mr.] Acosta [Calderón] will eventually be known."

ARGUMENTS OF THE REPRESENTATIVES

152. The representatives claimed that:

a) "the Court shall solve a matter that has not been presented in previous cases and that will imply a jurisprudential development in this subject. Said matter presents itself because of the impossibility, up to now, to locate the alleged victim, Mr. […] Acosta Calderón, since after having fulfilled his sentence he abandoned the country and the Ecumenical Commission of Human Rights […] lost all contact with the alleged victim. Even though it is considered that this is not an obstacle for the determination of the reparations[,] it does present some considerations regarding the execution and fulfillment of the patrimonial obligations;" and
b) the State must indemnify "Mr. Acosta Calderón's next of kin, that is[,] his partner, his children, and his mother".

CONSIDERATIONS OF THE COURT

153. This case presents the difficulty that neither the Commission nor the representatives know the whereabouts of the alleged victim. The Commission and the representatives state that after his release, Mr. Acosta Calderón supposedly returned to his home country of Colombia. Despite the efforts of Colombia's religious groups, Mr. Acosta Calderón has not been located. In this regard, the Commission and the representatives consider that this fact is not an obstacle for the determination of the corresponding reparations. Both parties suggested that all financial reparation corresponding to Mr. Acosta Calderón be kept in a fiduciary account or a trust under his name until he is located.

154. As previously mentioned, (supra para. 145), Article 63(1) of the Convention establishes that after declaring a violation of the Convention, the Court will order the payment of a fair indemnity to the injured party. The inability to locate the victim does not affect his right to the corresponding reparation. Therefore, this Tribunal considers that Mr. Acosta Calderón is the beneficiary of the reparations in this case.

B) PECUNIARY AND NON-PECUNIARY DAMAGE

Arguments of the Commission

155. The Commission stated that:

a) "all financial reparation that corresponds [to Mr. Acosta Calderón] shall be kept in a fiduciary account to his name, until he is located;"

b) Mr. Acosta Calderón "is entitled to receive – and the State has the obligation to grant him – a compensation that will reflect the fundamental and serious nature of [the] violations committed against him, in order to grant him an adequate reparation and discourages similar violations in the future; and

c) The Commission did not present any arguments regarding the reparation for pecuniary damage.

ARGUMENTS OF THE REPRESENTATIVES

156. The representatives requested that:

a) in what refers to pecuniary damages, the fact that Mr. Acosta Calderón was a farmer, the unified minimum wages of Ecuador, and that the domestic law establishes "fourteen salaries per each year" be taken into consideration. Also, "since contact has not been established with Mr. […] Acosta Calderón [and] his income was before his arrest has not been established [,] it is estimated that the Court must fairly determine them [at an amount] no less than $11,248.80;"

b) regarding lost earnings, they must be fairly determined by the Court, "but in no case should it be less than US$ 15,000.00;"

c) regarding non-pecuniary damages, the Court must consider the values determined in the case of Suárez Rosero, determining an amount that can in no case be inferior to US$ 20,000;

d) the State must compensate "the moral damage[,] to Mr. Acosta Calderón's next of kin, that is[,] his partner, his four children, and his mother. For the determination of said compensation, we consider […] that the values already established by the Court in the case of Suárez Rosero should be used. Consequently, [the State must pay] a compensation [in] favor of Mr. Acosta Calderón's partner in the amount of US$ 20,000.00 as reparation for the moral damage caused. Likewise, [the State must pay] a compensation in the amount of US$ 10,000.00 [in] favor of each of [Mr.] Acosta Calderon's four children for the moral damage caused. Finally, [the State must pay] an indemnity [in] favor of [Mr.] Acosta Calderón's mother in the amount of US$ 10,000.00 as reparation for the moral damage caused. Based on the aforementioned, [the State will pay] a total amount of US$102,748.80 (one hundred two thousand seven hundred and forty eight [dollars with eighty cents]), to be paid in United States dollars, since this is the legal currency used in Ecuador, [in] favor or Mr. […] Acosta Calderón and his closest family members;" and

e) [i]f the whereabouts of Mr. Acosta Calderón are not determined, we request that the State create a trust in one of the entities authorized for such activities and its administration, with the values established as compensations. If the whereabouts are not determined after ten years, [the Court must appoint] an organization or entity with no profit motive, which may not be the Ecumenical Commission of Human Rights, so they may use these amounts in the defense of the rights of detainees."

CONSIDERATIONS OF THE COURT

157. Pecuniary damage assumes the loss or detriment of the victim's income, the expenses incurred in virtue of the facts, and the pecuniary consequences that have a causal link to the facts of the case sub judice. [FN94] The Court considers proven that Mr. Acosta Calderón was a farmer (supra para. 50(1)). This Tribunal points out that due to the activity carried out by the

alleged victim it cannot determine what his monthly income was, and suitable vouchers were not presented in order to determine, in an exact manner, the income he was perceiving at the time of his arrest.

[FN94] Cfr. Case of Huilca Tecse, supra note 88, para. 93; Case of the Serrano Cruz Sisters, supra note 2, para. 150; and Case of "Children's Rehabilitation", supra note 59, para. 283.

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158. Non-pecuniary damages may include both suffering and affliction caused to the direct victims and their next of kin, such as detriment to very significant personal values, as well as non-pecuniary alterations in the conditions of existence of a victim or his or her family. Since it is not possible to assign a precise monetary equivalent to non-pecuniary damages, it can only be the object of compensation in two forms. First, through payment of an amount of money or delivery of goods or services that can be estimated in monetary terms, which the Tribunal will establish through reasonable application of judicial discretion and equity. And, second, through acts or works which are public in their scope or effects. [FN95]

[FN95] Cfr. Case of Caesar, supra note 1, para. 125; Case of Huilca Tecse, supra note 88, para. 96; and Case of the Serrano Cruz Sisters, supra note 2, para. 156.

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159. It is well settled in international jurisprudence that the judgment constitutes, per se, a form of reparation. However, the Court deems necessary the payment of a compensation for non-pecuniary damages. [FN96] The Court considers that Mr. Acosta Calderón suffered a non-pecuniary damage by having been arbitrarily kept in preventive detention for more than five years.

[FN96] Cfr. Case of Caesar, supra note 1, para. 126; Case of Huilca Tecse, supra note 88, para. 97; and Case of the Serrano Cruz Sisters, supra note 2, para. 157.

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160. In this regard, considering the activity carried out by the victim as his means of subsistence and the peculiarities of the instant case, the Court sets the amount of US $ 60,000.00 (sixty thousand dollars of the United States of America), based on the principle of equity, for pecuniary and non-pecuniary damages both for the time he was detained and for the decrease in capacity to carry out his normal work activities.

C) OTHER FORMS OF REPARATION (SATISFACTION MEASURES AND NON-REPETITION GUARANTEES)

Arguments of the Commission

161. The Commission stated that:

a) since "the State is who has the primary obligation to repair the violations proven by the bodies of the Inter-American System," Ecuador must create "an internal mechanism that can offer reparation for the people that seek an effective recourse when the rights granted to them by the American Convention are violated;" and
b) the State must adopt "the measures necessary to give effect to the appeal for legal protection of freedom, so its provisions, in accordance to Ecuadorian legislation, can be implemented from a procedural and substantive point of view; [a]dopt the measures necessary for the judicial criminal system to effectively comply with Ecuadorian legislation; [c]reate an internal mechanism, either judicial or administrative, in which the petitioners can present their complaints regarding faults in the opportune and effective operation of the criminal justice system before an internal organization and through which they may obtain reparations for the violations established by the […] Court."

Arguments of the representatives

162. The representatives alleged that:

a) "[g]iven the similarities [that exist with the case of Suárez Rosero], it becomes necessary to point out that Ecuador has not prevented that the situation repeat itself[,] on one hand and[,] on the other[,] that if those situations that occurred prior to the judgment of the case of Suárez Rosero were solved in an effective manner and through domestic mechanisms;"
b) in order to "avoid that the violations continue repeating themselves […] all those stipulations that establish a discriminatory treatment in detriment of those detained for crimes related to the Law on Narcotic Drugs and Psychotropic Substances must be annulled. Thus, the State must specifically revoke and eliminate the final provision of [Article] 37 of the Law on Compliance of Judgments introduced in virtue of the provision of [Article] 1 of Law 44, published in the Official Newspaper 218, of December 18, 1997;"
c) "the State has the obligation to introduce the legal amendments necessary to guarantee the possibility to judicially appeal all act, issued by any authority, judge, or tribunal, through which fundamental rights guaranteed by a Law, the Constitution, or the American Convention are violated;"
d) "the State [should] eliminate all constitutional limitations to legal protection;"
e) the State must adopt the measures necessary "to make the guarantee to consular protection effective in the terms foreseen in [Article] 36 of the Vienna Convention on Consular Relations";
f) the State "must create an independent commission to investigate the violations to human rights derived from the fight against drug trafficking." Also, "the results obtained from the final report issued by said Commission, [should be] presented to the Prosecutor's Office so they may begin the criminal procedures to obtain judgments and sanctions against the responsible parties. In the same manner, [the State should acknowledge] the evidentiary value of said results for the effect of civil causes the victims could decide to pursue against the State in order to obtain a reparation;"
g) the State must "investigate and punish those responsible of the violations to [Mr. Acosta Calderón's] human rights;"

h) the State must eliminate "Mr. […] Acosta Calderón's name from the public registries in which he appears to have a criminal record;"
i) "[i]n view of the existence of violations to the due process during the criminal case of [Mr.] Acosta Calderón[,] one form of reparation is to initiate […] a process of revision of his conviction;" and
j) "given the specific circumstances of the case three publications [must] be ordered. Two of them corresponding to the operative part of the judgment, one [in] one of the country's newspapers with highest circulation (El Comercio or el Universo) and another, also of the operative part, en one of Colombia's newspapers with highest circulation. This last publication may even finally help, if it happens first, to inform Mr. […] Acosta Calderón that he his rights have been protected by this […] Court. The third one is a complete publication in the Official Newspaper;"

Considerations of the Court

163. The Tribunal will now proceed to determine satisfaction measures to repair non-pecuniary damages, as well as measures that have a public impact. [FN97]

[FN97] Cfr. Case of Caesar, supra note 1, para. 129; Case of Huilca Tecse, supra note 88, para. 102; and Case of the Serrano Cruz Sisters, supra note 2, para. 165.
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a) Publication of this Judgment

164. As determined in other cases, [FN98] the Court considers that the State must publish at least once, in Ecuador's official newspaper and in another newspaper of ample national circulation, both the section called "Proven Facts" as well as the operative part of this Judgment, without the corresponding footnotes. The publication must be made within a six-month period, as of the notification of the present Judgment.

[FN98] Cfr. Case of Huilca Tecse, supra note 88, para. 112; Case of the Serrano Cruz Sisters, supra note 2, para. 195; and Case of Carpio Nicolle et al., supra note 91, para. 123.
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b) Elimination of Mr. Acosta Calderón's criminal record from the public registries

165. As another satisfaction measure, the State must eliminate Mr. Acosta Calderón's name from the public registries in which he appears with a criminal record in connection to the instant case.

D) COSTS AND EXPENSES

Arguments of the Commission

166. The Commission stated that "they are not aware of the financial arrangements between the alleged victim and his representatives and it does not know if they have received any kind of remuneration for their professional services." Also, "it considers that the granting of reasonable costs, based on the information presented by the petitioners, is essential."

Arguments of the representatives

167. The representatives alleged that:

a) the State must reimburse the costs and expenses paid by Mr. Acosta Calderón's representatives "in the procedures before the Inter-American Commission […], as well as before this […] Court. [The State must] also pay the costs and expenses incurred in by Mr. […] Acosta Calderón during the processing of the case before the domestic justice system;"
b) due to lack of existence of elements that allow an exact determination of the value of the costs and expenses incurred in by Mr. Acosta Calderón before the domestic justice system, it is fairly determined at US$ 2,000;
c) the State must reimburse US$ 7,2000.00 to CEDH for concept of the costs and expenses incurred in before the Inter-American system, without detriment to future costs and expenses as well as the cost of airplane tickets, accommodations, shipment of documents, photocopies, telephone calls, and other expenses related to said procedure; and
d) the State must reimburse US$5,110.00 to Dr. Alejandro Ponce Villacís for costs and expenses incurred in before the Inter-American system, without detriment to future costs and expenses related to this procedure.

Considerations of the Court

168. Regarding the reparation for costs and expenses incurred in by Mr. Acosta Calderón and his representatives before the national judicial system and the Inter-American system, there is no evidence in the process before this Tribunal that Mr. Acosta Calderón granted any power of legal representation to CEDHU or Mr. Alejandro Ponce Villacís to represent him before this Tribunal. However, taking into consideration the acts of representation of the CEDHU and Dr. Alejandro Ponce Villacís before the Inter-American Commission, as well as the briefs presented by them before the Court, this Tribunal determines, based on the principle of equity, the amount of US$ 5,000.00 (five thousand dollars of the United States of America) and US$ 2,000.00 (two thousand dollars of the United States of America), respectively. In the same sense, due to lack of elements that can help determine in an exact manner the value of the costs and expenses incurred in by Mr. Acosta Calderón before the domestic courts, this Tribunal establishes, based on the principle of equity, the amount of US$ 2,000.00 (two thousand dollars of the United States of America), which must be paid pursuant to that established in paragraphs 169 through 174 of the instant Judgment.

XIV. MEANS OF COMPLIANCE

169. In order to comply with the instant Judgment, the State must issue payment for the compensations for pecuniary and non-pecuniary damages (supra para. 160) to Mr. Acosta Calderón, as well as reimbursement of the costs and expenses (supra para. 168) to CEDHU and

Messrs. Alejandro Ponce Villacís and Acosta Calderón, within a one-year period, as of its notification.

170. If due to causes attributable to the victim it is not possible for him to receive the pecuniary reparations within the indicated time period, the State shall deposit said amounts in favor of Mr. Acosta Calderón in an account or deposit certificate in a reputable Ecuadorian bank, in United States dollars, and under the most favorable conditions allowed by legislation and banking practices. If after ten years the compensation has not been claimed, the amounts will be returned to the State along with the interests earned.

171. The State must comply with its obligations through payment in United States dollars.

172. The payments ordered in this Judgment as compensation for pecuniary and non-pecuniary damages and reimbursement of costs and fees, may not be affected, reduced, or conditioned due to current or future taxes or charges. Therefore, they must be paid in full to the beneficiaries in accordance with the present Judgment.

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

174. In accordance with its consistent practice, the Court retains the authority inherent to its competence, to monitor compliance with this Judgment. The case will be closed once the State has fully implemented all of the provisions of this Judgment. Within one year of notification of this Judgment, Ecuador must present a report of the measures taken in its compliance to the Court.

XV. OPERATIVE PARAGRAPHS

175. Therefore,

THE COURT,

DECLARES:

Unanimously, that:

1. The State violated, in detriment of Mr. Rigoberto Acosta Calderón, the Right to Personal Liberty enshrined in Article 7(1), 7(3), and 7(5) of the American Convention on Human Rights, in conjunction with Article 1(1) of the same, in the terms of paragraphs 70, 71, 81, and 84 of this Judgment.
2. The State violated, in detriment of Mr. Rigoberto Acosta Calderón, the Right to Personal Liberty and Judicial Protection enshrined in Articles 7(6) and 25 of the American Convention on Human Rights, in conjunction with Article 1(1) of the same, in the terms of paragraphs 97, 99, and 100 of this Judgment.
3. The State violated, in detriment of Mr. Rigoberto Acosta Calderón, the Right to a Fair Trial enshrined in Articles 8(1), 8(2), 8(2)(b), 8(2)(d), and 8(2)(e) of the American Convention

on Human Rights, in conjunction with Article 1(1) of the same, in the terms of paragraphs 107, 108, 114, 115, 119, 120, and 124 through 127 of this Judgment.
4. At the time in which the facts occurred, the State breached its obligation established in Article 2 of the American Convention on Human Rights in connection with Article 7(5) of the same, in the terms of paragraphs 135 and 138 of this Judgment.
5. This Judgment is, per se, a form of reparation in the terms of its paragraph 159.

AND DECIDES:

Unanimously, that:

6. The State must publish, at least once, in Ecuador's official newspaper and in another newspaper of ample national circulation, both the section called "Proven Facts" as well as the operative part of the instant Judgment, without the corresponding footnotes, in the terms of paragraph 164 of this Judgment.
7. As a satisfaction measure, the State must eliminate Mr. Acosta Calderón's name from the public registries in which he appears with a criminal record in connection to the instant case, in terms of paragraph 165 of this Judgment.
8. The State must issue payment for the compensations for pecuniary and non-pecuniary damages to Mr. Acosta Calderón, as well as reimbursement of the costs and expenses to CEDHU and Messrs. Alejandro Ponce Villacís and Acosta Calderón, within a one-year period, as of notification of this judgment, in the terms of paragraphs 160, 168 and 169 through 173 of this Judgment.
9. The Court will monitor compliance with this Judgment and will consider this case closed once the State has fully implemented all of the provisions of this Judgment. Within one year of notification of this Judgment, Ecuador must present a report of the measures taken in its compliance to the Court, in the terms of paragraph 174 of this Judgment.

Judges Cançado Trindade and Ventura Robles advised the Court of their Concurring Opinions, which accompany this Judgment.

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I have concurred with my vote for the adoption, by the Inter-American Court of Human Rights, of the instant Judgment in the case of Acosta Calderón versus Ecuador, since I agreed with its operative paragraphs and with that stated by the Court in the considerations that motivated it. What I am not satisfied with is that the Court did not issue a ruling regarding other matters set forth in the instant case, which, to my understanding, should have served as the bases for another two operative paragraphs in the instant Judgment. Thus my decision to present to the Court this Concurring Vote, in which I am obliged to inform of my reasoning, clearly different to that of the Court, regarding the matters ignored by it.

2. In the case of Suárez Rosero versus Ecuador (1997), the Inter-American Court declared the violation of Article 2 of the American Convention on Human Rights since Article 114 bis, in fine, of the Ecuadorian Criminal Code, in force at that time, robbed "a part of the prison population of a fundamental right on the basis of the crime of which it is accused," and, hence,

intrinsically injures "everyone in that category" (para. 98). The Court understood that the application of that legal stipulation had caused an "undue harm to the victim, and observed that, this law violates per se Article 2 of the American Convention, whether or not is was enforced" (para. 98). The mentioned stipulation of the Ecuadorian Criminal Code (Article 114 bis) was a violation to Article 2 of the Convention precisely because of its discriminatory nature, and specifically because it treated those accused of crimes related to drug trafficking (sanctioned by the Law on Narcotic and Psychotropic Substances) unequally before the law.

3. Despite not having been declared in that case, decided in 1997, a violation to Article 24 of the Convention, subsequently, in its historic Advisory Opinion No. 18 on the Juridical Condition and Rights of Undocumented Migrants (2003), the Court developed its jurisprudence with regard to discrimination and inequality before the law, having declared that

"the principle of equality before the law, equal protection before the law and non-discrimination belongs to jus cogens, because the whole legal structure of national and international public order rests on it and it is a fundamental principle that permeates all laws. Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable. This principle (equality and non-discrimination) forms part of general international law. At the existing stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the realm of jus cogens" (para. 101).

4. In its recent Judgment in the case of Yatama versus Nicaragua, adopted yesterday, June 23, 2005, the Court has confirmed the great jurisprudential advances reached by its Advisory Opinion No. 18, which has reaffirmed the nature of jus cogens of the principle of equality and non-discrimination (para. 184), and has stated that,

"Consequently, the States have the obligation to not introduce in their legal system discriminatory laws, eliminate regulations of a discriminatory nature, fight the practices of this nature, and establish laws and other measures that acknowledge and ensure effective equality before the law for all people. A distinction that lacks an objective and reasonable justification is discriminatory.
Article 24 of the American Convention prohibits discrimination of fact and of law, not only regarding the rights enshrined in said Convention, but in what refers to all laws passed by the State and their application. That is, it is not limited to repeating that stated in Article 1(1) of the same regarding the States' obligation to respect and guarantee, without discrimination, the rights acknowledged in said instrument, but instead it also enshrines a right that obligates the State to respect and guarantee the principle of equality and non-discrimination in the safeguarding of other rights and all internal legislation passed by them" (paras. 185-186).

5. In the instant case of Acosta Calderón, the same legal stipulation that the Court concluded caused damage to the victim in the case of Suárez Rosero, also caused an undue harm to the victim in the cas d'espece, when the facts occurred. Even though the two first paragraphs of Article 114 bis of the Ecuadorian Criminal Code, in force at that time, assigned the persons

imprisoned the right to be freed when the indicated conditions were present, its last paragraph included an exception to said right, [FN1] - which this Court considered incompatible with the American Convention (Article 2).

[FN1] In detriment of the accused for alleged involvement in drug trafficking.

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6. Taking into account the Court's jurisprudential development, from the case of Suárez Rosero up to the present case of Acosta Calderón (Advisory Opinion No. 18 and case of Yatama, supra para. 3 and 4), I do not see how we can exclude from the instant Judgment that the mentioned Article 114 bis, in fine, of the Ecuadorian Criminal Code, in force at the time when the facts of this case Acosta Calderón (including the period in which he was imprisoned) occurred, incurred in a violation of Article 2 (domestic legal effects), in combination with Article 24 (right to equality before the law), of the American Convention. [FN2]

[FN2] It has been proven before the Court (in the Judgment of Reparations of 01.20.1999, in the case of Suárez Rosero, para. 82) that, on 12.24.1997, the Ecuadorian Constitutional Tribunal declared Article 114 bis of the Criminal Code unconstitutional. However, pursuant to that alleged by the representatives, on 12.18.1997 an amendment to the Code of Compliance of Judgments in which a discriminatory rule was allegedly included was introduced (supra, para. 129(f)). Anyway, analysis of the scope of the amendments of 12.18.1997 alleged by the representatives (i.e., its non-compatibility or not with the American Convention) would not proceed in the instant case because they occurred after the facts of the cas d'espece, since Mr. R. Acosta Calderón was released on 07.29.1996.

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7. The mentioned Article 114 bis, in fine, of the Ecuadorian Criminal Code, applied in the instant case, violated Article 2 of the American Convention precisely because it was discriminatory; consequently it also violated Article 24 of the same instrument. Thus, I separate myself from the Court on this point, for having the Tribunal avoided the situation and not having been consistent with their own recent jurisprudential evolution. Even more, the Court stopped following, in this sense, the criteria that oriented it in the Judgment adopted yesterday, June 23, 2005, in the case of Yatama versus Nicaragua. With this superveniens period of time, within a term of only 24 hours, in matters so relevant as the principle of jus cogens of equality and non-discrimination, [FN3] the Court, on this specific issue, has unfortunately slowed down its own jurisprudential development.

[FN3] On the relevance of said principle, cf. A.A. Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos, vol. II, Porto Alegre/ Brazil, S.A. Fabris Ed., 1999, pp. 76-82.

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8. As has been held by the Court in its Advisory Opinion No. 18, of 2003, the States Members of the Convention may not issue measures that violate the rights enshrined in it; in virtue of the peremptory nature of the basic principle of equality and non-discrimination, "States have the obligation to combat discriminatory practices and not to introduce discriminatory regulations into their laws" (para. 88). The serious evils or our times, - drug trafficking, terrorism, organized crime, among so many others, - must be combated from within the Law, since they can not simply be confronted with their own weapons: said evils may only be overcome from within the Law.

9. Nothing justifies treating certain people with detriment to the fundamental principle of equality and non-discrimination, which also makes up the right to equality before the law, enshrined in Article 24 of the American Convention. This is a principle of the jus cogens, which cannot be ignored under any circumstance. I hope that the Court will soon recover the advanced line of its own recent jurisprudence, and recovers from the slip it has, in my opinion, incurred in regarding this matter in the instant Judgment.

10. Besides the operative paragraph missing, along with its corresponding assertion, on the violation of Article 24 (Right to Equal Protection) of the Convention in the present case, the Court also excluded the violation of Article 5 of the Convention (Right to Humane Treatment) en el cas d'espece. Paragraph 140 of the instant Judgment, through which the Court considered it lacked "sufficient evidence to issue a ruling regarding the violation of Article 5 of the Convention," data venia, is not sustainable.

11. An arbitrary arrest (as established by the Court in the instant case), that lasts five years, five months, or five weeks, in the prison conditions that prevail in both the American and European continents, [FN4] or in the other continents of the world (or "globalized" underworld of prisons), always causes traumas in those wrongfully imprisoned. "Substantial evidence" is not required to establish a violation to the right to humane treatment of the individual arbitrarily arrested. The Court was empowered to recur to an irrefutable presumption in this sense pursuant to its constant jurisprudence on this subject; this is how it should have proceeded, with the corresponding support of the operative paragraph that is missing.

[FN4] As inferred from the practice of the European Commission for the Prevention of Torture and Inhuman or Humiliating Treatment or Sanctions (under the European Convention of 1987 for the Prevention of Torture). For an analysis, cf. A. Cassese, Inhuman States – Imprisonment, Detention, and Torture in Europe Today, Cambridge, Polity Press, 1996, pp. 125-126.

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12. In my Concurring Vote in the case of Tibi versus Ecuador (2004), I referred precisely to the effects of an arbitrary arrest and the prison conditions of those wrongfully imprisoned (paras. 2-7). In effect, the Law cannot stop coming to the complete rescue of those that have simply been forgotten in the underworld of prisons, in the houses of the dead so lucidly condemned in the XIX century by F. Dostoievski (Recuerdos de la Casa de los Muertos, 1862). In my opinion, the burden of proof is reversed on this occasion; if it is asserted or considered that the

infringement of humane treatment is not proven ipso facto by a prolonged arbitrary imprisonment, the alleged non-infringement must be proven (onus probandi incumbit actori) …

13. I would like to conclude this Concurring Vote in a positive tone, if possible. In its substantiation of the determination of the violation of Article 8(2) of the Convention (judicial guarantees), in conjunction with Article 1(1) of the same, in the instant case, the Court considered that Mr. R. Acosta Calderón,

"as a foreign detainee, was not notified of his right to communicate with a consular official from his country with the objective of offering the assistance recognized in Article 36(1)(b) of the Vienna Convention on Consular Relationships. The foreign detainee, when arrested and before offering his first statement before the authorities, must be notified of his right to establish contact with a third party, for example, a family member, a lawyer, or a consular official, as corresponds, to inform them that he is in the State's custody. In the case of the consular notice, the Court has stated that the consul may assist the detainee in different acts of defense, such as the granting or hiring of legal representation, the obtainment of evidence in the country of origin, the verification of the conditions in which the legal assistance is exercised, and the observation of the defendant's situation while he is imprisoned. In this sense, the Court has also affirmed that the individual right to request consular assistance from his country of nationality must be recognized and considered within the framework of the minimum guarantees to offer foreigners the opportunity to adequately prepare their defense and have a fair trial. The non-observance of this right affected Mr. Acosta Calderón's right to defense, which forms part of the guarantees of the due legal process" (para. 125).

14. Accordingly, the right to information on consular assistance is an individual right, the Court has based its correct deliberation in this regard on its previous and truly pioneering Advisory Opinion No. 16, on the Right to Information on Consular Assistance in the Framework of the Guarantee of the Due Process of Law (1999, paras. 106, 86, and 122). This Advisory Opinion, adopted by the Court on October 01, 1999, has acted as a source of inspiration for international jurisprudence in statu nascendi regarding this matter, - as has been acknowledged in great length by contemporary judicial doctrine. [FN5]

[FN5] For example, the specialized bibliography, when referring to the later decision of the International Court of Justice (ICJ), of 06.27.2001, in the case of LaGrand stated that it was issued "a la lumière notamment de l'avis de la Cour Interaméricaine des Droits de l'Homme du 1er octobre 1999;" G. Cohen-Jonathan, "Cour Européenne des Droits de l'Homme et droit international général (2000)," 46 Annuaire français de Droit international (2000) p. 642. It has also been observed, in relation to Advisory Opinion n. 16 of the Inter-American Court, "le soin mis par la Cour a démontrer que son approche est conforme au droit international". Besides, "pour la juridiction régionale il n'est donc pas question de reconnaître a la Cour de la Haye une prééminence fondée sur la nécessité de maintenir l'unité du droit au sein du système international. Autonome, la juridiction est également unique. (...) La Cour Interaméricaine des Droits de l'Homme rejette fermement toute idée d'autolimitation de sa compétence en faveur de la Cour mondiale fondamentalement parce que cette dernière ne serait pas en mesure de remplir la fonction qui est la sienne." Ph. Weckel, M.S.E. Helali and M. Sastre, "Chronique de

jurisprudence internationale," 104 Revue générale de Droit international public (2000) pp. 794 and 791. It has also been stated that the Advisory Opinion of 1999 of the Inter-American Court contrasts with "la position restrictive prise par la Cour de La Haye" in its subsequent decision of 2001 in the case of LaGrand: - "La juridiction régionale avait exprimé son opinion dans l'exercice da sa compétence consultative. Or, statuant sur un différend entre États, la juridiction universelle ne disposait pas de la même liberté, parce qu'elle devait faire prévaloir les restrictions imposées a sa juridiction para le défendeur." Ph. Weckel, "Chronique de jurisprudence internationale," 105 Revue générale de Droit international public (2001) pp. 764-765. And, also: "La Cour Interaméricaine avait examiné dans quelle mesure la violation du droit d'être informé de l'assistance consulaire pouvait être considéré comme une violation de la règle fondamentale du procès équitable et si, par voie de conséquence, une telle irrégularité de procédure dans le cas d'une condamnation a mort constituait aussi une atteinte illicite a la vie humaine protégée par l'article 6 de Pacte relatif aux droits civils et politiques (…) La CIJ ne s'est pas prononcée sur ces questions qui ont trait a l'application de deux principes du droit international (la règle du procès équitable et le droit a la vie)." Ibid., p. 770. In a similar manner it has been observed that the CIJ "was curiously diffident as to whether this individual right should be characterized as a human right. The Court failed to mention Advisory Opinion OC-16/99 of the Inter-American Court of Human Rights, which held that Article 36 is among the minimum guarantees essential to providing foreign nationals the opportunity to adequately prepare their defense and receive a fair trial;" J. Fitzpatrick, "Consular Rights and the Death Penalty after LaGrand," Proceedings of the 96th Annual Meeting of the American Society of International Law (2002) p. 309. Cf. as well, in additional acknowledgment of the truly pioneering contribution of the Inter-American Court in this matter: M. Mennecke, "Towards the Humanization of the Vienna Convention of Consular Rights – The LaGrand Case before the International Court of Justice", 44 German Yearbook of International Law/ Jahrbuch für internationals Recht (2001) pp. 430-432. 453-455, 459-460, and 467-468; M. Mennecke and C.J. Tams, "The LaGrand Case", 51 International and Comparative Law Quarterly (2002) pp. 454-455; M. Feria Tinta, "Due Process and the Right to Life in the Context of the Vienna Convention on Consular Relations: Arguing the LaGrand Case," 12 European Journal of International Law (2001) pp. 363-365.

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15. The Inter-American Court has, in its Judgment of this case of Acosta Calderón versus Ecuador, reiterated its opinion regarding the individual right to information on consular assistance in the framework of the guarantees of a legal process, within a case, which is significant. Both in Advisory Opinion No. 16 and in the instant case of Acosta Calderón, the Court has correctly included that right within the conceptual universe of human rights.

16. I conclude this Concurring Opinion going a step further in the matter. The right to information on consular assistance, besides being within the guarantees of the due process of Law, has a direct incidence on the validity of other human rights internationally acknowledged, such as the right to personal liberty (Article 7 of the American Convention). In the heart of this Court, I have always maintained that the best hermeneutics in matters of human rights protection is the one that related the protected rights with each other, indivisible as they are, - and not one that inadequately seeks to separate them, wrongfully weakening the basis of the protection.

17. In this Court's pioneering Advisory Opinion No. 16, - a backdrop in the history of contemporary Public International Law itself, - this Tribunal has stated that Article 36(1)(b) and (c) of the Vienna Convention on Consular Relations of 1963 refers to "consular assistance in a specific situation: the deprivation of freedom" (para. 81). The individual right to information on consular assistance in the framework of human rights, in order to duly assist those deprived of their freedom is also present in this situation (para. 83). The hermeneutics I have defended in the heart of this Court, and that I continue and will continue to firmly defend, - is, in my opinion, the best option in order to achieve an integrated protection of the rights inherent to all human beings.

Antonio August Cançado Trindade
Judge

Pablo Saavedra Alessandri
Secretary

CONCURRING OPINION JUDGE MANUEL E. VENTURA ROBLES

1. Despite having concurred with my vote to the approval of all the operative paragraphs of the instant judgment, the allegation made by the representatives of the victim in the brief of requests, arguments, and evidence based on which the Inter-American Court of Human Rights (hereinafter "the Court", "the Inter-American Court", or "the Tribunal") declared, in the present case, the violation by the Republic of Ecuador of the Right to Humane Treatment, acknowledged by Article 5 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), in detriment of Mr. Rigoberto Acosta Calderón, has aroused in my mind several worries on subjects that the Court could have covered in its judgment, but did not. One of them is the violation to Mr. Acosta's psychic and moral integrity in this case.

2. Article 5 of the Convention, in its paragraphs 1 and 2, states that:

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

3. The Court, in its judgment, expressed in paragraph 143 that

"The arbitrary arrest and the repeated non-recognition of Mr. Acosta Calderón's right to a due process constitutes a situation in which the psychic and moral integrity could have been affected. However, in the present case, the Court does not have enough elements to issue a ruling on the violation of Article 5 of the Convention."

4. The worry in my mind referred not to the fact that since there is no evidence in the case file regarding if Mr. Acosta Calderón suffered any damage to his physical integrity during his imprisonment, or that the Court did not seek it through an order that would determine the presentation of evidence to facilitate adjudication of the case since the victim's whereabouts were unknown, but instead to the non-determination of the violation of Article 5 of the American

Convention in what refers to the psychic and moral integrity of a person who, according to the same judgment, spent more than five years in preventive detention, as a consequence of an imprisonment that the same Tribunal classified as arbitrary and that originated a repeated infringement of the due process.

5. Repeatedly, since the judgment of Reparation in the case of Aloeboetoe et al. versus Suriname (Cfr. Case of Aloeboetoe et al. Reparations (Art. 63(1) of the American Convention of Human Rights). Judgment of September 10, 1993. Series C No. 15, para. 52; Case of Maritza Urrutia. Judgment of November 27, 2003. Series C No. 103, paras. 168 and 169; and Case of Tibi. Judgment of September 7, 2004. Series C No. 114, para. 244) the Court has constantly affirmed in its jurisprudence that it is proper of human nature that a person submitted to aggressions and humiliation experiments a moral damage, and evidence is not required to reach this conclusion. Also, based on the case of Loayza Tamayo versus Peru (Cfr. Case of Loayza Tamayo. Judgment of September 17, 1997. Series C No. 33, para. 57; Case of Hilaire, Constantine, and Benjamin, et al. Judgment of June 21, 2002. Series C No. 94, para. 169; Case of Maritza Utrrutia. Judgment of November 27, 2003. Series C No. 103, para. 87; and Case of Caeser. Judgment of March 11, 2005. Series C. No. 123, para. 97), it has determined the violation of a person's psychic integrity due to the consequences of the arrest regime and the conditions of the prisons, which are similar in all Latin America, and to which Mr. Acosta Calderón was surely exposed.

6. In my opinion, the Court, in this case, should have considered the possibility to determine if Mr. Acosta Calderón's dignity was affected and if his psychic and moral integrated were violated, since it considers within its own judgment that this person was arbitrarily arrested, thus taking away his freedom, a natural condition of all human beings, and he was submitted to a process in which fundamental guarantees were violated. More than five years in prison must have caused Mr. Acosta Calderón pain, which must have resulted in a psychological and moral damage that does not need to be proved. The arbitrary arrest for such a long period of time should be enough to presume damage to his integrity and the resulting moral and psychic damage to a person. That is how the victim's representatives understood it when in their brief of requests and arguments they stated the following:

The Ecumenical Commission on Human Rights considers that under the same aforementioned principles, the Court must decide that submitting a person to an arbitrary arrest, to the deprivation of their judicial guarantees and the right to a due process, and to a judicial lack of protection under clear arbitrary conditions, necessarily produce moral suffering, without it being necessary to present evidence regarding said suffering since it results evident from human nature itself.
In principle, it should be recognized, and the Honorable Court is so requested to issue a ruling, that all form of dwindling or non-recognition of human dignity, the basis for human rights, constitutes a form of cruel treatment, since it implies partial or total non-recognition of a person's human condition. Every person evidently suffers when they are deprived in any way of any of the prerogatives or rights that must always be acknowledged by all. Any form of dwindling of what it means to be a person necessarily leads to the violation of humane treatment, since the individual will no longer continue to be a whole.

7. During the deliberation of this case and when voting the corresponding judgment, the Court lost a valuable opportunity to consider possible violations to Article 5 of the Convention and, specifically psychic and moral integrity, to determine the differences between the violation to humane treatment and the type of evidence required for its determination regarding violations to psychic and moral integrity. And, in the event of these last two types of violation, when should psychic and moral damages be presumed.

8. This will probably be a recurring matter in future cases submitted to the consideration of the Court, due to the conditions of the region's prisons, a public and notorious fact, as well as the many violations to personal liberty reported in Latin America. The effects of an arbitrary arrest and imprisonment on a human being, as well as the resulting psychic and moral damage and its possible presumption by the Tribunal in certain cases, is a matter that the Court must deal with hopefully sooner than later. And I hope it does.

Manuel E. Ventura Robles
Judge

Pablo Saavedra Alessandri
Secretary