

**Inter-American Court of Human Rights**  
**Case of the Miguel Castro-Castro Prison v. Peru**  
**Judgment of November 25, 2006**  
**(Merits, Reparations and Costs)**

In the case of the *Miguel Castro Castro Prison*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court", "the Court", or "the Tribunal"), composed of the following judges\*:

Sergio García Ramírez, President;  
Alirio Abreu Burelli, Vice-President;  
Antônio A. Cançado Trindade, Judge;  
Cecilia Medina Quiroga, Judge; and  
Manuel E. Ventura Robles, Judge,

also present,

Pablo Saavedra Alessandri, Secretary, and  
Emilia Segares Rodríguez, Deputy Secretary;

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and Articles 29, 31, 53(2), 55, 56, and 58 of the Court's Rules of Procedure (hereinafter "the Rules of Procedure"), delivers the present Judgment.

**I**  
**INTRODUCTION OF THE CASE**

1. On September 9, 2004, pursuant to that stated in Articles 50 and 61 of the American Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") submitted an application against the State of Peru (hereinafter "the State" or "Peru") to the Court. Said application originated from petitions No. 11,015 and 11,769, received at the Commission's Secretariat on May 18, 1992 and June 5, 1997, respectively.

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\* The Judge Diego García-Sayán excused himself from hearing the present case (*infra* paras. 91 and 92). Likewise, the Judge Oliver Jackman did not participate in the deliberation and signing of the present Judgment, since he informed the Court that, due to reasons of force majeure, he could not participate in the LXXII Regular Session of the Tribunal.

2. The Commission submitted the petition for the Court to decide if the State is responsible for the violation of the rights enshrined in Articles 4 (Right to Life) and 5 (Right to Humane Treatment) of the American Convention, in relation to the obligation established in Article 1(1) (Obligation to Respect Rights) of the same, in detriment of "at least 42" inmates that died; the violation of Article 5 (Right to Humane Treatment) of the Convention, in relation to the obligation established in Article 1(1) (Obligation to Respect Rights) of the Convention, in detriment of "at least 175" inmates that were injured and of 322 inmates "that having resulted [allegedly] uninjured were submitted to a cruel, inhuman, and degrading treatment;" and for the violation of Articles 8(1) (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Convention, in relation to the obligation established in Article 1(1) of the same, in detriment of [the [alleged] victims and their next of kin."

3. The facts presented by the Commission in the application occurred as of May 6, 1992 and they refer to the execution of "Operative Transfer 1" within the Miguel Castro Castro Prison, during which the State, allegedly, caused the death of at least 42 inmates, injured 175 inmates, and submitted another 322 inmates to a cruel, inhuman, and degrading treatment. The facts also refer to the alleged cruel, inhuman, and degrading treatment experimented by the alleged victims after "Operative Transfer 1".

4. Likewise, the Commission requested that the Court, pursuant to Article 63(1) of the Convention, order the State to adopt certain measures of reparation indicated in the petition. Finally, it requested that the Tribunal order the State to pay the costs and expenses generated in the processing of the case.

## II COMPETENCE

5. The Court is competent to hear the present case, in the terms of Articles 62 and 63(1) of the Convention, since Peru is a State Party in the American Convention since July 28, 1978 and it acknowledged the adjudicatory jurisdiction of the Court on January 21, 1981. Similarly, the State ratified the Inter-American Convention to Prevent and Punish Torture on March 28, 1991 and the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women on June 4, 1996.

## III PROCEDURE BEFORE THE COMMISSION

6. On May 18, 1992 Mrs. Sabina Astete presented a petition before the Inter-American Commission,<sup>1</sup> which is signed by the persons who indicate they are members of the Committee of Relatives of Political and War Prisoners. Said petition was identified under number 11,015, and it referred to the alleged "genocide of May 6 through 9, 1992" that took place at the Criminal Center Castro Castro and the lack of information "to the next of kin and public opinion" regarding the survivors, those dead, and the injured. Likewise, it referred to alleged "clandestine transfer[s] to

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<sup>1</sup> In response to the request of evidence and clarifications to facilitate adjudication of the case made by the President of the Court, the Commission indicated in its communication of November 3, 2006 that this writ of May 18, 1992 was "the initial petition that started the case 11,015."

different criminal centers" of Peru, without allowing "access [...] to the next of kin [and] attorneys."

7. On the days of June 12, July 9, August 10, 12, and 21 of 1992, August 17, 2000, January 23, and February 7, 2001, and May 31, 2001 the Commission forwarded additional information regarding the case to the State. This information referred, *inter alia*, to the mistreatment, "torture", "searches", and "isolation" to which the alleged victims of the facts of the Miguel Castro Castro Prison were supposedly submitted, after May 9, 1992 and during the transfer of the inmates to other criminal centers of Peru. Likewise, it referred to the alleged "inhuman" conditions in which the alleged victims were kept in the centers to which they were transferred. Similarly, it informed of the State's "harassment" against the next of kin of the alleged victims.

8. On August 18, 1992 the Commission requested that the State adopt precautionary measures with regard to the facts occurred in the Miguel Castro Castro Prison, pursuant to that established in Article 29 of the Rules of Procedure of the Commission. Among the measures requested were the authorization of "visits from the inmates' next of kin and attorneys", and the entry of "food and medicines". Likewise, the State was asked to offer "medical attention" to those who required it and to forward to the Commission "the official list of [...] those dead and missing as of the facts [of the] Criminal Center 'Miguel Castro Castro'."

9. On September 11, 1992 the State presented a brief, through which it forwarded information "regarding the measures adopted in relation to the request made by the Commission" in what referred to "the 'events' occurred as of May 6[, 1992]" in the Miguel Castro Castro Prison." On October 21 1992 the State presented a brief and appendixes, through which it forwarded the report prepared by the Public Prosecutors' Office of the Nation of Peru regarding the events occurred "in the criminal center Castro Castro on May 6[, 1992]."

10. On November 9, 1992 the State presented a brief and appendixes, through which it forwarded the report prepared by the Public Prosecutors' Office of the Nation regarding the additional information that was sent to it (*supra* para. 7).

11. On November 25, 1992 the Commission presented a brief and its appendixes to the Tribunal, through which it forwarded a request for provisional measures in relation to cases 11,015 and 11,048 being processed before the Commission, on the gross situation of the Peruvian criminal centers Miguel Castro Castro and Santa Mónica in Lima, Cristo Rey in Ica, and Yanamayo in Puno.

12. On December 14, 1992 the President of the Court (hereinafter "the President") issued a Ruling, through which he decided "[t]hat for now the request [...] of urgent measures of a preliminary nature [...] did not proceed" and it decided to "[s]ubmit to the Court the request presented by the Inter-American Commission in its next regular session."

13. On January 27, 1993 the Tribunal issued a Ruling with regard to the request for provisional measures made by the Commission (*supra* para. 11), through which it decided "[n]ot to issue, for now, the provisional measures [...] requested." Likewise, the Court considered it was necessary to "[r]equest that [the Commission] in the exercise of the attributions conferred to it by the Convention, the Statute, and the

Rules of Procedure, request the evidence or carry out the investigations necessary to prove the veracity of the facts" mentioned in the request of the measures.

14. On June 5, 1997 Mr. Curtis Doebbler, in representation of Mrs. Mónica Feria Tinta, presented a petition before the Commission, which was identified under number 11,769. Said petition referred, *inter alia*, to the events of the Miguel Castro Castro Prison as of May 6, 1992, as well as to the "torture", cruel, inhuman, and degrading treatment to which the alleged victims in this case were allegedly submitted to during the "attack" to the mentioned criminal center and after the same.

15. On June 29, 2000, case 11,769 (*supra* para. 14) was broken down into two case files: 11,769-A and 11,769-B, in application of that established in Article 40(1) of the Rules of Procedure of the Commission in force at that time. Case file 11,769-B referred to "the facts claimed [...] in relation to the events occurred in the prison Castro Castro, of Lima, in May 199[2]," and 11,769-A to the "arrest, trial, and other facts [...] referring directly and personally to [Mrs.] Mónica Feria Tinta."

16. On June 29, 2000 case 11,769-B (*supra* para. 15) was joined with the case identified as 11,015 (*supra* para.6) for its joint processing.

17. On March 5, 2001 the Commission approved Report N° 43/01, through which it declared the admissibility of the case. On March 21, 2001 the Commission put itself at the order of the parties with the purpose of reaching an amicable solution.

18. On March 16, 2001 the State presented a report, through which it mentioned the name of the alleged victims "that died during the events [...] of May 6 to 10, 1992."

19. On April 2, 2001 Mrs. Mónica Feria Tinta presented observations to the Report of admissibility of the case (*supra* para. 17). Among its observations she stated, *inter alia*, that she thought it was important to point out that it "was an attack originally directed against the female prisoners[, ...] among which there were pregnant women," and that "in the claim presented [...] it was specif[ied] that at the head of those directly responsible for the facts was [...] Alberto Fujimori Fujimori[,] who ordered the attack and the extrajudicial killings of prisoners between May 6 [and] 9[,] as well as the regimen applied to the survivors after the massacre."

20. On April 18, 2001 Mrs. Mónica Feria Tinta informed the Commission that she was not interested in proceeding with an amicable solution (*supra* para. 17). On April 23, 2001 the State presented a report, through which it expressed that "it did not wish to submit itself [...] to the procedure of amicable solution." (*supra* para. 17).

21. On April 24, 2001 the Commission requested to the petitioners and the State that they present "their arguments and evidence regarding the merits of the case" due to the "controversy between the parties as to the facts claimed." It also requested that the State present: "[t]he name and explanation of the specific circumstances in which the people die[d...] on May 1992 in the Criminal Center Castro Castro, including the forensic expert exams performed [... and] the corresponding death certificates;" "[t]he name [and] the type of injuries, [...] the circumstances [...] under which said injuries were caused, [...] and the forensic expert exams performed [in this sense]; and "[i]nformation on the administrative and judicial investigations carried out regarding the facts occurred in May 1992 in

the Criminal Center Castro Castro." This information was also requested to the petitioners, without the need to present official documents.

22. On November 1, 2001, after two extensions were granted, the State presented its arguments and evidence regarding the merits of the matter (*supra* para. 21). Likewise, It stated that it would complete its arguments regarding the merits of the matter during the hearing summoned for November 14, 2001 (*infra* para. 23).

23. On November 14, 2001 a hearing was held before the Commission on the merits of the case.

24. On October 20, 2003, after the granting of several extensions, Mrs. Mónica Feria Tinta presented her arguments regarding the case (*supra* para. 21).

25. On October 23, 2003 the Commission, pursuant to Article 50 of the Convention, approved Report N° 94/03, in which it concluded that the State "is responsible for the violation of the rights to life, humane treatment, a fair trial, and judicial protection, enshrined in Articles 4, 5, 8, and 25 of the American Convention, in relation to the general obligation of respect and guarantee of human rights established in Article 1(1) of the same instrument in detriment of the victims individualized in paragraph 43 of [said] report." The Commission also indicated that "the object of [... that] report trasc[ended] what referred to the enactment and application of antiterrorism legislation in Peru, in virtue of which some of the victims were imprisoned, since they were not subject of the facts claimed and proven." Likewise, the Commission recommended that the State: "[p]erform a complete, effective, and impartial investigation within the domestic legislation, in order to establish the historic truth of the facts; prosecute and punish those responsible for the massacre committed against the inmates of the Criminal Center 'Miguel Castro Castro' of the city of Lima, between the 6 and 9 days of May 1992;" "[a]dopt the measures necessary to identify the bodies that have not yet been claimed and hand over their remains to their next of kin;" "[a]dopt the measures necessary so that those affected can receive an adequate reparation for the violations to human rights suffered due to the State's actions;" and "[a]dopt the measures necessary to avoid similar facts from occurring again, in compliance of the duties of prevention and guarantee of fundamental rights acknowledged by the American Convention."

26. On January 9, 2004 the Commission notified the State of the mentioned report and granted it a two-month period, as of the date of its transmission, to inform of the measures adopted in order to comply with the recommendations made.

27. On January 9, 2004 the Commission communicated to the petitioners the approval of the report (*supra* para. 25) pursuant to Article 50 of the Convention and it asked them to present, within a one-month period, their position regarding the presentation of the case before the Court. It also requested that they present the information of the victims; the powers of attorney that prove their quality of representatives; the documentary and testimonial evidence and expert reports additional to those presented during the processing of the case before the Commission, and their demands regarding reparations and costs.

28. On March 4, April 7, and July 9, 2004, the State requested extensions to inform the Commission of the compliance of the recommendations included in Report

Nº 94/03 (*supra* paras. 25 and 26). The Commission granted the extension requested, the last of them until August 9, 2004.

29. On February 6 and March 7, 2004 the petitioners presented to communication to the Commission, in which they stated their interest in the forwarding of the case to the Court by the Commission (*supra* para. 27).

30. On March 7, 2004 Mrs. Mónica Feria Tinta presented a brief and its appendixes, through which she forwarded the information requested by the Commission in its communication of January 9, 2004 (*supra* para. 27). Likewise, she observed, *inter alia*, that "the facts were planned as a massacre[...]", that information was given to the Commission "on the type of torture inflicted on the prisoners during and after the massacre," and she "made emphasis on the physical violations perpetrated against injured women at the hospitals." Mrs. Feria Tinta indicated that "[t]he lack of reference to th[ose] horrendous facts in the Commission's report did not s[how] the magnitude and horror of the facts lived by the prisoners." Likewise, Mrs. Mónica Feria Tinta expressed, *inter alia*, that "[they] consider[ed] as part of the object of th[at] petition not only the facts occurred from May 6 [through] 9, 1992," but also "the terrible and inhuman prison regimen to which [...] [the inmates] were submitted with the intent of destroying them as individuals," regarding which she had presented information to the Commission. Similarly, Mrs. Feria Tinta pointed out that "[t]he scope of the Commission's report [...] did not reflect that those facts [were] part of the violations committed by the State."

31. On August 5, 2004 the State forwarded a report to the Commission in response to the recommendations of the Report on Merits Nº 94/03 (*supra* paras. 25, 26, and 28). The appendixes were presented on August 24, 2004.

32. On August 13, 2004, "before the lack of a satisfactory implementation of the recommendations included in report 94/03" (*supra* para. 25), the Commission decided to submit the present case to the jurisdiction of the Court.

#### IV PROCEEDING BEFORE THE COURT

33. On September 9, 2004 the Inter-American Commission presented the application before the Court, and it included documentary evidence, testimonial evidence, and expert assessments. The Commission presented the appendixes to the application on September 29, 2004. Likewise, it appointed Freddy Gutiérrez, Florentín Meléndez, and Santiago A. Canton as delegates and Messrs. Ariel Dulitzky, Pedro Díaz, Juan Pablo Albán, and Víctor Madrigal as legal advisors.

34. On October 15, 2004 the Secretariat of the Court (hereinafter "the Secretariat"), following the instructions of the President of the Court, asked the Commission to coordinate with the alleged victims and their next of kin so they would appoint, as soon as possible, a common intervener of the representatives, in order to proceed to notify the application, pursuant to that stated in Article 23(2) of the Rules of Procedure of the Tribunal. Likewise, it ruled that the Commission "indicate[...] who, in [its] opinion[, ...] should be considered the common intervener that [would] represent the alleged victims" in the proceedings before the Court.

35. On November 16, 2004 the Commission forwarded a brief, through which it presented the information requested through note of October 15, 2004 (*supra* para. 34) in relation to the appointment of a common intervener of the representatives of the alleged victims in the present case. On November 22, 2004 the Commission presented the appendixes to said brief.

36. On January 14, 2005 the Secretariat, following the President's instructions, forwarded notes to Mrs. Mónica Feria Tinta and Sabina Astete, accredited as representatives at the time of the presentation of the Commission's application, and informed them that the application was in the stage of its preliminary examination, pursuant to Article 34 of the Rules of Procedure of the Court. Likewise, it indicated to them that from the initial analysis of the mentioned application, the President had verified that in the procedure before the Commission there were several problems of representation, which continued before the Tribunal and he referred to those problems. Similarly, they were asked to present, no later than January 24, 2005, a final list of the alleged victims they would represent, regarding which the mentioned ladies certified that they knew their true will to be represented by them.

37. On January 24, 2005 Mrs. Sabina Astete presented a brief, in response to that requested by the President (*supra* para. 36), through which she presented the final list of alleged victims "represent[ed] by [Messrs.] Douglas Cassel and Peter Erlinder in consultation with [Mrs. Sabina Astete] and [Mrs.] Berta Flores." The appendixes to said brief were presented on January 26, 2005.

38. On January 25, 2005 Mrs. Mónica Feria Tinta presented a brief and its appendixes, in response to that requested by the President (*supra* para. 36), through which she presented the final list of alleged victims she represents, regarding which "she certified that she knows their will" to be represented by her.

39. On April 8, 2005 the Secretariat, following the President's instructions, granted Mrs. Feria Tinta and Astete a non-postponable term until April 29, 2005 to present all the powers of attorney they still had to forward in order for the Court to decide what corresponds. Likewise, they were informed that if they sent new powers of attorney after the expiration of the term granted, said powers of attorney would not change the decision made by the President or the Court.

40. On October 4, 2005 the Secretariat informed the Inter-American Commission, the State, and the representatives of the alleged victims and their next of kin that, in what refers to the disagreement of the representatives to appoint a common intervener, pursuant to Article 23 of the Rules of Procedure of the Tribunal, it ruled that the common intervener that would represent all the alleged victims would be Mrs. Mónica Feria Tinta since: from the analysis of all the powers of attorney in the case file presented before the Court, it could be concluded that Mrs. Feria Tinta represented the greater number of alleged victims that granted a power of attorney; she is an alleged victim and she assumed a great part of the representation during the proceedings before the Commission; and there were some problems with the powers of attorney in favor of Mrs. Sabina Astete, since they did not express with clarity the will of the grantor and the way they were drawn up led to mistakes or confusion regarding said persons, since they led to the understanding that Mrs. Feria Tinta had decided not to represent them. Likewise, they were informed that this should not imply a limitation to the right of the alleged victims or their next of kin to present before the Court their pleadings and arguments, as well as to offer the corresponding evidence, and that the common intervener "would be [the] only one

authorized to present pleadings, arguments, and evidence during the proceedings, [and that] they should channel the different claims and arguments of the various representatives of the alleged victims and their next of kin in the brief, oral arguments and offerings of evidence." Regarding the alleged victims that did not result represented or did not have representation, the Tribunal indicated that the Commission "would be their procedural representative as guarantor of public interest under the American Convention, in order to avoid their defenselessness," in application of Article 33(3) of the Rules of Procedure of the Court.

41. On October 4, 2005 the Secretariat, prior preliminary examination of the application by the President, pursuant to that stated in Article 35(1)(b) and (e) of the Rules of Procedure, notified it along with its appendixes to the State and to the common intervener of the representatives of the alleged victims and their next of kin (hereinafter "the common intervener"). It also informed the state of the terms for its reply and appointment of their representation in the process. Likewise, it informed the common intervener of the term to present her brief of pleadings, motions, and evidence (hereinafter "brief of pleadings and motions").

42. On October 6, 2005 the common intervener presented a brief, through which she informed that "she had instructed Doctor Vaughan Lowe to make legal representations in a joint manner with the undersigning [...]," and requested the adoption of the English language as the work language, along with Spanish.

43. On October 13, 2005 the Secretariat sent a note, through which, following the President's instructions, it informed the common intervener that the work language for the case would continue to be Spanish. The latter due to the fact that "the language previously employed, from the start of the processing before the Court and without variation, ha[d] been Spanish," "the language of the responding State [...]" the common intervener of the representatives, and the majority of the alleged victims [was] the Spanish language" and "the Tribunal lack[ed] resources to process the case in two languages or translate all the material reunited to a language different to the one that ha[d] been employed up to [that day]."

44. On October 17, 2005 the common intervener presented a brief and its appendixes, through which it requested a one-month extension to present the brief of pleadings and motions (*supra* para. 41). It also requested that the Tribunal ask the Commission to present the originals of some appendixes and videos of the testimonies recorded, which allegedly had not been forwarded to the Court.

45. On October 27, 2005 the Commission presented a brief and its appendixes, through which, *inter alia*, it requested that the Tribunal "ask the State [...] to forward certified copies of the totality of the documents available related to the investigations developed in the scope of the domestic jurisdiction with regard to the facts, as well as an authenticated copy of the applicable legislation and regulations." Likewise, it reiterated that "the documents sent [as appendixes to the application] w[ere] the best copy it had and that it has been able to obtain."

46. On November 2, 2005 the Secretariat, following the President's instructions, informed the common intervener that the extension requested to present her brief of pleadings and motions (*supra* para. 44) was not granted since the unpostponable nature of the term to present said brief is expressly established in the Rules of Procedure of the Court.



47. On November 2, 2005 the Secretariat, following the President's instructions, requested that the Commission forward the evidence indicated by the common intervener in her brief of October 17, 2005 (*supra* para. 44).

48. On November 4, 2005 the Commission presented a brief through which it forwarded the originals of 3 statements of alleged victims, in response to the request of evidence made on November 2, 2005 (*supra* para. 47). The appendixes to said brief were presented on November 7, 2005.

49. On November 6, 2005 the common intervener presented a brief, through which she forwarded her observations to the "correction of the appendixes" made by the Commission and she referred to the "[d]ocumentation regarding the initial processing" before the Commission. She stated that it did not include "any of the evidence produced in the presence of both parties corresponding to the years prior to the joining of case files 11,015 and 11,769-B." (*supra* para. 16) Due to the aforementioned she requested that the Commission "correct [said] omission" and that the two-month term to present the brief of pleadings and motions be computed "based on the receipt of [the] application and its legible and complete appendixes." Regarding the last request, the Secretariat, following the Tribunal's instructions, reiterated that stated in the Secretariat's note of November 2, 2005 (*supra* para. 46), in the sense that the term to present the brief of pleadings and motions is unpostponable and starts as of the day on which the application is notified. Likewise, the common intervener was informed that she would later be offered the opportunity to present final oral and written arguments.

50. On November 10, 2005 the State appointed Mr. Oscar Manuel Ayzanoa Vigil as Agent.

51. On November 29, 2005 the Secretariat, following the President's instructions, asked the Commission to "indi[cate] if in the proceedings before said body, it had received evidence 'in adversarial proceedings' that were not previously sent to the Tribunal, pursuant to that stated in Article 44(2) of the Rules of Procedure of the Court, and if so, to forward them as soon as possible." Likewise, on that day the Secretariat sent a note to the State, through which it asked it to forward with its response to the petition and observations to the pleadings, motions, and evidence the documentation regarding domestic investigations and the legislation applicable to the case requested by the Commission in paragraph 202 of its application.

52. On December 16, 2005 the Commission presented a brief with appendixes, through which it forwarded its response to that requested through note of November 29, 2005 (*supra* para. 51). The Commission indicated, *inter alia*, that "it had not omitted sending to the Tribunal any evidentiary element that it considered relevant for the case [...]." It also forwarded four documents that included "some reference to the facts [of the] case," spreading upon the record that the Commission "considered that they only reiterated evidence included in the process through other actions."

53. On December 20, 2005 the common intervener forwarded her brief of pleadings and motions, in which she enclosed documentary evidence and offered testimonial evidence and expert assessments which she accompanied with documentary evidence and testimonial evidence. Likewise, it enclosed a brief of 12 pages and its appendixes and stated that it was from "a group of [alleged] victims represented by other representatives." On December 26, 2005 she presented the appendixes to the brief of pleadings and motions.

54. On January 6, 2006 the Secretariat, following the President's instructions, requested that the common intervener present the document titled "List of Victims" in the Spanish language, "as soon as possible". Said document is part of the appendixes to the brief of pleadings and motions (*supra* para. 53).

55. On January 15, 2006 the common intervener presented a brief with its appendixes, through which she forwarded the translations to the Spanish language of several documents that had been presented in English in the proceedings before the Commission and the Court. On January 19, 2006 the Secretariat indicated that it was still awaiting the missing translation of the document titled "List of Victims" (*supra* para. 54).

56. On February 12, 2006 the State presented its response to the petition and observations to the brief of pleadings and motions, accompanied by documentary evidence and it offered testimonial evidence. On February 20, 2006 Peru forwarded the appendixes to said brief. In said brief, the State made an assent and partial acknowledgment of international responsibility for certain violations argued by the Commission (*infra* paras. 129 through 159). Likewise, Peru indicated that 'it reserv[ed] the right to express the legal grounds in a future brief[, ...] for which it request[ed] a reasonable period of time to be able to develop them with the properties that a case of this importance deserve[d]."

57. On March 3, 2006 the Secretariat, following the President's instructions and in application of the regulatory provisions, informed the State that it could not grant a new term to develop the "legal grounds" (*supra* para. 56), since it was a procedural act not contemplated in the Rules of Procedure. The Secretariat also told it that it would have the opportunity to present its arguments when exposing their final oral arguments in the eventual public hearing that will be summoned, as well as to present their final written arguments.

58. On March 13, 2006 the Secretariat, following the President's instructions, requested that the parties forward, no later than March 24, 2006, their observations to the request made by the Commission in paragraph 203 of its application, in the sense that the Court accepted as testimonial evidence, "in virtue of the principle of procedural economy," the statements given under oath by Mrs. Mónica Feria Tinta and Avelina García Calderón Orozco, during the hearing on the merits of the case celebrated before the Commission on November 14, 2001, included in Appendix 269 of the application.

59. On March 21, 2006 the common intervener presented a brief, through which it indicated that it forwarded its "observations" to the response to the petition presented by the State (*supra* para. 56).

60. On March 24, 2006 the Secretariat, following the President's instructions, informed the common intervener that the mentioned "observations" (*supra* para. 59) were not admitted, since it was a procedural act not contemplated in the Rules of Procedure. Likewise, it reiterated the request made to Peru through note of November 29, 2005 (*supra* para. 51), in the sense that it should forward the documents regarding domestic investigations and the norms applicable to the case.

61. On March 24, 2006 the common intervener presented the translation of the document titled "List of Victims" (*supra* paras. 54 and 55).

62. On March 24 and 27, 2006 the common intervener and the State, respectively, presented their observations to the request made by the Commission, in the sense that the Tribunal admitted as testimonial evidence the statements offered under oath by Mrs. Ferial Tinta and García Calderón during the proceeding before the Commission (*supra* para. 58). In this regard, the State indicated that “it did not have any objection” to the mentioned request. The common intervener expressed that Mrs. Avelina García and the common intervener “were willing to [...] be called before the Court [...] as witness[es].” Likewise, it added that “[i]f the Court [...] considers that for procedural economy [it is] preferable [...] to admit [...] the statements offered [...] in the hearing [before] the Commission [...], they accept[ed] the decision of the Court according to its best understanding.”

63. On April 26, 2006 the Commission presented a brief, through which it presented to the Tribunal a consultation made by “Mr. Douglas Cassel, legal advisor of the group of victims represented by the original claimant, Sabina Astete,” “regarding the appropriate mechanism to obtain authorization so that said group of victims could communicate directly with the Tribunal or, in its defect, could do so through the Commission and not through the common intervener.” Likewise, the Commission requested that the Court “arbitr[ate] the measures necessary to guarantee that all the [alleged] victims h[ave] access and [that they] were heard according to the proceedings established in the Rules of Procedure of the Court [...].”

64. On May 8, 2006 the common intervener presented a brief and its appendixes, through which she referred to the brief presented by the Commission on April 26, 2006 (*supra* para. 63), in which it presented to the Tribunal a consultation made by Mr. Douglass Cassel.

65. On May 24, 2006 the President of the Court issued a Ruling, through which it requested that Mr. Wilfredo Pedraza, proposed as a witness by the Commission, Messrs. Michael Stephen Bronstein, Edith Tinta, Rosario Falconí Alvarado, Lilliana Peralta Saldarriaga, Osilia Ernestina Cruzatt widow of Juárez, Eva Challco, Luis Jiménez, Gustavo Adolfo Chávez Hun, Mercedes Villaverde, Raul Basilio Orihuela, and Jesús Julcarima Antonio, proposed by the common intervener, offer their testimonies through statements offered before a notary public (affidavits). He also requested that Mr. Christopher Birkbeck, proposed as an expert witness by the Commission, and Messrs. José Quiroga and Ana C. Deutsch, proposed as expert witnesses by the common intervener, offer their expert reports through statements offered before notary public (affidavits). Likewise, he requested that, as evidence to facilitate adjudication of the case that Messrs. Miriam Rodríguez Peralta, Cesar Mamani Valverde, Alfredo Poccopachi Vallejos, and Madelein Valle Rivera, offer their testimonies through statements given before notary public (affidavits). Similarly, in said Ruling the President summoned the parties to a public hearing that would be held in the city of San Salvador, El Salvador, at the headquarters of the Supreme Court of Justice, on June 26 and 27, 2006, to listen to their final oral arguments on the merits and the possible reparations and costs, as well as the testimonial statements of Mrs. Gaby Balcázar Medina and Julia Peña Castillo, proposed by the Commission, of Messrs. Luis Angel Pérez Zapata and Lastenia Eugenia Caballero Mejía, proposed by the common intervener, of Mr. Omar Antonio Pimentel Calle, proposed by the State, and the expert reports of Messrs. Nizam Peerwani and Thomas Wenzel, proposed by the common intervener. Besides, in this Ruling the President informed the parties that they had time until August 3, 2006 to present their final written arguments in relation to the merits and the possible reparations and costs.

66. On May 30, 2006 the common intervener requested an extension to present the expert reports through statement offered before notary public, in response to that requested in the Ruling issued by the President on May 24, 2006 (*supra* para. 65). Following the instructions of the President of the Court the extension requested was granted until June 21, 2006.

67. On May 2, 2006 Mr. Douglas Cassel, one of the representatives of the alleged victims and their next of kin, but not the common intervener, forwarded two briefs and their appendixes, through which it presented a request of provisional measures to the Court, with the object, *inter alia*, that "the State ensure that [there was] a prompt and adequate [...] investigation of the robbery [suffered by Mrs. Madelein Valle Rivera]."<sup>2</sup>

68. On May 31, 2006 the President, in consultation with the judges, issued a Ruling through which it "dismiss[ed] the request of provisional measures presented by Mr. Douglass Cassel" due, *inter alia*, to the fact that it "consider[ed] that it was not [...] prove[n] that there was a situation of extreme seriousness and urgency that call[ed] for the adoption of urgent measures in favor of Mrs. Madelein Valle Rivera, to avoid an irreparable damage to her rights."

69. On June 1, 2006 the Commission requested an extension to present the expert report of Mr. Christopher Birkbeck through a statement offered before notary public, in response to that requested in the Ruling issued by the President on May 24, 2006 (*supra* para. 65). Following the President's instructions the extension requested was granted until June 21, 2006.

70. On June 5, 2006 the Commission presented a brief, through which it communicated that "on May 31, 2006 Mr. Douglass Cassel [...] ask[ed] the Commission to include him, Mrs. Sabina Astete, and Mr. Sean O'Brien, in the Commission's delegation for the case." Likewise, it requested that the Court "issue the measures consider[ed] necessary to guarantee the effective representation of all the [alleged] victims [...]."

71. On June 6, 2006 the Secretariat, following the President's instructions, asked the Commission to forward a copy of the brief through which Mr. Cassel made the request referred to in the Commission's communication of June 5, 2006 (*supra* para. 70).

72. On June 7, 2006 the Commission presented a brief and its appendix, through which it forwarded copy of "the relevant parts of the request presented to the Commission on May 31, 2006 by [Mr.] Douglass Cassel," in relation to the case (*supra* paras. 70 and 71). According to the appendix mentioned, on May 31, 2006 Mr. Douglass Cassel asked the Commission to appoint, pursuant to Article 69 of the Rules of Procedure and for the effect of the hearing that will be held before the Court on June 26 and 27, 2006, the petitioner Sabina Astete as a delegate of the Commission and the attorneys Douglass Cassel and Sean O'Brien as delegates or assistants.

73. On June 8, 2006 the common intervener forwarded copy of the written statements of the witnesses Michael Stephen Bronstein and Luis F. Jiménez (*supra*

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<sup>2</sup> Mrs. Madeleine Valle Rivera is an alleged victim of this case and through a Ruling of the President on May 24, 2006 she was requested to offer a statement through affidavit.

para. 65). The Secretariat, following the President's instructions, asked her to forward the statement of Mr. Michael Stephen Bronstein in the Spanish language as soon as possible.

74. On June 9, 2006 the Secretariat, following the President's instructions in consultation with the judges, sent a note to the Commission in relation to the briefs of June 5 and 7, 2006 (*supra* paras. 70 and 72), in which it informed the latter that the decision regarding the conformation of its delegation for the public hearing corresponded to the Commission itself, since it is a situation clearly foreseen and solved in Article 69(2) of the Rules of Procedure of the Commission, and Mr. Cassel expressly invoked the norm applicable to said situation. Likewise, it informed the Commission that the Court did not have any inconvenient in attending, in the present case, to the stipulation included in the Rules of Procedure of the Commission, in the manner considered appropriate by the same.

75. On June 9, 2006 the common intervener requested an extension to present the testimonies and expert reports through statements offered before notary public that had not yet been forwarded to the Tribunal, in response to that requested in the Ruling issued by the President on May 24, 2006 (*supra* para. 65). Following the President's instructions the extension was granted until June 16, 2006.

76. On June 9, 2006 the Commission requested an extension to present the testimony of Mr. Wilfredo Pedraza through a statement offered before a notary public, in response to that requested in the Ruling issued by the President on May 24, 2006 (*supra* para. 65). Following the President's instructions the extension requested was granted until June 21, 2006.

77. On June 11, 2006 the common intervener forwarded copy of the written statement of the witness Osilia Ernestina Cruzatt widow of Juárez (*supra* para. 65).

78. On June 12, 2006 the common intervener presented a brief and its appendix, through which she stated "her position" in relation to the request made by "Mrs. [Sabina] Astete and [Mr.] Douglass Cassel to be appointed Delegates of the Inter-American Commission" during the public hearing summoned in the present case (*supra* paras. 70 and 72). In this regard, following the President's instructions she was informed that her brief was forwarded to the Commission, for the corresponding effects.

79. On June 13, 2006 the common intervener forwarded copies of the written statements of the witnesses Eva Sofía Chalco Hurtado and Luz Liliana Peralta Saldarriaga (*supra* para. 65).

80. On June 13, 2006 the Association of Relatives of Missing Political Inmates and Victims of Genocide, in response to the evidence to facilitate adjudication of the case requested by the President (*supra* para. 65), sent copy of the written statements of the witnesses Nieves Miriam Rodríguez Peralta, Madelein Escolástica Valle Rivera, and Alfredo Poccorpachi Vallejos. Likewise, they presented a compact disc with the recording of said statements.

81. On June 13, 2006 Mr. César Mamani Valverde, in response to the request of evidence to facilitate adjudication of the case made by the President (*supra* para. 65), forwarded his written statement.

82. On June 16, 2006 the common intervener forwarded copy of the written statements of Mrs. Edith Adriana Tinta Junco de Feria (*supra* para. 65) and Rubeth Feria Tinta. Regarding the statement of the latter she stated that “[d]espite the fact that [said a]ffidavit was not offered [...], it became necessary because [the common intervener,] found it difficult to ask her [...] mother the questions,” reason why she asked the Tribunal to accept said statement “as a complement” to the statement of Mrs. Edith Tinta. The Secretariat informed the common intervener that said request would be forwarded to the Court for the corresponding effects.

83. On June 17, 2006 the common intervener forwarded copy of the statement offered by the witness Raúl Basilio Gil Orihuela (*supra* para. 65). Likewise, she requested an extension to present the testimonies of Messrs. Rosario Falconí, Jesús Angel Julcarima, Gustavo Chávez Hun, and Mercedes Villaverde through statement offered before notary public, in response to that requested in the Ruling issued by the President on May 24, 2006 (*supra* para. 65). The Secretariat, following the President’s instructions, asked the representative to forward said statements as soon as possible.

84. On June 19, 2006 the expert witness Christopher Birkbeck forwarded his written statement (*supra* para. 65).

85. On June 20, 2006 the Commission presented a brief, through which it desisted from presenting the written statement of Mr. Wilfredo Pedraza (*supra* paras. 65 and 76), since he informed the Commission that “despite the extension granted by the [...] Court [...], due to time limitations he would not be able to comply with that requested.” On that same day, the Commission presented a brief through which it indicated that “it did not have observations to present to the statements of Messrs. Michael Stephen Bronstein [*supra* para. 73], Osilia Ernestina Cruzatt widow of Juárez [*supra* para. 77], Eva Sofía C[h]allco Hurtado, Luz Lilliana Peralta Saldarriaga, Nieves Miriam Rodríguez Peralta, Madelein Escolástica Valle Rivera, Alfredo Poccorpachi Vallejos, and César Mamani Valverde” (*supra* para. 79). Additionally, in said brief it presented observations to the statement offered by Mr. Luis F. Jiménez (*supra* para. 73) and, *inter alia*, it requested that the Court “add to the body of evidence only those elements of the statement that compl[ied] with the objective mentioned by the Tribunal.”

86. On June 21, 2006 the common intervener presented a brief, through which she forwarded copy of the expert reports of Mrs. Ana Deutsch and Mr. José Quiroga (*supra* para. 65).

87. On June 24, 2006 the common intervener forwarded a complete copy of the written statement of the witness Jesús Ángel Julcarima Antonio (*supra* para. 65).

88. On June 25, 2006 the common intervener presented a brief, in which she formulated an “objection to the participation of Mr. Diego García Sayán as a judge in the present case,” since she considered that he would have a restraint to do so. The intervener stated, *inter alia*, that Judge García-Sayán had served as Secretary of Justice and Foreign Affairs of Peru, and as such was “responsible as an official of the policies and decisions of the Peruvian State in relation to the investigation or lack of investigation of the facts.”

89. On June 25, 2006 Peru presented a brief, through which it stated its “objection” to the claim of the common intervener (*supra* para. 88).

90. On June 25, 2006 the Court issued a Ruling, through which it “reject[ed] the objection presented by the common intervener [...] regarding the participation of Judge Diego García-Sayán in the hearing of the case, for considering it inadmissible” (*supra* para. 88) and ruled that the processing of the case should continue and the public hearing summoned by the Court should be held. The Court took into consideration that the petition was made the day before the public hearing was held and considered that no evidence that the facts and arguments exposed in the requests constituted any of the causes established in Article 19 of the Statute of the Court was presented.

91. On June 26, 2006 the Judge Diego García-Sayán presented a brief, through which he self-disqualified himself of hearing the present case. In said brief the Judge García-Sayán stated, *inter alia*, that “he had not intervened in the facts subject to this case, reason for which the Ruling of [the] Court [issued on the previous day] was perfectly adjusted to the stipulations of [the] Statute,” and that “much less, could he have intervened in any way in the ‘policies and decisions of the Peruvian State in relation to the investigation or lack of investigation of the facts.’” Likewise, he informed that he made the decision to self-disqualify himself since “a hearing [...] was [going] to be started [...] and its normal development could be affected by the unforeseeable behavior of the [common intervener and that t]he precious time of the Court, the parties, and the witnesses should concentrate on the merits and the possibility to be distracted on matters that do not have any relationship with the case and the effective validity of human rights, reason of existence of this Court, must not be left open.”

92. On June 26, 2006 the Court issued a Ruling, through which, despite the fact that it considered that there was no impediment for Judge García-Sayán to hear this case, “it accept[ed] the disqualification presented by the [mentioned] Judge [...] to continue hearing [...] the case.” (*supra* para. 91). The aforementioned, in consideration of that stated in Articles 19 of the Rules of Procedure and the Statute of the Court, and from the analysis of the motives presented by Judge Diego García-Sayán to disqualify himself from hearing the case.

93. On the 26 and 27 days of June 2006 the public hearing on the merits and possible reparations and costs was held in the city of San Salvador, El Salvador, in which the following appeared: a) for the Inter-American Commission: Florentín Meléndez and Santiago Canton, delegates; Víctor Madrigal, Juan Pablo Alban, Lilly Ching, and Manuela Cuvi, legal advisors; b) for the common intervener: Mónica Feria Tinta, representative, and Zoe Harper, advisor; and c) for the State of Peru: Oscar Manuel Ayzanoa Vigil, Agent. The witnesses and experts proposed by the parties and summoned by the President (*supra* para. 65 and *infra* para. 187) also appeared before the Court. Likewise, the Court listened to the final arguments of the Commission, the common intervener, and the State. Similarly, the Court asked the State and the common intervener to present certain explanations and documents along with their corresponding briefs of final arguments. Besides, in said hearing the common intervener presented different documents. On that same day, the common intervener forwarded the appendixes to the written statement of the witnesses Osilia Ernestina Cruzatt widow of Juárez and Luz Liliana Peralta Saldarriaga, as well as appendix No. 2 of the expert report of Mr. José Quiroga (*supra* para. 65).

94. On June 30, 2006 the Commission presented a brief, through which it informed that “[it did] not [have] observations to present to the statements of Messrs. Rubeth Feria Tinta, Raúl Basilio Gil Orihuela, Ana Deutsch, and José

Quiroga." (*supra* paras. 82, 83, and 86). It also presented observations to the statement of Mrs. Edith Feria Tinta and, *inter alia*, it requested that the Court "add to the body of evidence only those elements of the statement that compl[ied] with the object mentioned by the Tribunal, excluding those that refer[red] to the matter still pending before the Commission."

95. On July 3, 2006 the common intervener presented a brief, through which she asked the Court, in application of Article 51 of its Rules of Procedure, that "Mrs. Madelein Escolástica Valle, Mrs. Sabina Astete, and in general any person related to them [... abstain] from interfering with the witnesses of the [common intervener], intimidating and starting a campaign against the witnesses that have appeared before the Court [...] during the [public] hearing," as well as "that it take the measures necessary so that the copies recorded in the hearing [were] not object of public circulation as request[ed] by Mrs. Sabina Astete." In this regard, the Court dismissed the first petition because it understood that it did not fit into the conditions established in the mentioned Article 51 of the Rules of Procedure regarding the protection of witnesses and expert witnesses. In what refers to the request regarding the "public circulation" of the recorded copies of the hearing, the Court dismissed it due to lack of admissibility, since it is a procedural act of a public nature. Likewise, it indicated that if the common intervener would have considered that there were exceptional circumstances that required that the Court receive the statements of the witnesses proposed by her in private, she should have indicated it to the Tribunal, with anticipation, so it could issue the corresponding ruling.

96. On July 4, 2006 the common intervener presented a brief, in which she stated, *inter alia*, that "the statement offered by Mrs. Edith Tinta [was] in its totality relevant in the matter of this case." (*supra* paras. 82 and 94).

97. On July 5, 2006 the Commission presented a brief, in which it stated that "it did not have observations to make to the sworn statement of Mr. Jesús Ángel Julcamira Antonio." (*supra* para. 87).

98. On July 7, 2006 the common intervener forwarded her observations to the written statement of the witness Madelein Escolástica Valle Rivera and the expert witness Christopher Birkbeck (*supra* paras. 80 and 84).

99. On July 10, 2006 the common intervener forwarded a copy of the translation to the Spanish language of the statement offered by the witness Stephen Bronstein (*supra* para. 73).

100. On July 11, 2006 the common intervener forwarded a copy of an appendix to the written statement of the expert witness Ana Deutsch, "which was not sent with the original by mistake" (*supra* para. 86) and, in relation with the sworn statement offered by Mr. Luis F. Jiménez, she requested, *inter alia*, that "his testimony be include[d] in its totality to the evidence offered in this case."

101. On July 27, 2006 the Secretariat, following the President's instructions, reminded the State and the common intervener of the documentation or explanations that the Court requested from them after the presentation of their final oral arguments in the public hearing on the merits and the possible reparations and costs held on June 26 and 27, 2006 (*supra* para. 93). Likewise, it asked the Commission and the common intervener to present, no later than August 3, 2006,



their clarifications or observations with regard to several issues referring to the determination of the alleged victims of the case.

102. On August 3, 2006 the Commission presented a brief, through which it forwarded its response to the clarifications or observations in relation to the matter of the determination of the alleged victims of the case (*supra* para. 101).

103. On August 3, 2006 the Commission presented its final written arguments on the merits and the possible reparations and costs. As an "appendix" to its brief of final arguments the Commission forwarded a brief of the "Grupo Canto Grande 92", indicating that it was a brief "received by the Commission from the group of [alleged] victims represented by Mrs. Sabina Astete." On August 11, 2006 it presented the appendixes to the mentioned brief of Mrs. Sabina Astete.

104. On August 3, 2006 the common intervener presented its response to the clarifications or observations in relation to the matters regarding the determination of the alleged victims of the case (*supra* para. 101). On August 15, 2006 it presented appendixes 2, 3, and 4 of the mentioned brief.

105. On August 9, 2006 the State presented its final written briefs and its response to the request for evidence to facilitate adjudication of the case requested in the public hearing (*supra* paras. 93 and 101). On August 10, 2006 the State presented the appendixes to said briefs.

106. On August 18, 2006 the common intervener presented its final written arguments. Likewise, she enclosed the documents included in 6 "Appendixes".

107. On August 23, 2006 the Secretariat of the Court, following the President's instructions, granted time until September 23, 2006 so that the parties could forward the observations considered convenient to the mentioned briefs through which the Commission and the common intervener presented their response to the clarifications or observations with regard to the matters referent to the determination of the alleged victims, and the State's response to the Court's request for evidence to facilitate adjudication of the case (*supra* paras. 102, 104, and 105).

108. On August 25, 2006 the State presented "supervening evidence[, ... in relation to] the criminal accusation made by the Fifth Supraprovincial Criminal Prosecutors' Office of Lima [...] against the former president Alberto Fujimori Fujimori [...]" in relation to the present case.

109. On August 28, 2006 the Secretariat, following the President's instructions, granted time until September 23, 2006 for the Commission and the common intervener to present the corresponding observations to the brief presented by the State on August 25, 2006 (*supra* para. 108).

110. On August 31, 2006 the common intervener presented a brief and its appendixes, through which it forwarded its observations to the clarification regarding the determination of the alleged victims presented by the Commission on August 3, 2006 (*supra* paras. 102 and 107). On that same date, the common intervener presented a brief and its appendixes, through which she forwarded her observations to the "supervening evidence" presented by the State through its brief of August 25, 2006 (*supra* paras. 108 and 109). The appendixes to these last observations were presented on September 19, 2006.

111. On September 8, 2006 the common intervener presented a brief and its appendix, through which it presented "the [...] article published by the newspaper *Correo* on September 6, 2006 in relation to the prosecution of Alberto Fujimori Fujimori for some facts related to the present case." Likewise, she made some corrections to information that was set forth in her brief of final arguments (*supra* para. 106) and stated that she was forwarding documentation regarding "receipts [...] of] expenses." This last documentation was presented on October 4, 2006.

112. On September 14, 2006 the State presented a brief and its appendixes, through which it forwarded "supervening evidence, under the protection of that stated in Article 44°, subparagraph 3, of the Rules of Procedure of the Court," in relation to "[the] ruling of last August 29[, in which the] preliminary proceedings have been started with an arrest warrant against former president Alberto Fujimori Fujimori, for the facts occurred between May 6 through 9, 1991 in the Penitentiary 'Miguel Castro Castro'." On September 20, 2006 Peru presented the appendixes to said brief.

113. On September 22, 2006 the Commission presented a brief, through which it forwarded its observations to the evidence presented by the State as an appendix to its final written arguments (*supra* para. 105) and to the one presented on August 25, 2006 as supervening evidence (*supra* paras. 108 and 109). Likewise, it referred to the brief presented by the common intervener on August 3, 2006 on the clarification and observations related to the determination of the alleged victims (*supra* paras. 104 and 107).

114. On September 26, 2006 the Secretariat, following the President's instructions, granted time until October 6, 2006 for the common intervener and the Commission to present the observations considered appropriate to the mentioned "supervening evidence" presented by the State on September 14, 2006 (*supra* para. 112).

115. On September 29, 2006 the common intervener presented a brief and its appendixes, in which she forwarded her observations to the brief and evidence presented by the State on September 14, 2006 (*supra* paras. 112 and 114).

116. On October 5, 2006 the Commission presented a brief, through which it forwarded its observations to the brief and evidence presented by Peru on September 14, 2006 (*supra* paras. 112 and 114).

117. On October 20, 2006 the Commission presented a communication, with which it enclosed appendixes. In its communication the Commission pointed out that it was forwarding a "copy of the communication [of] October 16, 2006, through which Messrs. Hubert Arce Carpio and Francisco Alania Osorio asked the Commission [...] to assume the defense of its interests, [in relation to this] case [...], and Mrs. Doris Quispe La Rosa [...] ratif[ied] her will in this sense." As appendixes to said communication the Commission also enclosed the written statement of the aforementioned alleged victims.

118. On October 24, 2006 the common intervener forwarded a brief, through which she referred to the communication presented by the Inter-American Commission on October 20, 2006 and its appendixes (*supra* para. 117), and stated that she "[o]bjects [...] the presentation of testimonies at this moment of the process and considers[...] that in virtue of Article 44 of the Rules of Procedure they are inadmissible."

119. On October 25, 2006 the Secretariat, following the President's instructions, informed the parties that both the communication presented by the Inter-American Commission on October 20, 2006 and its appendixes (*supra* para. 117), as well as the brief of the common intervener of October 24, 2006 (*supra* para. 118), would be sent to the Court for the corresponding effects. Likewise, it indicated that upon receiving said communication from the Inter-American Commission the Secretariat verified that it is evidence that was not requested to said body and that in its brief the Commission does not make any reference to the presentation of the written statements enclosed.

120. On October 30, 2006 the Secretariat, following the President's instructions and pursuant to that stated in Article 45(2) of the Rules of Procedure of the Tribunal, requested that the Inter-American Commission forward, no later than November 2, 2006, a complete copy of the application identified before said body under number 11,769 (*supra* para. 14), as well as specific clarifications in relation to the claim identified with number 11,015 (*supra* para. 6).

121. On November 3, 2006, after an extension that was granted to it by the President, the Commission forwarded a brief and its appendixes, through which it presented the document and clarifications requested, following the instructions of the Tribunal's President, through note of October 30, 2006 (*supra* para. 120).

122. On November 6, 2006 the Secretariat, following the President's instructions and pursuant to that stated in Article 45(2) of the Rules of Procedure of the Tribunal, asked the group of representatives made up by Sabina Astete, Douglass Cassel, Peter Erlinder, and Bertha Flores to present, no later than November 9, 2006, specific evidence with regard to the determination of the alleged victims.

123. On November 7, 2006 the common intervener presented a brief and its appendixes, through which she referred to the brief presented by the Inter-American Commission on November 3, 2006 and its appendixes (*supra* para. 121).

124. On November 9, 2006 the group of representatives made up by Sabina Astete, Douglass Cassel, Peter Erlinder, and Bertha Flores forwarded copy of the documents requested to it, following the President's instructions, through a note of the Secretariat of November 6, 2006 (*supra* para. 122).

125. On November 15, 2006 the Secretariat, following the President's instructions and pursuant to that stated in Article 45(2) of the Rules of Procedure of the Tribunal, asked the Inter-American Commission to present, no later than November 20, 2006, specific evidence with regard to the determination of the alleged victims.

126. On November 18, 2006 the common intervener presented a brief, through which she referred to the brief presented by the group of representatives made up by Sabina Astete, Douglass Cassel, Peter Erlinder, and Bertha Flores on November 9, 2006, in relation to the documents that were requested to them following the instructions of the President of the Tribunal (*supra* para. 124).

127. On November 14 and 20, 2006 the common intervener presented documentation regarding the "receipts [...of] expenses."

128. On November 20 and 22, 2006 the Commission forwarded two briefs and an appendix, through which it presented its response to the request for evidence to

facilitate adjudication of the case made by the President of the Court through its note of November 15, 2006 (*supra* para. 125).

## V

### PARTIAL ACKNOWLEDGMENT OF INTERNATIONAL RESPONSIBILITY

129. Below the Court will proceed to determine the scope of the partial acknowledgment of international responsibility made by the State (*supra* para. 56) and the extent of the subsisting controversy.

130. Article 53(2) of the Rules of Procedures establishes that

[i]f the respondent informs the Court of its acquiescence to the claims of the party that has brought the case as well as to the claims of the representatives of the alleged victims, their next of kin or representatives, the Court, after hearing the opinions of the other parties to the case, shall decide whether such acquiescence and its juridical effects are acceptable. In that event, the Court shall determine the appropriate reparations and indemnities.

131. The Inter-American Court, in exercising its contentious function, applies and interprets the American Convention. When a case has already been submitted to its jurisdiction, it is empowered to declare the international responsibility of a State Party to the Convention for violation of its provisions.<sup>3</sup>

132. The Court, in the use of its jurisdictional functions of international protection of human rights, may determine if an acknowledgment of international responsibility made by a respondent State is well-based, in the terms of the American Convention, to conclude the proceedings or if it is necessary to continue with the examination of the merits and the determination of the possible reparations and costs. For these effects, the Tribunal will analyze the situation presented in each specific case.<sup>4</sup>

133. In the present case, the State has partially acknowledged the facts in different acts before the Court. In the public hearing before the Tribunal (*supra* para. 93) the State made a more ample and specific acknowledgment regarding the facts than the one made in its response to the petition and observations to the brief of pleadings and motions (*supra* para. 56). In its final written arguments (*supra* para. 105) Peru reiterated said acknowledgment in the terms of the one made in the mentioned hearing.

134. In its factual and judicial considerations, this Court will consider the more ample acknowledgment made by the State, to which it will make reference in the following paragraphs. Since in the mentioned public hearing, and in its final arguments the State did not refer expressly to the matter of the victims or the rights violated, the Tribunal will refer, in what refers to these matters, to that previously indicated by the State in its response to the application and observations to the brief of pleadings and motions.

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<sup>3</sup> Cfr. *Case of Vargas Areco*. Judgment of September 26, 2006. Series C No. 155, para. 42; *Case of Servellón García et al.*. Judgment of September 21, 2006. Series C No. 152, para. 52; and *Case of Ximenes Lopes*. Judgment of July 4, 2006. Series C No. 149, para. 61.

<sup>4</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 43; *Case of Servellón García et al.*, *supra* note 3, para. 53; and *Case of Ximenes Lopes*, *supra* note 3, para. 62.

**A) Scope of the partial acknowledgment of international responsibility made by the State**

*1) Regarding the facts*

135. In the public hearing held in El Salvador on June 26 and 27, 2006 (*supra* para. 93), the State mentioned that

[t]he facts [...] cannot be hidden, the pain cannot be hidden, [...] those injured cannot be hidden, the pain of the victims' next of kin cannot be hidden. In the response to the petition in this sense, the Peruvian state is acknowledging those facts due to the evidence of the same and because since they occurred [...] they were subject to an ample diffusion by the media.

[...] We believe that in order to analyze the facts it is necessary to analyze the context in which they occurred. [...] For twenty years Peru lived an extremely serious situation of internal conflict. [...] The facts of May 6 through 9[ , 1992 ...] were committed against inmates of a specific orientation. The acts of violence were directed against two pavilions, or mainly against one pavilion, pavilion 1 A and pavilion 4B, occupied at the time of the facts by inmates accused of crimes of terrorism linked to Peru's communist party Sendero Luminoso[. ... T]he act had a specific purpose: attack Sendero Luminoso.

[...] based on the government's military strategy of that time it oriented its actions toward that party, toward that group, there was a logic of war [against] the adversary.

136. Likewise, in response to a question made by the Tribunal, the State clarified that it acknowledges only the facts from May 6 to 9, 1992, and not the ones from the dates after that. Next, the State expressed that "it also acknowledges" "the situations expressed in the brief of pleadings, motions, and evidence presented by the common intervener," understanding that it does so with regard to the facts of May 6 to 9, 1992.

137. In the brief of final arguments (*supra* para. 105) the State "reassert[ed] and ratif[ied] the arguments and positions expressed within the framework of the [mentioned] Public Hearing [before] the Court," and reiterated that it acknowledges its partial responsibility in this case. Peru mentioned that "it acknowledges its responsibility in the facts occurred between May 6 t 9, 1992." Likewise, it added that:

[... e]ven though individual responsibilities will be determined within the Domestic venue, in the terms [o]f the process currently being followed before the Judicial Power [...], we cannot ignore the magnitude of the facts referred to in the present process and the responsibility of the Peruvian State in the same.

It also asked the Court to take into consideration "the historical context within which these facts occurred, in contrast with the State's current administration," and indicated that "the facts object of the present process were part of the strategy of the government in office to confront, violating human rights, the internal conflict."

*2) Regarding the alleged victims and the rights claimed as violated*

138. When expressing its partial acknowledgment of responsibility with regard to the facts, in the terms in which it was done in the public hearing and in its final written arguments (*supra* paras. 93 and 105), Peru did not make any express reference to the victims or the rights that the Inter-American Commission and the common intervener of the representatives claim were violated.

139. Previously, in the response to the petition and the observations to the brief of pleadings and motions, Peru stated, with regard to the victims, that

[...] regarding the citizens that died and were injured during the events, [...] their characteristics and circumstances of identification must be based mainly on the judicial actions currently in process and that will be delimited in the judgment that will be issued by the Judicial Power.

140. Similarly, in the response to the petition Peru accepted that the Court "conclude and declare" that "the State is partially responsible for":

i. [...] the deaths caused during the execution of Transfer Operative I, in the terms that the process currently before the Judicial Power for the facts charged, will in a timely and impartial manner declare and punish; since from the analysis of the facts there are innumerable situations that must be clarified with regard to the precise circumstances of the deaths.

ii. [...] those injured and mistreated during the execution [...] of Transfer Operative I, in the terms that the process currently before the Judicial Power for the facts charged, will in a timely and impartial manner declare and punish; since from the analysis of the facts there are innumerable situations that must be clarified with regard to the precise circumstances of those facts.

iii. [...] not respecting the right to a fair trial and judicial protection of the victims and their next of kin, while there was a Judicial Power that covered up the violations to human rights caused by the governmental administration of Alberto Fujimori. However, given the current existence of an ongoing independent and impartial judicial process, the violation has stopped and thus it was not completed and the rights have been restored and are being fully exercised by the victims and their next of kin.  
[...]

141. Besides, in said response to the petition the State mentioned that:

it accepts the non-compliance of the general obligation to respect and guarantee the human rights established in Article 1(1) of the American Convention [...]. However, it accepts a partial responsibility in the violations of the right to life, humane treatment, as long as the Judicial Power of Peru does not issue a ruling regarding the historical detailed truth of the events occurred between May 6 to 9, 1992.

### 3) *Regarding the requests for reparations and costs*

142. In its response to the petition, Peru indicated that "[i]n relation [to] the reparations that derive from this partial acknowledgment of responsibility, [...] it accepts the publication of the judgment issued in a newspaper of national circulation," and it stated "its objection to the symbolic measure of placing a commemorative plaque in the criminal center 'Castro Castro', since there is already a monument in reminder of all the victims of the armed conflict and since the mentioned criminal center is actually in operation with the presence of inmates that are both organized and active members of the Communist Party of Peru- Sendero Luminoso and a measure of this type would both affect the internal security of the criminal center and the measures destined to the reconciliation of Peruvians." It also indicated that "[i]n what refers to the monetary reparations that may result from the determination of responsibilities, the State proposes to determine the amounts according to policies that are being implemented by the State or that are going to be implemented, either by legislative and/ or administrative proceedings, according to experiences that may have occurred in other cases discussed before the Inter-American System, and as an effect of the State's acknowledgment of its international commitments."

143. In this regard, in the public hearing (*supra* para. 93) Peru stated that “in coherence with this policy of acknowledgment of the facts and seeking a reconciliation” it will start the corresponding consultations in order to promote an agreement for an amicable solution. Likewise, it referred to the comprehensive plan of reparations recommended by the Commission for Truth and Reconciliation, as well as to Law N° 28592 on the reparations for victims of the internal armed conflict.

144. Finally, in the State’s brief of final arguments it asked the Court “to declare [its] responsibility in the facts object of the present proceedings and set measures of reparation that fit within the legal and regulatory measures that the State is implementing as part of its commitments derived from the signing of international treaties in matters of Human Rights.” Likewise, it requested that the Tribunal “acknowledge [the] firm intention [of Peru] to implement policies of reparation” and it “reaffirm[ed] its firm intention to implement[... the symbolic reparations] in a context that means the real dignification of the victims and their next of kin [...].”

4) *Arguments of the Inter-American Commission and of the common intervener with regard to the partial acknowledgment of responsibility*

145. With regard to said acknowledgment, the Inter-American Commission expressed that it appreciated the acknowledgment made by the State of the facts and it considers it a positive step towards the compliance of its international obligations. Likewise, in its brief of final arguments (*supra* para. 103) the Commission added that “[t]he State [...] has accepted in its totality the facts of the case, including the denial of justice, reason for which it [...] requests that the Court consider them established and include them in the judgment on merits issued by it, in reason of the importance that the establishment of an official truth of that occurred has for the victims of violations of human rights, as well as for their next of kin and the Peruvian society.”

146. Likewise, in its final written arguments the Commission observed that “the acknowledgment [made by the State] does not refer to the juridical implications in relation to the facts, or to the appropriateness of the reparations requested by the parties” and that “the state agent, [during the public hearing,] stated that he did not have instructions to proceed with the acceptance of the Peruvian State’s international responsibility for the violations claimed by the parties.” The Commission requested “that the Court decide in the judgment the matters that remain in contention, that is, the assessment and juridical consequences of the facts acknowledged by the State, and the reparations that result appropriate in attention to the seriousness of the facts, the number of victims, and the nature of the breaches claimed against human rights.”

147. On her part, the common intervener of the representatives asked the Tribunal, *inter alia*, to “[issue] a judgment [...] both on the substantive matters determined by the facts[, as well as] by law, based on [...] the arguments of the parties, and that it determine the corresponding reparations.” In the public hearing the intervener stated that she rejected the offer made by the State to try to achieve an amicable solution in the terms proposed (*supra* para. 143). She also referred to the terms in which the State partially acknowledged its responsibility, and she pointed out that in the criminal investigation that is being carried out the survivors are not considered victims and that the crimes investigated do not correspond to what really happened.

148. The Court considers that the acknowledgment of responsibility made by the State is a positive contribution to the development of this process and to the validity of the principles that inspire the American Convention.<sup>5</sup>

## **B) Extent of the subsisting controversy**

149. After having examined the partial acknowledgment of responsibility made by the State and taking into account that stated by the Commission and the common intervener, the Court considers that the controversy subsists in the terms established in the following paragraphs.

### *Regarding the facts*

150. The Commission interpreted that the acknowledgment of the facts made by the State includes "[the] totality [of] the facts of the case." (*supra* para. 145) The Tribunal does not agree with this appreciation, since the State clearly said that it "acknowledges its responsibility in the facts occurred between May 6 to 9, 1992" presented in the Commission's application and it also expressed that "it acknowledges" "the situations expressed in the brief of pleadings, motions, and evidence presented by the common intervener." Thus it is clear that Peru did not acknowledge the facts that occurred after May 9, 1992. It is important to point out that in the proceedings before the Court the State did not expressly object the evidence presented to prove the alleged facts after May 9, 1992.

151. In what refers to the facts that occurred between May 6 and 9, 1992, the Commission and the intervener do not coincide in the description and classification of some of them. Therefore, the Tribunal must take into account the more ample examination that the intervener offers on some facts that were not claimed by the Commission (*infra* paras. 167 through 169), and with regard to the facts that have been classified differently by the Commission and the intervener, it will determine said facts based on the evidence provided in this process (*infra* paras. 164 through 166).

152. Based on the aforementioned considerations, it concludes that the controversy subsists in what refers to the facts allegedly happened after May 9, 1992. Therefore, it will determine the corresponding facts proven, pursuant to that claimed by the parties and the body of evidence of the case.

### *Regarding the rights whose violation is being claimed*

153. In its response to the petition and observations to the brief of pleading and motions, the State acknowledged the violation of Article 1(1) of the Convention and stated that it acknowledged "partial responsibility" with regard to the violations of Articles 4 and 5 of the same "as long as the Judicial Power of Peru does not issue a ruling on the historical detailed truth of the events occurred between May 6 and 9, 1992." It also expressly stated that it "contradicts the extremity of the application that requests that the [S]tate be declared responsible for the violation of the right to judicial protection."

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<sup>5</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 65; *Case of Goiburú et al.* Judgment of September 22, 2006. Series C No. 153, para. 52; and *Case of Servellón García et al.*, *supra* note 3, para. 77.



154. Later, in the public hearing and in its final arguments, by acknowledging its responsibility regarding the facts of May 6 through 9, 1992, the State did not expressly indicate which rights claimed by the Commission and the common intervener it admits as breached. However, from that expressed by the State it can be concluded that it changed the position it had held in its response to the petition (*supra* para. 139). In this sense, in said response Peru stated that the determination of the facts and breaches depended on the ruling of its Judicial Power, while in its final arguments the State expressly acknowledged the facts of May 6 through 9, 1992, without having them depend on any decision of domestic courts, and stated that the ruling issued by them is only related to the determination of individual criminal responsibilities.

155. Despite the fact that from the State's acknowledgment of responsibility it could be concluded that it admits that the rights to life and humane treatment of the inmates were breached from May 6 to 9, 1992, the Court considers that it is adequate to establish, in the corresponding chapters, the judicial consequences of the facts acknowledged by the State, as well as those occurred after May 9, 1992, pursuant to that claimed by the parties<sup>6</sup> and the body of evidence of the case.

#### *Regarding the alleged victims*

156. When acknowledging its responsibility regarding the events of May 6 and 9, 1992 the State did not expressly state that it acknowledged as victims the people indicated under that concept by the Commission and the common intervener.

157. However, based on the fact that the State expressed that "the facts [...] cannot be hidden, the pain cannot be hidden, [...] those injured cannot be hidden, the pain of the next of kin of the victims cannot be hidden," the Court considers that the State acknowledged that as a consequence of the facts of May 6 through 9, 1992 there were people who died, people who resulted injured, and people who suffered, including the inmates' next of kin.

158. As previously stated, the Tribunal will establish who the victims of the acts of violation acknowledged by the State are, pursuant to that claimed by the parties and the body of evidence of the case, also taking into account that it did not present any objection to the evidence provided by the Court on the alleged victims. Likewise, the Tribunal will determine the victims of the events occurred after May 9, 1992 that constitute a breach of the Convention, pursuant to that claimed by the parties and the body of evidence of the case.

#### *Regarding the Reparations*

159. When acknowledging its responsibility regarding the events of May 6 to 9, 1992 the State referred expressly to the subject of reparations and asked the Court to set the measures of reparation (*supra* para. 144), stating its firm intent to comply with the measures that correspond to it. The Court will determine the corresponding

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<sup>6</sup> The Comisión alegada as violated articles 4, 5, 8.1, 25 and 1.1 of the American Convention, in the terms stated in the considerations of this Judgment. The common intervener of the representatives alleged as violated articles 4, 5, 7, 8, 11, 12, 13, 24, 25 and 1.1 of the American Convention, as well as articles 1, 6, 7, 8 and 9 of the Inter-American Convention to Prevent and Punish Torture, and articles 4 and 7 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.

measures of reparation, for which it will also take into consideration that expressed by the State regarding the reparations that it “accepts” and the objections it presented to some of the measures of reparation requested.

## VI PREVIOUS CONSIDERATIONS

160. In this chapter the Court will present some consideration regarding the events object of the present case, and the determination of the alleged victims.

### A) REGARDING THE FACTS OBJECT OF THE PRESENT CASE

161. It is necessary to consider two matters in this subject. On one hand, the Commission and the intervener do not coincide in the description of some of the facts occurred between May 6 and 9, 1992; on the other, in what refers to the facts occurred after May 9 1992, the Commission included in the application less facts than those developed by the common intervener.

162. Before issuing a ruling on these matters, the Court reaffirms its jurisprudence in what refers to the determination of the facts, in the sense that, in principle, “the claiming of new facts different to those presented in the application is not admissible, without detriment of the possibility to present those that explain, clarify, or dismiss those that have been mentioned in the application, or respond to the demands of the petitioner,” as well as with the exception of supervening facts.<sup>7</sup> Likewise, the Tribunal reiterates that

it has the power to make its own determination of the facts of the case and to decide on aspects of law not claimed by the parties based on the principle of *iura novit curia*. That is, even though the petition is the factual framework of the proceedings, this does not present a limitation to the Court’s power to determine the facts of the case, based on the evidence produced, on supervening events, on complementary and contextual information included in the case file, as well as in notorious facts or of public knowledge, that the Tribunal considers appropriate to include within said facts.<sup>8</sup>

163. On the other hand, the Court has taken note that in paragraph 79 of the petition the Commission stated that

it wishes to point out that the object of the present application transcends what refers to the enactment and application of the antiterrorism legislation in Peru, in virtue of which some of the victims were imprisoned, since it is not the subject of the facts claimed and proven. Likewise, it is important to notice that during the proceeding before the Commission the possible international responsibility of the State for the regretful death of a police officer that occurred in the development of the same facts that motivate the present case was not analyzed, as well as the injuries caused to others. The State must investigate said facts and punish those responsible, however, the State’s responsibility in this sense was not claimed before the Commission.

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<sup>7</sup> Cfr. *Case of the Ituango Massacres*. Judgment of July 1, 2006. Series C No. 148, para. 89; *Case of the Sawhoyamaya Indigenous Community*. Judgment of March 29, 2006. Series C No. 146, para. 68; and *Case of the Pueblo Bello Massacre*. Judgment of January 31, 2006. Series C No. 140, para. 57.

<sup>8</sup> Cfr. *Case of the Ituango Massacres*, supra note 7, para. 191; *Case of the Pueblo Bello Massacre*, supra note 7, para. 55; and *Case of the “Mapiripán Massacre”*. Judgment of September 15, 2005. Series C No. 134, para. 59.

1) *Facts occurred between May 6 and 9, 1992: differences in the description and classification of the same by the Commission and the common intervener*

164. It has been clearly established that Peru acknowledges the facts occurred between May 6 and 9, 1992 presented in the Commission's application and that it also expressed that "it acknowledged" "the situations expressed in the brief of pleadings, motions, and evidence presented by the common intervener." (*supra* para. 150). However, the Commission and the intervener did not coincide in the description and classification of some of the facts that occurred in said period.

165. In some cases the difference obeys to the fact that the intervener explains the fact claimed by the Commission in a more ample manner. In this sense there is no problem since, according to the jurisprudence of this Tribunal, the intervener may explain or clarify the facts presented in the application (*supra* para. 162). Besides, Peru acknowledged said facts (*supra* para. 150).

166. However, there are other facts in which there is a contradiction between the Commission's arguments and the intervener's position and it is contradictory to adopt both versions of the fact. These are, basically, the facts regarding the existence of a riot or a resistance of the inmates prior to "Operative Transfer 1" in the early morning of May 6, 1992, as well as the possession and employment of weapons by the inmates. The different classification made by the parties regarding these facts is due mainly to the analysis and assessment they have made of the evidence. The Tribunal will determine the facts based on the evidence presented in this process, applying the rules of competent analysis.

2) *Facts occurred after May 9 1992: facts not included in the application, which are object of this case*

167. In its application the Commission presented several facts that allegedly occurred after May 9, 1992, date on which the so-called "Operative Transfer 1" concluded. However, the Court has proven that in her brief of pleadings and motions the common intervener presented more facts than those included in the Commission's application, with regard to what is claimed happened after that date. Likewise, in its final arguments the Commission included as facts of this case some of the factual situations presented by the common intervener.

168. Since in the present case the lack of inclusion of those facts was observed by the common intervener and that from the appendixes to the petition facts that were not expressly included in the same can be concluded, the Tribunal will proceed to rule on this factual matter.

169. Before this situation and in compliance with the responsibilities that correspond to it regarding the protection of human rights, the Tribunal will use its power to make its own determination of the facts of the case<sup>9</sup> that allegedly occurred after May 9, 1992 (*supra* para. 162) and will determine in the chapter of Facts Proven those that are object of this case. For this, the Court will take into account the facts described by the Commission in its application and those that arise from the evidence provided as appendixes to the same. Besides, the Tribunal has made

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<sup>9</sup> Cfr. Case of the Ituango Massacres, *supra* note 7, para. 192; Case of the Pueblo Bello Massacre, *supra* note 7, para. 55; and Case of the "Mapiripán Massacre", *supra* note 8, para. 59.

sure that those facts were also object of the processing of the present case before the Commission and that they are related to the facts of the same prior to May 9, 1992. It is important to mention that before the Court Peru did not object the evidence regarding the facts of after May 9, 1992 nor did it present arguments to contradict said facts, despite having multiple opportunities to do so.

**B) REGARDING THE DETERMINATION OF THE ALLEGED VICTIMS**

170. In the present case, pursuant to that stated in Article 33(1) of the Rules of Procedure, the Commission included in the text of the application the name of the alleged victims, indicating who the deceased inmates were (“whose death [was] established in a irrefutable manner through the body of evidence”), the inmates injured, and the inmates that resulted without injuries. With regard to the next of kin of the alleged victim, despite the fact that the Commission requested that the Court declare that they were the victims of breaches to Articles 5<sup>10</sup>, 8, and 25 of the Convention, the first only indicated the name of some of the next of kin of the inmates that died (Appendix A of the application). Likewise, it mentioned that the list of the alleged victims presented by the petitioners in the proceedings before the Commission was not contested by the State.

171. In the brief of pleadings and motions the intervener indicated that there were 11 persons included in the application as “uninjured” inmates, but that according to the evidence collected by her these people had been injured during the events of this case. Later, when responding a request for clarifications to facilitate adjudication of the case (*supra* para. 104) the intervener claimed that there were two more people in the same situation. In this regard, the intervener explained that after the year 2001, alleged victims regarding which they did not have information gave it to her and that others gave her a more detailed information, and she also explained that some injuries to the hearing system, injuries caused by splinters, and mild bullet injuries were not originally considered as injuries by some inmates, reason for which it was thought that they were not injured. On its part, the Commission, when presenting the observations that were requested to it regarding this matter (*supra* paras. 102 and 103) indicated, *inter alia*, that “if the common intervener presented evidence that leads the Honorable Tribunal to the conclusion that [said] persons were injured during the facts, the Commission considers their inclusion as victims appropriate.”

172. The Court will take into consideration the evidence included in the case file in order to proceed to determine if the alleged surviving victims, whose names are in the application, resulted uninjured or injured, including these 13 alleged victims to which the intervener refers as allegedly injured (*supra* para. 171). The Tribunal points out that the State was guaranteed its right to defense and that it did not present any objection or observation in this regard.

173. Likewise, the Tribunal will take into consideration the evidence requested by the President to facilitate adjudication of the case in what refers to the alleged victims (*supra* paras. 122 and 124), according to which there was one more person that should be included as an alleged surviving victim,<sup>11</sup> whose name was not

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<sup>10</sup> The breach of Article 5 of the Convention regarding the next of kin was claimed in the brief of final arguments.

<sup>11</sup> It is Mr. Francisco Alcazar Miranda.

included in the application, but was indicated in the brief of another group of representatives of alleged victims that the common intervener enclosed in her brief of pleadings and motions (*supra* para. 53). Similarly, that group of representatives requested the inclusion as an alleged victim of another person<sup>12</sup> that was not in Miguel Castro Castro Prison during any of the days in which the "Operative Transfer 1" was carried out, but that they claim was later transferred to the criminal center of Santa Mónica de Chorrillos and submitted to conditions of imprisonment that allegedly breached his rights. The Court could not include said person as an alleged victim since it is only considering the alleged violations occurred after the "Operative Transfer 1" in relation to those inmates that lived through the facts of the mentioned "Operative".

174. With regard to the alleged victims, in her brief of pleadings and motions the intervener also indicated that there were 31 people included in the list of alleged victims of the Commission's application that the intervener considers are not alleged victims "because they were not in pavilions 1-A and 4-B at the time of the facts or because they reached individual agreements with the Peruvian State." The intervener reiterated said position when reasoning a request for clarifications to facilitate adjudication of the case (*supra* para. 104). On its part, when presenting the observations requested to it regarding this matter (*supra* para. 102), the Commission indicated that "[d]uring the proceeding before it, and based on the evidence provided by the parties, the Commission reached the conviction that these 31 persons were also victims of the facts [...]," and it stated that "it has not had before it evidence that discredits this conclusion."

175. In this sense, this Court will issue a ruling regarding these 31 individuals that were included in the application taking into account the evidence presented, the Commission's observations, as well as the fact that the State did not object their inclusion as alleged victims nor did it make an observation in this sense, despite having had the procedural opportunity to do so.

176. On the other hand, in what refers to the next of kin of the alleged victims in the proceeding before the Court, both by means of the common intervener as well as through the evidence to facilitate adjudication of the case, the names of other family members have been included and evidence has been presented to the Court in this regard.

177. In the present case the Commission and the common intervener have claimed that the next of kin of the inmates stated as alleged victims in this case would also be alleged victims of the claimed breaches against the American Convention.

178. The jurisprudence of this Tribunal regarding the determination of alleged victims and their next of kin has been ample and adjusted to the circumstances of each case. Pursuant to Article 33(1) of the Rules of Procedure of the Court, the identification with precision and in the due procedural opportunity of the alleged victims in a case before the Court corresponds to the Commission, and not this Tribunal.<sup>13</sup> However, in its defect, on some occasions the Court has considered as victims people that were not claimed as such in the application, as long as the right

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<sup>12</sup> It is Mrs. Claudina Delgado Narro.

<sup>13</sup> *Cfr. Case of Goiburú et al.*, *supra* note 5, para. 29; *Case of Servellón García et al.*, *supra* note 3, para. 158; and *Case of the Ituango Massacres*, *supra* note 7, para. 98.

to defense of the parties has been respected and the alleged victims are related to the facts object of the case and to the evidence presented to this Court.<sup>14</sup>

179. Besides the people expressly stated in the application as the next of kin of the alleged victims, this Tribunal will use the following criteria to define who else will be considered next of kin of the inmates presented as alleged victims in this case: a) the procedural opportunity in which they were identified and that the State's right to defense has been guaranteed; b) the acknowledgment of responsibility made by the State; c) the evidence presented in this regard; and d) the characteristics of the present case.

180. In order to assess the evidence that allows the determination of the next of kin the Court will take into account the specific circumstances of the present case. The Court also points out that the State was guaranteed its right to a defense and that the latter did not present an objection with regard to said evidence.

181. Likewise, the Tribunal will rule what it considers appropriate with regard to the next of kin of the alleged victims that were not identified in the proceedings before this Tribunal (*infra* para. 420).

## VII THE EVIDENCE

182. Prior to examining the evidence offered, the Court will present, based on that established in Articles 44 and 45 of the Rules of Procedure, some considerations developed in the jurisprudence of the Tribunal and applicable to this case.

183. The principle of the presence of the parties to the dispute applies to evidentiary matters, and it involves respecting the parties' right to a defense. The principle is enshrined in Article 44 of the Rules of Procedure, in what refers to the time frame in which evidence must be submitted, in order to secure equality among the parties.<sup>15</sup>

184. The Court has stated, with regard to the receipt and assessment of the evidence, that the proceeding followed before it is not subject to the same formalities as domestic judicial actions, and that the incorporation of certain elements into the body of evidence must be done paying special attention to the circumstances of the specific case and taking into account the limits imposed by the respect to legal security and the procedural balance of the parties. The Court has also taken into account that international jurisprudence, when it considers that international courts have the power to appraise and assess the evidence according to the rules of competent analysis, has not established a rigid determination of the *quantum* of the evidence necessary to substantiate a ruling. This criterion is especially valid for international human rights tribunals that have ample powers in

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<sup>14</sup> Cfr. *Case of Goiburú et al.*, *supra* note 5, para. 29; *Case of Servellón García et al.*, *supra* note 3, para. 158; and *Case of the Ituango Massacres*, *supra* note 7, para. 91.

<sup>15</sup> Cfr. *Case of Almonacid Arellano et al.* Judgment of September 26, 2006. Series C No. 154, para. 67; *Case of Servellón García et al.*, *supra* note 3, para. 33; and *Case of Ximenes Lopes*, *supra* note 3, para. 42.

the assessment of evidence presented before them regarding the relevant facts, pursuant to the rules of logic and on the basis of experience.<sup>16</sup>

185. Based on the aforementioned, the Court will proceed to examine and assess the documentary evidentiary elements forwarded by the Commission, the common intervener, and the State in the different procedural opportunities or as evidence to facilitate adjudication of the case requested. For this, the Tribunal will comply with the principles of competent analysis, within the corresponding legal framework.

#### A) DOCUMENTARY EVIDENCE

186. Among the documentary evidence presented by the parties, the Commission and the common intervener forwarded testimonial statements and written expert reports, in response to that stated by the President in his Ruling of May 24, 2006 (*supra* para. 65). Besides, another group of representatives presented testimonial statements requested by the President as evidence to facilitate adjudication of the case in said Ruling (*supra* para. 65). Finally, the intervener presented a written testimonial statement that had not been requested by the President and asked that it be admitted (*supra* para. 82). Said statements and expert reports are summarized below:

#### Statements

##### a) Proposed by the common intervener:

##### 1. Michael Stephen Bronstein, inmate of the Miguel Castro Castro Prison at the time of the facts

He is a British citizen and during the time of the facts he was detained in the Miguel Castro Castro Prison in pavilion 6A.

The women who were suspected of belonging to Sendero Luminoso were detained in pavilion 1A. It was known in the prison that the authorities had decided to relocate the women imprisoned for crimes against security in a new high security prison. There were rumors regarding the realization of an inspection of large proportions. On May 6, 1992 strong explosions awakened him, coming from pavilion 1A, which would continue the following days. The police was throwing grenades from the roof, which exploded on the outsides of the windows in order to keep the inmates far away from them; they were also throwing fulminating grenades from helicopters through the fans, that transported more soldiers to the inside of the criminal center. Due to the intensity of the attacks on the first day he believes that their intent was to kill the women. The latter tried to run through the conduits to pavilion 4 to save their lives.

On the third day the events were intensified. The authorities brought all the prisoners together in pavilions 6A, 6B, and 5, and they were obliged to go out to the courtyard and sit in rows without moving for 18 hours. During that time the witness could hear on the news that the then President Fujimori had no intention of negotiating. Towards the end of the "operative" the witness heard that Colonel

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<sup>16</sup> Cfr. *Case of Almonacid Arellano et al.*, *supra* note 15, párr. 69; *Case of Servellón García et al.*, *supra* nota 3, pára. 35; y *Case of Ximenes Lopes*, *supra* note 3, páras.. 44 y 48.

Cajahuanca, who was in charge of the operation, gave the order to kill all of those who were surrendering. Afterwards, the inmates returned to pavilion 6A. Pavilion 1 A was closed for at least two or three months in order to be rebuilt.

Since he belonged to the English army and received instructions regarding armaments, he was able to identify the weapons that were used during the days of the attacks to the criminal center, which are used to cause the greatest damage possible. He also recognized the men in uniform that participated in the attack, who besides belonging to the Police and Army, were part of the special assault forces.

He considers that the assault on the women was premeditated. Force was used in a massive scale and it was designed to cause as many deaths and injuries as possible.

## **2. Edith Tinta, mother of the alleged victim Mónica Feria Tinta**

She referred to the arrest of her daughter, who was transferred to the Criminal Center Castro Castro one week before the events. After the facts occurred in the criminal center, her daughter Mónica continued detained and incommunicado without her next of kin being able to provide her with clothes, food, or books.

She referred to her daughter's acquittal in 1993 and to what allegedly happened to her after that.

The witness and her husband have suffered since their daughter was accused of terrorism, they have suffered from health problems, they have not been able to see her for approximately 14 years, and they have been subject to all type of injustices and persecutions by the State.

## **3. Rubeth Feria Tinta, sister of the alleged victim Mónica Feria Tinta**

The witness and her mother stood in the outsides of the Miguel Castro Castro Prison awaiting information on the state of her sister. The next of kin of the inmates were moved away by police officers with the use of tear gases and gunshots. Her mother fainted and threw up due to the gas. During four days there were detonations, explosions, and shots fired. They witnessed how the pavilion 1A was completely brought down. The next of kin were mistreated when they presented themselves at the morgue and the authorities denied them all information of the deaths and injuries. After the four days of attack her sister was transferred to the criminal center of Santa Mónica. From that moment on they were not allowed to visit her or provide her with clothes, food, or medicine. Five months later the next of kin were allowed to see her when she was taken to a proceeding to the Palace of Justice and, subsequently, they were allowed to visit her in the criminal center of Santa Mónica for 10 or 15 minutes.

After the facts, the Feria Tinta family has suffered for the way in which Mónica has been stigmatized in the media, especially the mother who already suffers from high blood pressure and sleeping problems.

## **4. Luz Liliana Peralta Saldarriaga, sister of the alleged victim that survived Martín Peralta Saldarriaga**



On the date of the facts, her brother Martín was imprisoned in pavilion 4B of the criminal center Castro Castro in preventive detention. On Wednesday May 6, 1992, after hearing the news on the radio, she went to the criminal center and could observe that the prisoners were being bombed while the crowd of family members screamed that the “killing stop”. She could notice that “the prosecutor was there, watching how defenseless prisoners were being bombed since the first day.”

The police started shooting and throwing tear gas bombs to the group of family member that were located on the outsides of the criminal center, made up mostly by women since it was a women’s visiting day. Many of them were pregnant, with children, or were elderly. The witness, who was 9 months pregnant, fell down and was run over by the crowd who was trying to escape from the gunshots and the tear gas bombs. She thought she was going to lose her baby and therefore decided to return home.

As a result of the “heartbreaking” anguish experimented, “she unconsciously retain[ed her] delivery.” She gave birth on May 10, 1992. What she experimented those days had an impact on her daughter who has been receiving psychological treatment and has developed fear toward people. The witness does not have economic resources to pay for this treatment and she wants her daughter to receive professional help.

Three weeks after giving birth, the witness went to the criminal center to see her brother, who was injured, but she was not allowed to visit him. It was not until August or September that she was able to see him for the first time, but only through some fences. Her brother is finally being tried, after having been imprisoned for 15 years awaiting a conviction.

#### **5. Osilia Ernestina Cruzatt widow of Juárez, mother of the alleged victim Deodato Hugo Juárez Cruzatt**

Her son was detained in the Criminal Center Castro Castro and “he was a leader among the political prisoners.” She visited him on Wednesdays and Saturdays and she could notice that he seemed “yellow and was in skin and bones.”

On Wednesday May 6, 1992 she went to visit her son in the criminal center, but she was not able to go in because the militants and police officers were throwing tear gas bombs and they impeded their entry. Her son died on “the day before Mother’s Day.” She went to recover his body at the morgue, where she observed bodies that were “burned beyond recognition.” Se also observed “a friend of [her] son, [...] named Elvia [who was] dead,” “[h]er stomach was swollen and they had taken out her nails.” When she found her son’s body, she noticed that “[h]is chest had been transfixed with bayonets through the back. [...] He had 6 or 7 bullet wounds in the chest [and] back [..., t]hey had blown or cut off his penis,” and they had shot him in the head. She was able to obtain an order to remove the body and she buried her son on that same day, for which she had to ask for a “\$2,500” loan.

The consequences of the traumatic death of her son have been difficult to face. For her children “it was not easy to find work due to their surnames[; ...] the simple fact of being Hugo’s brothers, who died in the way he did, put [them] in a difficult situation.” She suffers from arthrosis, one of her arms does not work correctly, and she also suffers from emotional pressure and cardiac insufficiency.

She considers that “[w]hat happened in Castro Castro was not a riot.” Her son knew that “they were going to go in to kill, that they were going to want to kill him.”

Her son should have been prosecuted and not murdered. She requested that Alberto Fujimori be prosecuted for the crimes he committed in the criminal center of Castro Castro.

#### **6. Eva Sofía Chalco Hurtado, alleged victim**

She referred to her arrest in September 1991 and indicated that she entered the prison of Castro Castro on October 10, 1991 when she was pregnant. At the time of the facts of this case she was seven months pregnant.

Neither her nor her family were informed of the alleged transfer that was supposed to be made. When the attack started she was sleeping on the fourth floor of pavilion 1A. Peruvian forces made holes with explosives all throughout the roof and started shooting through those holes. In the meantime, “[t]he whole floor was flooded with asphyxiating gases” and many of the prisoners were passing out due to asphyxia. Approximately at 5 or 6 in the afternoon she made it to pavilion 4B, where the injured prisoners were located. The soldiers threw kerosene or gasoline and “flames of fire” from the roof.

“Towards Saturday afternoon” she heard a voice saying “we are coming out. Do not shoot.” However, the soldiers fired their submachine guns and “some [inmates] fell to the floor, others continued walking.” A splinter fell on her foot, she had to drag herself and she was forced to lie on a piece of land, along with other women “that were bleeding and wet”, where she was kicked and obliged to lie face down for hours, despite her pregnancy.

On May 10, 1992 she was transferred to the Criminal Center Cristo Rey in Ica, along with another 52 women, approximately. Around 8 inmates were assigned per cell. The cells had a very reduced area, without bathroom, and they only had two cement beds. The only light that came into the cell was through the holes in the roof, though which they “sometimes even through rats at them.”

On June 27, 1992 she gave birth to a premature baby in a hospital of Ica through a C-section, since the baby’s position in her uterus was not normal. She only had her son for five days, for fear of the constant threat against her safety and integrity in the criminal center. During her imprisonment she was able to see her son “only a very few times”, and she could finally be “his mother” only when she was released from prison 10 years later.

At the beginning of 1993 they were transferred to the prison of Santa Mónica, occasion on which they used electrical sticks against them and they were “horribly” beaten.

The experience she went through had effects on her son’s health, who suffers from alterations in his nervous system and “[h]e cannot resist strong emotions. Neither strong sorrows nor happiness.” As a consequence of the prison conditions described, the witness caught tuberculosis and she currently suffers from polyneuritis. Likewise, she has felt depression and her family has been strongly affected by the consequences of the massacre.

## 7. Luis F. Jiménez, eyewitness to the facts of May 1992<sup>17</sup>

He was the attorney for the Executive Secretariat of the Inter-American Commission of Human Rights at the time of the facts. On May 6, 1992 he was contacted by a relative of one of the inmates, who asked him to come to the criminal center "as soon as possible, since an operative of combined forces of the Army and Police to transfer the inmates to a different criminal center had started, and it was considered by the next of kin as an excuse to carry out what they called a 'genocide'."

On that same day the witness went to the criminal center along with a security official appointed by the State. He met with the Director of the criminal center, Colonel Gabino Cajahuanca, in the outskirts of the center. The latter told the witness that "he feared a massacre" and requested that the Commission adopt measures. The colonel also informed him that he had been removed the power to make decisions, "since the control of the criminal center had been assumed by a special police force unit."

According to the information provided by different sources, the witness could prove that the prisoners had not carried out a riot, "instead it had been a violent unilateral action carried out by police forces."

On the night of May 7, 1992 he was informed by a group of relatives of the inmates, accompanied by their attorneys, that "the prisoners accepted their transfer under the condition that representatives of the Human Rights Commission of the OAS and the Red Cross be present." On the next day this was communicated personally to the Secretary of Justice, but he never received a response from the latter. The highest governmental authorities were aware of the offer made by the prisoners in acceptance of their transfer.

On May 9, 1992 he went to the criminal center in company of the President of the Episcopal Conference. He could notice that "[t]he bombing against the pavilion was really impressive." He tried to get close to the door of the criminal center but the armed forces "fired dissuasive shots." He also observed that there was uniformed personnel, which he considered were part of "combined Military and Police forces [..., and there was also] helicopters over flying [, ...] rifle shots[,] detonations of weapons of a large caliber [and] a large number of shielded vehicles." He also heard invocations through megaphone offering to respect the life of those who surrendered, but immediately afterwards he heard gunshots that he assumed "were destined to eliminate those they had intended to."

After these events, the Peruvian authorities did not immediately supply a list of those injured, dead, and the survivors. Entrance to the criminal center Castro Castro was not permitted, but it was allowed at the prison of Santa Mónica, the morgue, and the Police Hospital. When he visited the prison of Santa Mónica, where some of the survivors of the facts were transferred, he observed that these women "were still dirty with the dust from the criminal center and splashed with blood." Likewise, he was impressed with "the overcrowding of the inmates."

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<sup>17</sup> In the President's ruling of May 24, 2006 (*supra* para. 65) the object of this statement was delimited so that it would refer only "regarding the facts that occurred in the Miguel Castro Castro Prison in his condition of eyewitness of the facts of May 1992, pursuant to the terms established in the Whereas 37 of the [...] Ruling." According to that stated in said Ruling the witness should refer to the facts of which he had personal and direct knowledge.

### **8. Raúl Basilio Gil Orihuela, alleged victim**

He was detained in the Criminal Center Castro Castro in pavilion 4B, at the time of the facts. Since he did military service in Peru, where he received training on the handling of firearms and explosives, he recognized the "war weapons" used within the prison. He also recognized that elite police officers, armed forces, members of the FOES (elite group of the Marines), and sniper shooters participated, and prior to the "operative" he observed the presence of the Peruvian army dressed in uniform in pavilions 4B and its surrounding areas. One month before the events in the criminal center, pavilions 1A and 4B were inspected, since the press was saying that there were weapons within the criminal center. The result of the inspection was that there were no firearms within those pavilions.

In the dawn of May 6, 1992 he heard a strong explosion that came from pavilion 1A, where the women were located. There were shots fired, bombs, and tear gas. The heat was unbearable, there were bodies of women on the floor and those that survived were asking for help. Fire bombs, which contain white phosphorous, were used and upon contact with the human body they produce a burning sensation in uncovered areas, in nasal cavities, and it causes asphyxia and chemical "burning" of internal organs and the skin. He considers that the objective was to "kill them all at once." It was a "military attack", "[t]here was no riot there."

The combined armed forces killed several people and from a helicopter destroyed pavilion 1A. In pavilion 4B inmate Cesar Augusto Paredes died from a gunshot to the head. On May 9, 1992 Mr. Mario Aguilar died due to the burns caused to his body.

The number of people injured and dead was considerable. The inmates decided to go out screaming "do not shoot, we are coming out." A little while later the witness heard bursts of shots fired and screams and when he went to the pavilion's entrance, he recognized several dead bodies, among which was Deodato Hugo Juárez and Janet Talavera. Uniformed, hooded officials took Antonio Aranda and Julia Marlene to "the kitchen", where they were murdering inmates. The inmates that survived were placed face down on the floor with glass, under the rain, without an adequate diet, they were mistreated, beaten, stepped on, and bit by dogs.

The mistreatments continued during the following months. There were inspections where they forced inmates to present themselves in the nude in the courtyards, they were tortured with electrical sticks, and they were submitted to revisions in intimate parts of their bodies. As a consequence of those treatments, he suffers from a chronic back pain, loss of sight in his right eye, and injuries in his left arm.

### **9. Jesús Ángel Julcarima Antonio, alleged victim**

He referred to his arrest and transfer to the Criminal Center Castro Castro on November 8, 1991. His legal condition was of accused, he had not been prosecuted nor had the charges against him been formalized. After some news reports in the Peruvian media indicated that there were weapons and tunnels in the criminal center, the inmates were submitted to a detailed revision after which it was clear they did not have weapons nor were there tunnels built by the inmates in the criminal center.

The events started in the dawn of May 6, 1992 when explosions were heard in pavilion 1A, where the women were located. The inmates moved to said pavilion through the conduits to help the women. When they arrived they smelled gunpowder, they could feel a burning sensation in their throat and they could not breathe. There were dead and injured people. As a consequence of the shots fired by the soldiers from the roof toward pavilion 1A Marcos Callocunto died and Víctor Javier Olivos Peña was seriously injured. The witness was injured by a bomb, situation that was complicated by the tuberculosis that he already suffered. Jesús Villaverde was also injured during these events.

During the attacks the inmates did not receive food, water, or medical attention. Some of the injured died because of the lack of attention. The State agents killed people selectively, such as Janet Talavera. After undergoing four days of attacks, the survivors were transferred to an area called "no man's land". They were forced to be naked and outdoors, face down on the floor, and they could not use the bathroom. Besides this, they were beaten and stepped on. The witness did not receive medical attention and remained with the same clothes for fifteen days.

The tortures continued during the following months. As punishment they were forced to sing Peru's national anthem, whose first verse says "we are free", kerosene camphor, and rat skin were thrown into the food. They were kept locked inside 23 hours and a half per day, visits were restricted, working, singing, exercising, and developing any type of activity within the criminal center was forbidden.

As a consequence of what happened in the criminal center, his emotional relationships were affected and his health worsened. The tuberculosis he already suffered from got worse, he lost his teeth, and his vision in great proportion, and he contracted allergies to humidity and developed digestive problems. His family also suffered as a consequence of the facts. His parents suffered health problems and the economic resources that were going to be for his siblings were used on him, reason for which his siblings have not been able to conclude their academic studies.

**b) Called upon by the President as evidence to facilitate adjudication of the case:**

**10. Nieves Miriam Rodríguez Peralta, alleged victim**

On the "days prior to May 6 there was an 'inspection' in which it was verified that there was no type of weapons [or] 'Armed resistance' to justify the crime of genocide pursuant to the Peruvian legislation against the group of prisoners of pavilions 1A and 4B accused of belonging to Peru's Communist Party."

On May 6, 1992 she was sleeping when she heard the first explosion in the women's pavilion and she soon realized that they were being "brutally and cowardly" attacked. She could notice that they had blown open one of the walls of pavilion 1A and the yard with dynamite and that "there were bullets, bombs, and tear gases everywhere." Likewise, she observed that police officers were proceeding to place dynamite on the roof of the fourth floor. The inmates tried to find an exit through a conduit because "[i]t seemed that they were going to throw the pavilion down." The conduits were not tunnels built by the inmates, but instead constructions that joined the pavilions. It was difficult to enter the conduit because you had to pass in front of a window and the snipers would shoot at the smallest movement. The inmate María

Villegas fell seriously ill. Trying to exit the pavilion toward the conduit, the witness suffered from a bullet shot in the leg. Two prison mates took her to pavilion 4B. The bullet caused impact in the left lumbar area affecting the nervous roots but she was denied medical attention, "proving once more that [the authorities] did not care about the inmates' lives."

The prison mates that were in the pavilion requested that the injured be transferred and that they be offered medical attention. Likewise, "they repeatedly asked for a guarantee for their lives (the presence of representatives of the International Red Cross, attorneys and their next of kin) in order to go out." However, "the attack was more brutal and uncontrolled every time." On May 9, 1992 "the prisoners that went out holding hands singing the International" were object of a selective killing.

When she ran into the other persons injured she heard the voice of Elvia Sanabria. After the transfers she noticed that she was no longer there.

This "brutal and sinister attack" was extensive to her next of kin and especially affected her mother, who got heart sickness, was in psychiatric treatment and who tried to take her own life when she could not stand the suffering she felt as a consequence of the attacks and then when looking for the body of her daughter who she thought dead.

After these events, the witness was transferred along with other injured persons to a hospital where, during almost their entire stay and in plain cold, they were kept in the nude and covered only with a sheet, until the Red Cross was finally allowed to give them a blanket and a nightgown. During the women's stay in the hospital they were watched over by three armed custodians. She had a probe to eliminate urine that was only changed once in a month. In the hospital they were not provided any medicines, which led to the death of María Villegas. After 15 days she was transferred along with other injured women to the maximum-security criminal center of Chorillos, but the doctor of the criminal center would not assume responsibility for what could happen and she was returned to the hospital along with other prison mates; they had open wounds.

One month later she was transferred once again to the criminal center of Chorillos. She urgently required physical rehabilitation, but it was repeatedly denied. After more than a year she was taken to a specialized center, but for them her muscles had already become atrophied, condition characterized by the specialists as irreversible due to lack of physical rehabilitation. The specialists considered that it was possible that the witness recover mobility in one of her legs if she was submitted to daily rehabilitation, treatment that she was not able to fulfill because the prison authorities did not take her. She was later transferred to the National Rehabilitation Center, where the diagnosis was that she could only maintain the muscular mass that she had, but the authorities impeded the corresponding rehabilitation treatment. On two occasions she suffered from skin burns with a hot-water bag. Regarding her open wounds, she was only given an antibiotic cream by the doctor of the criminal center, until she was taken to the hospital by demand of her family.

The inmates were also victims of beatings by security forces, such as those received on September 25 (approved by the prosecutor Mirtha Campos) and in November 1992. She was pulled through the hall along with other inmates and they were kicked all over their body "without respecting the pregnant, elderly, or sick women."

Once on the floor the guards walked and jumped on their backs and they placed their sticks between the buttocks of other inmates.

She referred to her prosecution in 1994 by a special court without a face.

She referred to several problems she suffers as a consequence of the bullet wound and the lack of physical rehabilitation, such as: partial paraplegia affecting the inferior limbs; hemorrhoids due to severe and chronic constipation; constant infections in her urinary tract; swelling of the rectum due to lack of elasticity of the muscles; osteoporosis due to lack of movement and the overcrowded conditions at the prison; and problems in her respiratory tract and joints due to humidity and filtrations in the cells. Besides her health and material goods, she also lost her job and plans for professional growth and development. She suffered a great moral damage and emotional consequences due to the previously described "breaches that denigrated [her] dignity as a person and a woman." The injuries described have made it difficult for her to develop any activity or work and have had a deep impact on her family, affecting especially her mother and sisters (one of them was arrested and the other was fired from her job).

She requested that the Court make justice so that "these facts do not remain unpunished and that a fair reparation be granted [to her] for the damages caused to [her] next of kin[,] [her] physical and mental health and [her] honor."

#### **11. Cesar Mamani Valverde, alleged victim**

The witness was an inmate in the Criminal Center Castro Castro in pavilion 4B. On May 6, 1992 he was awakened by a strong explosion that came from pavilion 1A, where the women were located. It was the beginning of a series of bombs and explosive discharges thrown against said pavilion. On the next day those injured were taken to pavilion 4B and they "picked up five bodies of inmates," which were buried that same day. After trying to establish a dialogue between the parties, no response was obtained from the high authorities of the armed forces. At the beginning it had been accepted that the injured persons come out, but they changed their mind and the snipers started shooting from the other pavilions against several inmates, the roof was perforated, and hand grenades and tear gas bombs were introduced. At that time there were 30 dead people and more than 500 people trapped. The inmates were huddled, there was no space where to walk through, they could not eat, they slept too close to the bodies, they were asphyxiating and burning due to the gases, bombs, and fire used by the armed forces within the criminal center. He considers that the authorities did not want a transfer, but to "kill the inmates".

His mother had to go to the morgue when searching for him and check all the bodies, which was a traumatizing experience for her.

He was taken to the police hospital where he did not receive the necessary medical attention. Along with him he recognized Walter Humanchumo, Luis Pérez Zapata, Víctor Olivos Peña, and Agustín Machuca. His diagnosis after "the explosion" in the criminal center Castro Castro were second degree burns on his face, chest, both arms and legs; perforation of his eardrums in both ears, a cut on the right superior eyelid, loss of the ocular globe of the right eye, and total loss of vision in his left eye. An operation to remove his right eye was programmed, but on that same

day he was transferred to the Alcides Carrión Hospital, where they did not continue with his medical treatment. He was placed in a completely anti-hygienic cell. In August 1992 he was taken back to the Criminal Center Castro Castro, where the mistreatment continued. He was constantly beaten, forced to go outside to the yard naked in the winter to be inspected, they never let him work, nor did he have access to the media, and they did not let him read or cure his eye, which led to an infection. On various occasions his food had grounded glass, urine, rests of rat parts, and it was not given warm or at adequate hours. Therefore, the cases of tuberculosis and infections increased. His mother was submitted to humiliations in the inspections carried out in order to enter the criminal center.

In mid November of 1994 'faceless' judges prosecuted him and he was acquitted. Once released he was harassed, persecuted, arrested and stigmatized as a terrorist by the Peruvian government. Therefore he could not reinsert himself in the Peruvian society, and this led him to request refuge initially in the Republic of Bolivia and later in the Republic of Chile. His lifestyle after the facts has been very precarious, since he has physical handicaps and considerable neurological and psychological damages, reason for which his health worsens every day, which has prevented him from obtaining a job or studying.

The witness requests that the State be convicted, that the corresponding measures of reparation and fair satisfaction be granted to him, and that those responsible for the acts that, pursuant to Peruvian legislation, constitute genocide perpetrated against a political group be criminally punished.

## **12. Alfredo Poccorpachi Vallejos, alleged victim**

He was imprisoned in the Criminal Center Castro Castro accused of terrorism at the time in which the facts occurred. On May 6, 1992 he saw officers of DINOES (elite police force) on the rooftops of the pavilions, and on the in the roundhouse "with command uniforms, guns, and balaclavas." He could hear gunshots and explosions and the tear gas bombs reached pavilion 4B, where he was located. The prisoners reached that pavilion through a conduit. From that pavilion "they scream[ed] to the authorities of the criminal center to respect the life of the prisoners[,] to stop the attack and talk to the delegates, but [...] the calls to the Director of the criminal center were in vain." The inmate Janet Talavera was riddled thirty meters from where he was standing, when some inmates were exiting pavilion 4B.

Later, the inmates were transferred to different criminal centers without informing their next of kin. The witness was transferred to the criminal center Lurigancho, where the inmates were "hardly beaten in presence of the Prosecutor Mirtha Campos." During the trajectory to an unknown destination, the prisoners were beaten. Inmates were submitted to "beatings [and] torture." In the prison "they [were] submitted to an absolute isolation[,] without clothes, and in general without the most minimum provision of elemental needs." He considers that "the objective was to eliminate them systematically both physically and morally, reducing them to inhuman conditions."

He was under medical treatment for suffering of tuberculosis and due to the events described his treatment was suspended and his "health worsened notably due to the abuse to which he was submitted, the tear gas bombs, and the multiple explosions in the pavilions, tortures, and beatings." As a consequence of the attack to the Criminal Center Castro Castro his tuberculosis worsened, and "the lack of adequate treatment



caused by the brutality of the Peruvian prison system has caused [him] to have five relapses." Besides, "he suffers from chronicle gastritis [due] to the isolation and annihilation plan to which he [was] submitted after the facts." He also suffers from deficient brain irrigation as a consequence of the beating to his head and has grenade splinters in his scalp. These and other illnesses have affected his quality of life significantly. Tuberculosis has especially limited his performance at work.

He presented four writs of habeas corpus claiming the abuses committed against him, but they were all declared inadmissible. Four requests of conditional freedom, three requests of summons, and two complaints to the Internal Control of the Judicial Power were also denied. He remained in prison 18 years and 5 months without being prosecuted or convicted, and he was released due to "extinguishment", since his detention exceeded the sentence corresponding to the crime he was being charged with.

The witness and his next of kin have suffered psychological consequences as a result of the mistreatments, illnesses, and terrible events seen. "All the previous situations have breached [his] right to life, health, work, equality, and [his] liberty and physical and mental integrity."

Within his "desires of justice, [...] are the release of the survivors that are still imprisoned, the cease of the persecution against the survivors, complete restitution of his rights and honor before society and punishment of those responsible for this act of genocide."

### **13. Madelein Escolástica Valle Rivera, alleged victim**

She was a victim of the events that occurred from May 6 to 9 in the Criminal Center Castro Castro. She was imprisoned in pavilion 1-A, and was awaiting conviction. On May 6, 1992 she heard a detonation around 4:00 hours. The members of the Special Forces attacked pavilion 1A, and snipers were located on the rooftops of other pavilions shooting through windows and the cabin. The attack was very intense, with all type of grenade throwing weapons, bazookas, long weapons, tear gas, vomiting, and paralyzing bombs. As the hours went by the intensity of the attack against pavilion 1A increased and bombs were even thrown from a war helicopter that was flying over the criminal center. She observed that María Villegas was wounded.

At approximately 5 p.m. of May 6, 1992, the witness and other prisoners, among which there were pregnant women, took refuge in pavilion 4B, which they reached through the conduits of the criminal center. The snipers were shooting at them and many prisoners died trying to reach pavilion 4B, as was the case of Vilma Aguilar.

On the next day, the attacks started again at 5:00 hours. The inmates demanded the presence of the International Red Cross and of prosecutors and attorneys as mediators, but the requests or a dialogue, a cease of fire, and medical assistance for the wounded and for pregnant inmates were denied. Eventually, four delegates of the inmates were allowed to come out to speak with the prosecutor Mirtha Campos, who said that "she was not going to allow the intervention of any foreign institution as mediator of the conflict." At no time did the authorities inform them that they were going to be transferred to another criminal center. The inmates "never oppose[d] the transfer of prisoners, they were only demand[ing] guarantees for

[their] lives and that the International Red Cross, [their] attorneys, next of kin, and the press be present.”

On May 9 the pavilion 4B was demolished with a war canon. At approximately 4 p.m. the prisoners decided to go out and ask the authorities not to shoot. First, two prisoners went out holding hands, followed by a group of prisoners signing the International. The snipers riddled the prisoners. Two of the inmates died instantly and others were seriously injured. Among the dead was his father Tito Valle, who he saw die. When they were in the area called “no man’s land” he heard the state agents asking for the leaders. On that night they separated the wounded into three groups. The first group was taken at dawn and the other two groups were left outside face down on the floor.

On the next day she was transferred along with other inmates to the criminal center of Cachiche in Ica. Upon her arrival she noticed that there was no pavilion in conditions to house more than 50 prisoners. They were taken to cells with cement beds, without mattresses or blankets. During her one-year stay in this criminal center she was submitted to beatings by the police. Likewise, she suffered from direct harassment from the director of the criminal center, which constantly threatened them and beat them when they performed their so called “inspections”. They were also prevented from speaking with their next of kin in private, who have suffered from this “policy of reduction, isolation, and systematic annihilation” to which they have been submitted.

On May 7, 1993 they were transferred to Lima, operation carried out in the middle of beatings for not accepting the denigrating treatment to which they were submitted. Upon arrival at the maximum-security criminal center of Chorillos they were pulled out of the bus and later beaten with sticks “from head to feet.” As of that date they were not allowed out to the yard, to work, or study, and their visits were restricted to once a month through a telephone booth and only for half an hour. When the outings to the courtyard were reestablished, it was given for only half an hour for every two cells. Likewise, during the period between 1992 and 1998 they were not allowed access to pen or paper, thus being denied the right to free expression. Access to the press was also denied for a 6-year period, reason for which their right to information was breached. When allowed access to certain publications, they were incomplete. Access to specialized books was also forbidden. Access to a portable radio was denied until the year 2000.

Se recovered her freedom in May 2002 and is currently studying Law. She suffered damages for having witnessed the political genocide in the criminal center Castro Castro and the murder of her father, as well as for all the abuse and disproportionate restrictions to which she was submitted. As a consequence of the events of May 6 to 9, 1992 she has had problems with her sight, serious hearing problems and chronicle biliary hepatic gastritis. Likewise, due to a bad diet and the overcrowded conditions at the criminal center, another prisoner that was ill infected her in 2001 with tuberculosis. Within the psychological consequences suffered are insomnia, loss in the ability to remember things and the trauma that comes from remembering the circumstances under which her father died. Her family has also been affected by this emotions stress, especially her sister Liudmila, due to the circumstances in which she lost her father. Also, as of 1987, members of the intelligence service have harassed her family.

She requested that the Court rule the State's responsibility for the breaches to her human rights and those of her next of kin, that those responsible for the genocide for political reasons be prosecuted and punished, and that her and her next of kin be granted complete reparation for the damages suffered.

#### **EXPERT REPORTS**

**a) Proposed by the Inter-American Commission on Human Rights:**

**1. Christopher Birkbeck, criminology specialist**

The explosions registered on the first day of the facts in the Criminal Center Castro corresponded to a military action that is specifically mind grabbing, given the inmates' characteristics of imprisonment and relative defenselessness. Two matters require special attention: the existence of weapons within the criminal center, and the non-use of alternative mechanisms to the use of force in the executions of the "Moving Operative 1".

Pursuant to information provided by survivors and the contents of a record of the seizure of weapons of May 10, 1992 there were weapons within the criminal center at the time of the facts. The State and the prison administration did not comply with the security and control standards of prisons. If the possession of weapons had prevented among inmates, the Government would not have had a reason to expect resistance from the inmates. Facing the possibility of this type of resistance, nothing justified the need to act with physical force to end the conflict that arose regarding the operative, as effectively occurred in the dawn of May 6, 1992.

When facing the resistance of inmates measures such as the following can be adopted: negotiations with inmates; offer rewards for compliance or threaten with punishments; restrict certain components of the visitation regimen in the prison; or use physical force to submit, confine, or transfer the inmates. The use of force should have been the last measure used. To recur to force immediately weakens and eliminates the possibility of other strategies. Therefore, the inmates could not trust that their lives would be respected when the police officers told them to surrender, which also impeded a peaceful agreement.

The inclusion of sound grenades and shots as means of harassment can be clearly fit into the definition of torture formulated in the Inter-American Convention to Prevent and Punish Torture.

Given that physical force represents a means permitted for internal control in prisons, it is necessary to evaluate if that employed by the State was proportional to the degree of resistance of inmates and the objective of the operative.

As of the reconstruction of the events made by the Commission for Truth and Reconciliation and by the Commission's application, it is possible to distinguish two phases in the response of inmates before the situation presented. The first of them can be classified as resistance to authorities; the second as a surrender. The resistance started prior to May 6, 1992 when the inmates blocked doors and windows and reinforced the walls of the pavilions and it went on until 6 in the afternoon of May 9<sup>th</sup>, moment on which the inmates started surrendering before the authorities. During the resistance phase, there is no evidence of risks of escape. To the contrary, the inmates hid in their pavilions as in entrenchment.

The "Operative Transfer 1" started with three explosions and the entrance of an undetermined number of police officers firing their weapons. The use of force was disproportionate, since according to the body of evidence none of the circumstances contemplated in the Basic Principles on the Employment of Force and Fire Arms by Officers In Charge of Enforcing the Law, which state that fire arms may be used in a transfer operative if there is an imminent risk of death or serious injuries arising from the inmates, or there is a threat of escape with clear indications of their immediate intention to kill or seriously injure someone, were present.

There is no specific statement indicating that the inmates used weapons, there is no evidence or results from forensic examinations that leads to the conclusion of said circumstance. On the contrary, there is evidence that the armed forces were indiscriminately shooting at the inmates, resulting in the death of several inmates that were trying to move from one place to another in order to find protection from the gunshots. The body of Mr. Hugo Juárez Cruzatt presented 11 bullet wounds with different trajectories. Sixteen of the inmates that surrendered were separated from the group and killed in different parts of the criminal center Said deaths constitute extrajudicial killings.

## **b) Proposed by the common intervener**

### **2. José Quiroga, specialist in the attention of torture victims**

He made a physical evaluation of 13 of the alleged victims. He referred to "three critical moments": the torture prior to the attack on the criminal center, the torture during the attack, and the torture after the same.

During the four days of the attack on the Criminal Center Castro Castro war weapons, tanks, artillery helicopters, rockets, and explosives were used. The inmates examined were deprived of sleep, water, and food. Some of them drank their own urine because of the thirst they were experimenting. All this under constant gunshots, bombing, gunfire, and use of fire starting weapons. The victims experimented suffering for having to go over the human bodies that were still warm. The alleged victims examined described a sensation of asphyxia, a burning sensation all over their body and the respiratory system. Likewise, there were injuries caused by grenade and bullet splinters. They also had the traumatic effect of seeing other inmates die and fall wounded, some of them being abandoned and others tortures despite the seriousness of their injure. Some of the persons interviewed described acts of great cruelty against people wounded, who were forced to drag themselves, such as blows with the butt of a gun, kicks, and they were carried as if they were objects when they were transferred to the hospital.

The composition of the gases used in Castro Castro is unknown, but we do know that the two components that were mostly used are O-chlorobenzylidene malonitrile, known as CS, and 1- chloroacetophenone, known as CN, and that they need a solvent that is usually methylene chloride. These components together cause the reactions described in the statements, that is: burning sensation; irritation in the eyes, nose, lungs, and in the skin; and asphyxia that may cause death. The solvent is known as a cancerigenic and it may also cause changes in the somatic chromosomes.

The witnesses that survived were taken to the area known as "no man's land". They were put face down for hours and guarded with dogs without muzzles. Many of them were beaten, they were not given water or food, and they were not allowed to use the bathroom or change their clothes. There was no consideration with pregnant women or the elderly.

After the events of the Criminal Center Castro Castro the inmates were submitted to a very strict disciplinary regimen. The transfer from the area "no man's land" to pavilions 1A and 4B already rebuilt was done through a "dark alley", a form of punishment that consists in forcing the prisoner to walk through a double line of officials armed with blunt elements such as pipes, and metallic or rubber sticks. As the prisoner advances he receives multiple hits, falls down, and receives more blows until he reaches the other end of the alley. The prisoners were forced to sing the national anthem, which starts with the verse "we are free". That was the reason why they resisted singing, and therefore received innumerable beatings with rigid and hard sticks all throughout their body and on the soles of their feet. This practice is known as "falanga" and it produces local bruises, intense pain, and difficulty when walking. Some victims may suffer from chronic pain due to enlargement of the plantar aponeurosis and even fractures of the bones of the metatarsus. They were also punished with electricity applied with an electric stick that generally does not leave markings, just an intense acute pain. All these forms of punishment were collective and due to the severity and physical and psychological consequences are consistent with torture. They were forced to stay in punishment rooms without being allowed to sit or lie down.

The consequences in the people examined are permanent. On one hand the memories of the events are recorded in the brain and said memories can be relived due to different stimuli. Many torture victims present post-traumatic stress and in some cases it may be permanent. On the other hand, the survivors have permanent physical limitations and some have worsened due to lack of treatment.

### **3. Ana Deutsh, specialist in the attention of torture victims**

She performed a psychological and psychosocial evaluation on 13 of the alleged victims.

The specific characteristics of the attack on the Criminal Center Castro Castro permit the classification of this episode as a "collective torture" due to the following elements: the attack was unexpected and the inmates were in a defenseless state, since they were sleeping; the attack was massive and aggressive and given the characteristics of the weapons used its intent was to annihilate in an indiscriminate manner. The inmates remained with fear that they were going to die. Besides, an intense psychological and emotional suffering was triggered since the wounded did not receive attention and their prison mates had to helplessly observe this situation. They were also deprived of food and water. The attacks came from the State's security forces. These situations fit into the elements of torture, pursuant to the UN Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment.

The fact that the attack started in the pavilion where the women that were political prisoners were located and where several of them were pregnant, would indicate an intentional selection against the women. Besides, the fact that this attack was planned to end on Mother's Day was interpreted and felt like an additional

instigation, like a cruelty against their next of kin, especially their mothers, and also against the victims, who "were suffering with the thought of the suffering of their mothers and other relatives."

On the following days the "collective torture" continued. The inmates evaluated remained in the area called "no man's land" without receiving food or water, without moving, without being allowed to use the bathroom. Upon their return to the pavilion, some inmates were kept incommunicado for five months and they received additional punishments, such as the one that consisted in putting up to 20 prisoners in a room of approximately 2 meters by 2 meters, where they could not sit or lie down, with a hole on the ground for a bathroom. During the following days and months the inmates received other mistreatments and they were submitted to psychological torture, through: the prohibition to work, read, and go to the courtyard; the obligation to remain in their cells 23 hours and a half per day; and the prohibition to receive visits. All these measures put the prisoners in a very stressful state, the interrupted their rhythm of life, and states of anxiety and despair were caused due to the lack of capacity to modify or prevent or be affected by these measures.

The treatment inflicted on the next of kin of the inmates also constitutes torture, since they were victims of beatings, tear gases, bombs, and gunshots of the Armed Forces. They were humiliated by being called relatives of "terrorists". They had to witness the destruction of their loved ones, and they were submitted to the horrible experience of looking for their relatives' bodies in a pile, dismembered, bleeding, or en decomposition. They were also submitted to intimidations if they denounced or alleged their rights with the government, and for five months they were denied information and contact with the survivors of the events.

The victims have suffered an accumulation of traumas, reason for which the psychological damage is deeper and longer lasting. The diagnosis that corresponds to similar experiences is that of "complex post-traumatic stress". The passing of time did not have a healing effect on any of those interviewed that continue in a post-traumatic pathological process. "The impunity factor contributes significantly in preventing a recovery."

## *B) TESTIMONIAL EVIDENCE AND EXPERT ASSESSMENT*

187. On the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006 the Court received the statements of the witnesses proposed by the Inter-American Commission on Human Rights, the State, and the common intervener in a public hearing (*supra* para. 93), as well as the opinion of the experts proposed by the common intervener. Below, the Tribunal summarizes the main parts of said statements and expert opinions.

### **Statements**

#### **a) Proposed by the Inter-American Commission**

##### **1. Gaby Balcazar Medina, alleged victim**

She was imprisoned on the second floor of pavilion 1A in the Criminal Center Castro Castro, along with approximately 100 other inmates. Only the inmates accused of terrorism were located in pavilions 1A (women) and 4B (men) of the criminal center

Castro Castro. She is not sure if in the other pavilions there was somebody in these same circumstances.

On May 6, 1992, a visiting day, approximately at 4:00 hours, when the witness was resting, the explosions and gunshots started within the criminal center. The walls of pavilion were torn down and tear gas bombs and other stronger ones were thrown. In order to protect themselves from the gases and be able to breathe the inmates had to use handkerchiefs with vinegar or their own urines, and they even had to put their face in the hole that they used as a bathroom because it was the only place where fresh air came in. Mr. Juan Bardales died that day in the morning. After the deaths, a "climate" of despair started to appear among the women, who felt that they were going to die and that their next of kin who were outside the criminal center were going to witness it. If it had been a transfer she would not have objected it, since living with men at the Castro Castro criminal center was not comfortable.

Due to the "air [...] bombing" the roof of the fourth floor was perforated, and the soldiers entered the pavilion through said perforation injuring some inmates, among which she recognized María Villegas. Since pavilion 1A was going to be destroyed, the inmates, of whom four were pregnant, had to "drag themselves" on the ground going over bodies and protecting themselves from the bullets that were being shot by the snipers, jumping from the second floor to the basement where the conduit, which was filled with rats, was and they went toward pavilion 4B. Other inmates did not have the same luck, among whom she recognized Mrs. Vilma (she does not remember her surname) of 60 years of age, who was reached by the bullets because she could not jump. The intensity of the attack did not decrease at any time. A group of the inmate's delegates tried to establish a dialogue so that they would not be hurt in the transfer.

On Saturday the inmates were all piled up. The attacks were intensified and the bombings and explosions continued. The witness describes the effects of the bombs like "feeling that you could no longer breathe, like if your whole body was burning, like your body wanted to escape you." When the pavilion's door opens some of the inmates start going out and they were all "murdered", among who she recognized Mr. Marco Azaña. The witness decided to go out since the pavilion was going to come falling down. She thought "if I go out at least my mother will be able to bury me and identify my body." When she went out to the area known as the "coop" she was caught by a splinter that caused a wound in her right leg. She also saw a lot of dead and injured people in this area, among who she recognized Mrs. Violeta (she does not remember her surname) who was dead, Marco Azaña, and Elvia Sanabria, who she does not know if they were dead or injured, and Miriam Rodríguez and Luis Angel, who were injured. While she was walking to the area known as the "commonplace" she looked towards the rooftops of the criminal center and there were a lot of soldiers dressed as rangers, who were aiming and verbally attacking the inmates. The witness stopped walking and they immediately started shooting at her. She was wounded in the neck, the arm, and the right breast. When the soldiers noticed that she was still alive, they shot her in the back, and she lost consciousness. When she regained consciousness she was in the area of the criminal center "where visitors are inspected", along with other wounded prisoners. There a prison guard who gave her water helped her.

Later the hooded soldiers grabbed her by the feet and hands and "threw" her onto a truck along with other injured inmates. When she was in that truck exiting the criminal center she could hear the voices of the next of kin, who were screaming in

protest for the attack, which "gave her strength" to hold on to her life. In the truck the soldiers, who told them they were going to kill them, threatened them or "throw them off" on the way to the hospital, and one of the soldiers kicked her in the face.

In the hospital she did not receive the necessary medical attention; she was not bathed and the flies would stand on her body, which was covered with blood; she was left without food, because due to her injuries she could not eat by herself and nobody would help her; she was naked in front of all the soldiers that were guarding her and they constantly aimed at her with guns; and they did not let her use the bathroom in private or receive visits from her next of kin. During all that time she was mistreated by the soldiers. In the hospital Consuelo, Noemí (she does not remember their surnames) and María Villegas died due to lack of attention.

She was later transferred to the prison of Chorrillos, barefoot and dressed with a robe that the Red Cross gave her. In that prison the inmates remained in overcrowded conditions, in cells that did not have the normal hygiene conditions, without water, badly fed, and they were not allowed to perform activities such as reading, work, or going outside to the yard. Approximately 5 months after the attacks on the criminal center they were able to receive a visit; however, they were not allowed to touch their next of kin.

She was prosecuted by 'faceless' judges and she was declared innocent. Her life has changed radically since the events in the Criminal Center Castro Castro, not only because of the scars on her body which do not let her lead a normal life, but also because she has been stigmatized as a terrorist. When she was released she wanted to start a new life with her family, but she has not been able to. She will always remember those events that left her scarred for life. Besides, she also has disorders, since during the first years she would have nightmares about the criminal center, the bodies, and the executions.

Referring to the facts in the criminal center and to all the painful situations she went through, the witness stated "[...] I really do not know why so much hate [, ...] I do not know why human beings can reach those levels of evil." She also referred to the values she transmits to her students in her professional life, because although she saw so much evil, there were also people who helped her.

## **2. Julia Genoveva Peña Castillo, mother of the alleged victims Julia Marlene Olivos Peña and Víctor Javier Olivos Peña**

She is the mother of two inmates that were imprisoned in the criminal center Castro Castro. On the morning of May 6, 1992 she found out through the news that something was happening in the criminal center and she immediately went to its installations. She arrived at the criminal center at approximately 7:00 hours. There were a lot of soldiers and members of the press. The next of kin of the inmates that found out what was going on also arrived, and since it was a Wednesday of visits, more relatives continued to arrive. At around 3:00 p.m. more force was used and more soldiers arrived. The next of kin did not receive any type of information with regard to the disturbances in the criminal center and they received a "very strong" treatment from the soldiers.

On the afternoon of May 9, 1992 the attack was intensified. Many of the mothers hugged "because the noise from the cannons reached [their] hearts." You could see



the splinters from the pavilion flying through the air. They thought their children would no longer be alive because the attack was very strong. They clearly heard the voice of the colonel of the criminal center saying "come out, surrender, come out". She recognized her daughter[s voice yelling "stop your fire, stop your fire, we are going to come out, we request evacuation." She was very happy to hear her daughter's voice. Later on "the voices became silent, and all you could hear were gunshots from what sounded like a machine gun or a long weapon," that were fired from time to time. The next of kin spent the night there, without knowing who was dead and who was injured, since they were not given any information.

On May 10, 1992, Mother's day, the witness did not know anything about her children, and so she started looking in the morgue. Once inside "she saw the girls thrown on the floor naked and sewn up," there were bodies piled up, and they were performing autopsies on other bodies on the table. Looking for her daughter and son she lifted and moved bodies, but she did not find them. She went to the International Red Cross, but they did not know anything. At approximately 5 p.m. she went to the Police Hospital. There someone told her "lady your daughter is dead, [...] she is at the morgue, but now you should go to Carrion Hospital because that is where your son is, they just took him there, and if you do not pick him up today they will kill him." The witness went to that hospital, which was very far away, but they did not let her in because visiting hours were over. However, she was able to enter by climbing a wall. She looked for the morgue, where she did not find any dead bodies, but she heard a moan that came from behind the door. She opened the door and there was her son "on a tin table" with a sheet tied around him, he had five wounds and a very high fever. When she found her son, a soldier came into the room and treated her very badly. She told him that if he had come to kill her son "he would have to kill [her] first." At that moment a doctor came in and asked why the witness' son was in the morgue if he was alive. The soldier left. They took her son to the Police Hospital.

On May 11, 1992 she returned to the Police Hospital, but she was not allowed to enter. The doctor told her that her son was very ill and could die. She returned to the morgue but did not find her daughter.

On May 12, 1992 she went to the National Office of Criminal Investigation and Support for Justice (DIRINCRI) because they told her that they had a list of all those who had died. They asked her for her daughter's name and told her she was not on the list. She went back to the morgue again, where other mothers were also looking for their children. The officers of the DINCOTE did not let them in, but when one of them was not looking the witness was able to go in and ran to where the freezers were located. She was able to open a freezer and her daughter's body "fell on top of her". The witness mentioned that "she will never forget that" and she described that moment. On the floor there were three bags tightly closed and the witness opened them. In one of them she found Fernando Orozco, who was all cut up. He was the son of one of the women who was there. In the other bag there was a burned person, and in the other a piece of carbon. The witness' daughter was missing part of her neck and it seemed, from the signs on her body, that she had been dragged and beaten. The doctor from the morgue helped her with a box to remove her daughter's body from the morgue. The witness sent the body home with a relative, while she went back to the hospital to see her son.

She stated that she was not aware that there was an open process in Peru regarding the facts of this case. She asked the Inter-American Court to rectify the miscarriage of justice and to punish those responsible for the facts.

**b) Proposed by the common intervener:**

**3. Luis Ángel Pérez Zapata, alleged victim**

He explained a map of the Miguel Castro Castro Prison, referring to its structure, the location of the pavilions 1A and 4B, and some places mentioned in the statements. He indicated that the criminal center had a wall of between 6 and 8 meters in height, made of brick and cement. The inside part of the criminal center is what is known as "no man's land". In the area known as the "roundhouse", which is the central area of the criminal center, there are some underground passages through which the pavilions communicated. Due to the overcrowding in pavilion 4B, some inmates were allowed to sleep at night in pavilion 1A. In pavilion 4B there were more than 400 people, despite that it was a pavilion with a capacity for 90. On the first day of the events the witness was in pavilion 1A.

After the coup d'état of April 5, 1992 the militarization of the Criminal Center Castro began. During the coup d'état rights and liberties were restricted, "even habeas corpus were ignored."

At 4:30 hours of May 6, 1992 the explosions by "combined troops" of the Army and the Police started. They used "long [...] war weapons", tear gas bombs, firebombs, and artillery helicopters that fired missiles and rockets against pavilion 1A. The firebombs "burn [on the inside] and rob oxygen, [and] prevent breathing." The attack was also produced from the roofs and windows of the other pavilions, where the snipers were located.

During the days of the attack they bombed the walls, fired instalazas weapons against the walls, which "are of a very resistant [and] anti-seismic concrete [and they measure] 25 cm. in width." They also bombed the roofs in order to create holes, through which they fired bursts of machine-gun fire and threw explosives. They also used "artillery helicopters" to fire missiles against the pavilion. The witness expresses that "[t]he situation quickly led you to believe that they were going to be crushed under the rubble of that pavilion." "Being under this bombing is like being in hell" because there is tear gas that do not let you breathe, the explosions shake the pavilion, you can hear the bursts of machine-gun fire, and you think "here they are going to [...] kill us all." Additionally, they were without electricity, water, or food.

According to what they later told him, during the attacks, the inmates that were in the criminal center for common crimes were taken to the courtyard where they remained together in the middle and guarded.

On the fourth day of the attacks the inmates decided to leave pavilion 4B because they thought that it was going to be "crushed as [had] occurred in 1A" and they could no longer take the situation. A group of inmates asked through screams that the shooting stop because they were going to come out, but they were executed. The witness exited pavilion 4B, he walked by "the roundhouse" and reached the "entrance door", from where he could see that "there were [...] hundreds of troops combined with war weapons," and that on the hills there were soldiers with weapons. When he was walking he saw that "in front [of him] there was a machinegun with

three legs." He turned around and a bullet reached him in the back and another on the hand, and the palm of his hand blew open. He was lying face down when a soldier with a shotgun and balaclava put the weapon in his mouth, insulted him, and kicked him. He asked for water because he was very thirsty, he felt pain in his hand and back, he had a "hole" in his clavicle. Approximately one hour later two soldiers took him by the hand that hurt and pulled him up by the arm, "like if he were a sack of potatoes" and threw him into a military truck where there were other wounded persons. They threw other people on top of him. He was then taken to the police hospital.

In the Police Hospital they stitched up his hand in such a manner that he ended up with many scars and he cannot move it well. During the time he was in the hospital "the doctors told [them] that there was no medicines for [them]." The International Red Cross was constantly supervising that they had medicines. In the hospital he was guarded by three or four armed police officers that did not allow anyone to enter his room.

Two weeks later he was transferred to the "Carrión" hospital, where he was kept in a dirty area, without windows, very noisy, without clothes, and with his wounds became infected since they were not given the medicines that had been provided by the Red Cross. The Red Cross "was not allowed entrance until after 15 days had gone by." After approximately one month and a half they were transferred again to the Criminal Center Castro Castro without clothes or shoes. Since it was winter the cold made his bones and wounds hurt more. In the Criminal Center Castro Castro they kept on "torturing them", they played military marches at 6 a.m. at a very high volume; they were beaten; they were given electrical discharges; they were not allowed to perform any activity such as reading or working; they could not go out to the yard; they remained confined 24 hours in cells of 2x1.80mts without sunlight; the food they were given was dirty, and it even had small rocks; and they were forced to walk through two lines of guards, who beat them with sticks and irons. He had to undergo all these "tortures" when he was recovering of the injuries caused by the bullet wounds.

Family visits were allowed six months after the events of the Criminal Center Castro Castro.

His mother suffered a lot and "the tension caused her cancer"; she died two years ago. During the days of the attack his mother cried a lot and she felt very bad that the witness was being "bombed [and] killed" and she could not do anything about it.

He is in his fifth year of Law School in the University of San Marcos. He also works in civil construction. Currently, besides the injuries caused by the bullets (which include the scars), he has an injury in his ear that has decreased his hearing capacity, which was caused by an explosion during the attack on the criminal center. Besides, he has movement problems in his hand, which has made it difficult for him to carry out certain tasks, and he cannot lift his arm "completely". He has many difficulties hearing a person in a normal conversation, and even more so his classes.

In Peru nobody has been prosecuted and no authority has assumed responsibility for what happened.

**4. Lastenia Eugenia Caballero Mejía, wife of the alleged victim Mario Aguilar Vega and mother of the alleged victims Ruth and Orlando Aguilar Caballero**

Her husband and son were imprisoned in pavilion 4B of the Criminal Center Castro Castro and her daughter was held in pavilion 1A of said criminal center. She found out through the news of what was happening in the prison and she went to it with her granddaughter. When she arrived she saw many soldiers and police officers surrounding the penitentiary center. She heard gunshots and explosions and nobody gave her information on the inmates. On the third day the situation became more serious, the number of soldiers increased and the explosions and gunshots continued. The soldiers mistreated the next of kin, they told them to leave, and they shot and threw tear gas and water at them. Additionally, people dressed as civilians fired weapons at them.

On the third day of the events, when she still did not know what could have happened to her next of kin, she went to the morgue to look for information. The morgue "was a complete meat shop". To identify her next of kin she was shown pictures of people that were "destroyed". There were worms on the floor and a hideous smell, there were people "thrown on the floor as if they were animals." Additionally, the personnel of the morgue was performing the autopsies in front of the relatives, as if they did not care that they were watching. It was "an immense pain" for the witness that "left her marked as with a very large footprint." Her children and husband were not in the morgue, and thus she returned to the criminal center.

When she was outside the criminal center on the fourth day of the events smoke was coming out, "very loud sounds" were heard, and machine guns could also be heard "as if it were a war." She imagined that her children and husband would be dead. She returned to the morgue and did not find them.

The State did not provide an official list with the names of the people that died or of the survivors and their condition.

Her children survived the event and were transferred to the prisons of Ica and Puno. After 12 years of asking different people about what happened, she found out that her husband died as the result of the explosion of a firebomb and he was carbonized.

She suffers from psychological and nervous disorders as well as of other illnesses of the urinary system. She requested that those responsible be punished and that her husband's body be handed over to her so that she may bury him.

**c) Proposed by the State:**

**5. Omar Antonio Pimentel Calle, Judge of the Second Supraprovincial Criminal Court**

He works as a Supraprovincial Judge, in charge of hearing cases of terrorism and breach of human rights. As of July 2005 he has been hearing the case for the events occurred in the Criminal Center Castro Castro between May 6 and 9, 1992, in its preliminary stages. After evaluating the accusation presented by the Fifth Supraprovincial Public Prosecutor, the witness proceeded to ordering the start of the

preliminary proceedings. The judicial investigation is exclusively for aggravated murder, based on Articles 106 and 108 subparagraph 4 of the Criminal Code of Peru, and the aggrieved parties will be the next of kin of the victims of said homicides.

Regarding the survivors and the wounded the mentioned Court is not hearing their cases, since in Peru the monopoly of criminal actions belongs to the Public Prosecutors' Office. The prosecutor must denounce before the judge, and the latter can not *motu proprio* start said action. It is possible that once in the prosecution stage of a case sit be determined that some information must be completed, case in which it will be forwarded once again to the Prosecutor, so it may "complete it". In the case of the Criminal Center Castro Castro "the information has been transferred to the [competent] prosecutor" so it may give its opinion regarding two aspects: the first is that on the record and in the investigation it is said that many people were injured, and that other acts have breached different juridical rights and they not only resulted in deaths; and the second is that the civil part requested the appearance of the former President Fujimori in the process.

The ruling regarding the responsibility of the former President Alberto Fujimori corresponded to the Nation's Public Prosecutors' Office due to the immunity he had in his quality of President. Being the case in said Public Prosecutors' Office the immunity period of Mr. Fujimori expires, reason for which the Nation's Public Prosecutors' Office forwarded the actions to the Supraprovincial Prosecutor, where said ruling is pending.

The process is in its preliminary stage "with 95% of [the] actions requested by the Prosecutors' Office" finished, among which are the statements of 12 defendants and 106 statements between police officers and inmates, among which are the statements of Vladimiro Montesinos and of members of the Colina Group. 15 confrontation actions between defendants, and between the latter and witnesses have been carried out, in order to clarify some matters under investigation. Two proceedings of preventive statements by relatives, who are the only ones who have appeared in the civil part, have been carried out. Investigations are being carried out to find out the names and addresses of the next of kin of the fatal victims. In the process the investigations and statements performed by the Commission for Truth have been taken into consideration, but many of them have had to be "specified by the Public Prosecutors' Office in order to have greater legitimacy."

Proceedings of expert ratification have been carried out by 8 legal doctors who enacted the protocols for the autopsies of the dead inmates and by 8 ballistic experts who enacted the expert reports on forensic ballistics practiced on the dead inmates. In these proceedings of expert ratification they were asked questions seeking to clarify the content of the mentioned protocols and reports "that already existed but [...] were incomplete," in order to determine: the external location of the wounds; the possible cause and way of production; the trajectory and distance of the bullets fired; the trajectory and entrance and exit wounds in the dead bodies; and the direct cause of death.

In the preliminary proceedings, exhumations have not been performed, since they were previously done and the fatal victims identified through the investigations have been handed over to their next of kin. No pending exhumation is on record. On April 21, 2006 a proceeding of judicial investigation was carried out in the Criminal Center Castro Castro, in presence of the accused, of inmates as witnesses, and of the doctors and experts, "who would issue a comprehensive report and a technical

ballistics report." The weapons seized in "Operative Transfer 1 " are also trying to be located, as well as the bullets from fire weapons extracted from the dead, and those found in pavilions 1A and 4B, in the "roundhouse", and in "no man's land". Information is also being collected regarding the "weapons seized from the intervening state personnel", and official letters have been issued to recollect information on the names of the personnel and those in charge of the distribution of the weapons appointed to the different police units that participated in the "operative".

There are 13 people accused, among which we can find the former director of the criminal center (Gabino Marcelo Cahahuanca Parra), the former chief of the National Police (Adolfo Cuba y Escobedo), and the former Secretary of the Interior (Juan Briones Dávila). The other accused are Teofilo Wilfredo Vásquez, Alfredo Vivanco Pinto, Jorge Luis Lamela, Jesús Artemio Konja, Jesús Manuel Pajuelo Garcia, Feliz Lizarraga, Estuardo Mestanza, José Johnson, Adolfo Javier Cuelles Conero, and Miguel Barriga. The only arrest warrant that has been issued was against one of the accused that has not appeared before the court to offer a preliminary statement. None of the accused have been imprisoned. According to Peruvian legislation, upon issuing the order to start the preliminary proceedings, the judge may order an arrest or orders to appear with restrictions. In this process the orders to appear with restrictions have had a positive result, since with the exception of one of the accused, all the others have appeared. The fact that the crime they are charged with is serious is not in itself sufficient grounds to issue an arrest warrant.

The process has been declared complex because the autopsy protocols that were a "little incomplete" had to be ratified, and statements from people that have several proceedings against them had to be collected, which causes that the "proceedings overlap each other." When a process is declared complex the investigation period, that normally takes 4 months, is extended to 8 months, pursuant to Article 202 of the Code of Criminal Procedures.

The investigation period expires approximately on July 25, 2006, and it will be forwarded to the Supraprovincial Prosecutor so it may issue his opinion, and then to the National Criminal Court where the trial will take place. In what remains of the investigation period preliminary statements of the next of kin of the victims will be received "within what is humanly possible."

## **EXPERT OPINIONS**

### **Proposed by the common intervener:**

#### **1. Nizam Peerwani, forensic expert**

He referred to the extension and form in which forensic investigations are carried out. These investigations must include a complete series of X-ray exams of the body of the deceased. X-rays are very important because they document the wounds, which allow a prediction on the type of fire weapons used, and the presence of foreign matters in the body, such as bullets, fragments of grenades or shrapnel. It is also important to take photographs that document the person's identity and their wounds so another forensic expert may perform an independent evaluation. Likewise, the forensic exam must include the recollection, preservation, and analysis of blood samples and toxicology exams. The toxicological tests may detect

substances and chemicals in the body, such as drug abuse and inhalation of smoke or tear gas. For example, a toxicological exam may detect that white phosphorous was used as an igniter when the wounds were produced. Without toxicology an independent verification cannot be made on the type of weapons or agents that were used during the assault or attack. For the forensic investigation, evidence such as bullet cases or metal fragments, left behind after the attack, must also be collected in order to provide key information on the attack and the person's injuries. The evidence collected should include fingerprints and the clothes of the dead persons. Clothes are the most important evidence, because it is what prevents the gunpowder and the smoke from coming into contact with the body. A forensic evaluation of a body without access to its clothes is an insufficient evaluation. In the present case several of these forensic analysis can no longer be performed due to the passing of time: such as the analysis of the inmates' clothes and the collection of air and gas samples from the criminal center at the time of the attack.

Regarding the controversy on if "Operative Transfer 1" was an attack or if it was an operation destined to controlling a riot in the prison, the expert carried out an evaluation, which included: the type of weapons used, the seriousness of the wounds caused to the prisoners, the number of prisoners killed, the number of serious injuries, and the number of police officers and members of the army that were injured or that died. Based on these circumstances he concluded that the event was an attack and not an operative to control a riot in the prison. To reach said conclusion he used as grounds the type of injuries suffered. Several of the prisoners suffered strange injuries such as abrasions with fire weapons, injuries in their feet, in their legs, in their extremities, and in other uncommon angles. Based on these wounds, the fact that the prisoners had to dodge bullets fired at them is confirmed. The forensic evidence also suggests that some prisoners died due to explosions and burns. Likewise, the prisoners had wounds in their backs and extremities, consistent with shots fired randomly and imprudently.

He also referred to the types of weapons used in prison. The most important evidence available shows the use of weapons of attack and great speed against the inmates. Specifically, there is evidence that suggests and backs 7.62-millimeter rounds were fired against the prisoners. The weapons of great speed produce a great amount of destruction in the tissues and a great number of internal wounds in the body. Besides, these high-speed bullets with speeds that exceed 700-1000 meters per second carry with them a great amount of kinetic energy, which tends to bounce off its objective, causing even more damage. Those attack weapons of great speed are usually used in wars, and not in a closed environment such as prisons.

## **2. Thomas Wenzel, expert in psychological disorders in torture survivors and in disorders due to posttraumatic stress**

He referred to four important factors that can predict the development of long-term consequences in victims: the exposure to extreme physical violence with which the life and integrity of the people was threatened taking into account their severe injuries; the exposure to long periods of physical traumas that develop severe traumatic consequences; the complete loss of rules and social treatment that have a very severe impact on the body's psychological and biological systems; and the loss of dignity and transfer of guilt in the victims.

The previous and subsequent factors to what occurred in the Criminal Center Castro Castro can influence the long-term consequences, for example the lack of access to

treatment, and traumatic violence such as torture before and after the main event in the prison.

Keeping women naked in the hospital may be considered a technique of psychological torture.

The symptoms of a person with disorders due to posttraumatic stress caused by torture are: the inability to function within a family, as well as to concentrate and sleep adequately; the complete destruction of the biological functions of the brain and the body; the destruction of sleep patterns, nightmares; and problems at work. For a person that has been tortured these consequences could turn into something permanent if the person does not receive an adequate treatment. The severe impact on the next of kin can become a second trauma. Besides, kids that are exposed to the severe trauma of their parents suffer long-term consequences.

With regard to rehabilitation, social implications, especially stigma and feelings of humiliation and guilt, must be taken into account. The suffering of the next of kin must be dealt with in an adequate and sustainable manner through interventions in the community and society. If the person has been wrongfully accused of something and he is blamed for what has happened it is going to be impossible for them to function once again in their environment.

He referred to the different types of symbolic reparations, and he made emphasis on the fact that each victim must be treated individually. First a diagnosis of the victim must be made because he could be very traumatized. An expert must perform an individual evaluation, and in many cases the evaluation has to be multidisciplinary. The evaluation must help prepare a rehabilitation plan, which will allow the person to regain control of their life. The victims must be convinced to seek help, and it is necessary that there be access to those treatments and to standards for individual diagnosis in the community. Community orientation measures must be developed and the next of kin must be attended as well, since many of them have been severely traumatized and they suffer along with the survivor. In some cases the trauma is so severe that it is almost impossible to treat.

He indicated that the tension suffered by the mother could have great impact on the development and life of a child, especially if this tension occurs in the last three months of the pregnancy.

The beatings on the soles of the feet "create a very long-lasting and permanent pain, that is very difficult to treat," and "they affect the entire nervous system [since t]he soles of the feet have a high density of nervous sensors." The treatment given to the prisoners "was definitely not normal in containing prisoners." The elimination of stimuli, such as lack of light, prohibition of exercise, music, and reading has "psychological and biological effects." The lack of "light [for] a long period of time [...] causes depression[, ...] it causes a pretty strong damage on the psychological system and on the glands [of the] brain, [as well as effects] on the body's hormonal structures." These types of conditions "may [...] activate other psychological effect [or] affect a vulnerable point [of some inmate, and] then this could lead to long-term problems, including chronicle psychosis, among others." In this case a systematical psychological torture was employed.

### *C) EVIDENCE ASSESSMENT*



### *Assessment of Documentary Evidence*

188. In this case, as in others<sup>18</sup>, the Tribunal admits the probative value of the documents presented in a timely fashion by the parties on their procedural opportunity, or as evidence to facilitate adjudication of the case that were not disputed or objected, and whose authenticity was not questioned. Likewise, in application of Article 44(2) of the Rules of Procedure, includes the evidence offered before the Commission, as long as they have been received in procedures carried out with the presence of all parties. Specifically, it includes the statements offered under oath by Mrs. Mónica Feria Tinta and Avelina García Calderón Orozco during the public hearing on the merits celebrated before the Commission on November 14, 2001, taking into account that the State expressed that it did not have observations in this sense (*supra* para. 62).

189. With regard to the written statements given by the witnesses Michael Stephen Bronstein, Edith Tinta, Rubeth Feria Tinta, Luz Liliana Peralta Saldarriaga, Osilia Ernestina Cruzatt widow of Juárez, Eva Sofía Chalco Hurtado, Luis F. Jiménez, Raul Basilio Gil Orihuela, Jesús Ángel Julcarima Antonio, Nieves Miriam Rodríguez Peralta, Cesar Mamani Valverde, Alfredo Poccorpachi Vallejos, and Madelein Escolástica Valle Rivera, as well as by the experts Christopher Birkbeck, José Quiroga, and Ana Deutsch (*supra* paras. 73, 77, 79, 80, 81, 82, 83, 84, 86, 87, and 99) the Court considers them relevant since they adjust to the object that was defined by the Tribunal in the Ruling in which it ordered that they be received (*supra* para. 65), taking into account the observations presented by the Commission (*supra* paras. 85, 94, and 97) and by the intervener (*supra* para. 98). On other occasions the Tribunal has admitted sworn statements that were not offered before a notary public, when this does not affect legal certainty and the procedural balance between the parties.<sup>19</sup> Likewise, the Court accepts the waiver made by the Commission regarding the presentation of the written statement of Mr. Wilfredo Pedraza (*supra* para. 85).

190. In application of that stated in Article 45(2) of the Rules of Procedure, the Court includes in the body of evidence the documents presented by the Commission, by the intervener, and by another group of representatives different to the common intervener (*supra* paras. 47, 48, 93, 101, 102, 104, 105, 120, 121, 122, 124, 125, and 128) in response to the requests made by the President and the Court.

191. The Court adds to the body of evidence, pursuant to Article 45(1) of the Rules of Procedure and because it considers them useful in deciding this case, the documentation presented by the intervener at the end of the public hearing held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006 (*supra* para. 93), those presented as appendixes to the final written arguments (*supra* paras. 103, 105, 106, 120, and 121), and those forwarded by the the group of representatives of alleged victims through the intervener and the Commission (*supra* paras. 53 and 103) taking into account the observations made by the intervener (*supra* para. 110) and the Commission (*supra* para. 113).

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<sup>18</sup> Cfr. *Case of Almonacid Arellano et al.*, *supra* note 15, para. 74; *Case of Goiburú et al.*, *supra* note 5, para. 57; and *Case of Servellón García et al.*, *supra* note 3, para. 38.

<sup>19</sup> Cfr. *Case of Servellón García et al.*, *supra* note 3, para. 46; *Case of Claude Reyes et al.* Judgment of September 19, 2006. Series C No. 151, para. 51; and *Case of Ximenes Lopes*, *supra* note 3, para. 52.

192. Similarly, in application of that stated in Article 44(3) of the Rules of Procedure, the Court includes in the body of evidence the documents presented by the State (*supra* paras. 108 and 112), taking into consideration the observations presented by the intervener and the Commission (*supra* paras. 110, 113, 115, and 116), as well as part of the documentation presented by the common intervener (*supra* paras. 111 and 127), and assesses them within the totality of the body of evidence, applying the rules of competent analysis.

193. Likewise, in application of that stated in Article 45(1) of the Rules of Procedure, the Court includes in the body of evidence of the present case Supreme Decree No. 065-2001-PCM of July 4, 2001, Decree Law N° 25418 of April 6, 1992, and the Supreme Ruling No. 438-2001-PCM of September 6, 2001, since they are useful for the present case.

194. The Court states that the testimonies offered before notary public (affidavits) of Messrs. Gustavo Adolfo Chávez Hun, Mercedes Villaverde, and Rosario Falconí Alvarado, which were proposed by the intervener and requested through Ruling of May 24, 2006 (*supra* para. 65), were not forwarded to the Court without offering any explanation in this regard.

195. The Tribunal will not assess the documentation presented by the Commission on October 20, 2006 (*supra* para. 117), nor part of the documentation presented by the common intervener on October 4<sup>th</sup> and November 14<sup>th</sup> and 20<sup>th</sup>, 2006 (*supra* paras. 111 and 127), since its time-barred presentation does not obey to any of the conditions contemplated in Article 44 of the Rules of Procedure.

#### *Assessment of the Testimonial and Expert Evidence*

196. The Tribunal admits and grants the corresponding evidentiary value to the testimonies of Gaby Balcázar Medina, Julia Peña Castillo, Luis Angel Pérez Zapata, Lastenia Eugenia Caballero Mejía, and Omar Antonio Pimentel Calle, as well as to the expert reports of Messrs. Nizam Peerwani and Thomas Wenzel, which were not objected or contested. This Tribunal considers that the testimonies of Gaby Balcázar Medina, Julia Peña Castillo, Luis Angel Pérez Zapata, and Lastenia Eugenia Caballero Mejía that result useful in the present case, cannot be assessed in an isolated manner since they are alleged victims and they have a direct interest in the case, on the contrary they must be assessed within the totality of the evidence in the proceedings.<sup>20</sup>

### **VIII PROVEN FACTS**

197. Pursuant to the partial acknowledgment of international responsibility made by the State (*supra* paras. 129 through 159), according to that stated in paragraphs 164 through 169 of the present Judgment, and according to the body of evidence of the present case, the Court considers that the following facts have been proven:

#### ***Background and juridical context***

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<sup>20</sup> Cfr. *Case of Almonacid Arellano et al.*, *supra* note 15, para. 78; *Case of Goiburú et al.*, *supra* note 5, para. 59; and *Case of Claude Reyes et al.*, *supra* note 19, para. 56.

197(1) During the period that goes from the beginning of the eighties until the end of the year 2000, Peru lived a conflict between armed groups and agents of the police force and the military. This conflict got worse in the midst of a systematic practice of violations to human rights, among them extrajudicial killings and forced disappearances of people suspected of belonging to armed groups that existed on the fringe of the law, such as Sendero Luminoso (hereinafter SL) and the Revolutionary Movement Tupac Amará (hereinafter MRTA), all practices carried out by state agents following orders given by military and police leaders.<sup>21</sup>

197(2) On July 28, 1990 Mr. Alberto Fujimori Fujimori was sworn in as President of Peru, pursuant to the Peruvian Political Constitution of 1979, for a five-year term. Article 205 of said Constitution does not permit immediate presidential reelection. On April 6, 1992 President Alberto Fujimori Fujimori enacted Decree Law N° 25418, with which he temporarily established the so-called "Emergency and National Reconstruction Government." Said government dissolved the Congress and the Court of Constitutional Guarantees, it intervened the Judicial Power and the Public Prosecutors' Office<sup>22</sup> and it removed several judges from the Supreme Court of Justice.<sup>23</sup>

### ***The Commission for Truth and Reconciliation***

197(3) With relation to the events occurred during the two decades of violence, the State, through Supreme Decree No. 065-2001-PCM of July 4, 2001, modified by Supreme Decree No. 101-2001-PCM, both issued by the President of the Republic, created a Commission for Truth and Reconciliation (hereinafter CVR) with the objective of clarifying the process, facts, and responsibilities of terrorist violence and the violation of human rights that occurred from May 1980 until November 2000, attributable both to terrorist organizations and State agents, as well as the proposal of initiatives destined to strengthening the peace and harmony between Peruvians.<sup>24</sup> Said Commission issued its Final Report on August 27, 2003.<sup>25</sup>

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<sup>21</sup> Cfr. *Case of Baldeón García*. Judgment of April 6, 2006, Series C No. 146, para. 72(2); *Case of the Gómez Paquiyauri Brothers*. Judgment of July 8, 2004, Series C No. 110, para. 67(a); *Case of Cantoral Benavides*. Judgment of August 18, 2000. Series C No. 69, para. 63; *Case of Castillo Páez*. Judgment of November 3, 1997. Series C No. 34, para. 42; and *Case of Loayza Tamayo*. Judgment of September 17, 1997. Series C No. 33, para. 46. Likewise, cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru. Patterns in the perpetration of crimes and violations to human rights, pages 93, 115, 139, and 167 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); Inter-American Commission on Human Rights, Report on the situation of human rights in Peru of 1993, Document OEA/Ser.L/V/II.83.Doc.31, March 12, 1993; Report on the situation of torture in Peru and other cruel, inhuman, or degrading treatments or punishments of the National Coordinator of Human Rights of Peru of January 1992 to September 1994; and annual report of 1993 of the National Coordinator of Human Rights of Peru.

<sup>22</sup> Cfr. *Case of Huilca Tecse*. Judgment of March 3, 2005. Series C No. 121, paras. 60(6) and 60(8); and Decree Law No. 25418 of April 6, 1992 (evidence to facilitate adjudication of the case included by the Inter-American Court pursuant to Article 45(1) of its Rules of Procedure).

<sup>23</sup> Cfr. *Case of the Constitutional Court*. Judgment of January 31, 2001. Series C No. 71, para. 56(1).

<sup>24</sup> Cfr. *Case of Baldeón García*, *supra* note 21, paras. 72(1) and 72(2); and Supreme Decree N° 065-2001-PCM, Article 1 (evidence to facilitate adjudication of the case included by the Inter-American Court pursuant to Article 45(1) of its Rules of Procedure).

<sup>25</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

197(4) The Commission for Truth and Reconciliation was made up by twelve persons of Peruvian nationality, "of a well-known ethical trajectory, prestige, and legitimacy in society and identified with the defense of democracy and constitutional institutionality," an observer, and a deputy secretary, appointed by the President of the Republic, with the approving vote of the Cabinet, through Supreme Ruling 438-2001-PCM of September 6, 2001, approved by the President of the Cabinet.<sup>26</sup>

197(5) The CVR received thousands of accusations regarding acts of torture and cruel, inhuman, or degrading treatments or punishments produced during the period between 1980 and 2000. In its final report it states that of 6,443 acts of torture and cruel, inhuman, or degrading treatments or punishments registered by said body, 74.90% corresponded to actions attributed to State officials or people that acted under its authorization or acquiescence, and 22.51% corresponded to the PCP subversive group- Sendero Luminoso. Likewise, the CVR expressed, in its final report, that "the forceful disappearance of people was [...] one of the main mechanisms of counter-subversive fighting employed by State agents, acquiring the characteristics of a systematic or generalized practice." "Of the total of victims reported to the CVR as executed or whose whereabouts continue to be unknown due to responsibility of State agents, 61% were victims of forced disappearances."<sup>27</sup>

197(6) The CVR in its final report, in the chapter called "The cases investigated by the CVR", dedicated a section to the events occurred in the Miguel Castro Prison titled "The extrajudicial killings in the criminal center Canto Grande."<sup>28</sup>

197(7) On July 20, 2005 Peru enacted Law N° 28592, which created the National Comprehensive Plan of Reparations (hereinafter PIR), with the purpose of "establishing the Legislative Framework of the Comprehensive Plan of Reparations – PIR for the victims of the violence occurred during the period of May 1980 through November 2000, pursuant to the conclusions and recommendations of the Report of the Commission for the Truth and Reconciliation." On July 6, 2006 the Bylaws of the mentioned Law N° 28592<sup>29</sup> were approved.

### ***The criminal centers and the armed conflict***

197(8) In the final report issued by the CVR it established that "during the years of political violence, [the prisons] were not only areas for the imprisonment of

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<sup>26</sup> Cfr. Supreme Ruling 438-2001-PCM of September 6, 2001 (evidence to facilitate adjudication of the case included by the Inter-American Court pursuant to Article 45(1) of its Rules of Procedure).

<sup>27</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume VI, Forced Disappearance of Persons by State Agents, sections 1(2) and 1(4), pages 73 and 171 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>28</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, pages 769 to 787 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>29</sup> Cfr. Law No. 28592 that creates the National Plan of Reparations (dossier on merits and eventual reparations and costs, volume IX, folios 2741 through 2755); and Supreme Decree No. 015-2006-JUS that approves the Regulations to Law No. 28592 (on merits and possible reparations and costs, volume IX, folio 2745).

those accused or convicted for crimes of terrorism, but scenarios in which the Communist Party of Peru [PCP-Sendero Luminoso] and, in less measure, the Revolutionary Movement Túpac Amaru, extended the armed conflict."<sup>30</sup>

197(9) As of the coup d'état of April 5, 1992, and in order to fight subversive and terrorist groups, the State implemented in the prisons practices not compatible with the effective protection of the right to life and other rights, such as extrajudicial killings and cruel and inhuman treatments, as well as the disproportionate use of force in critical circumstances.<sup>31</sup>

197(10) The State improvised a single system for the concentration of inmates, without implementing adequate regimens to these inmates accused and convicted for terrorism crimes and treason.<sup>32</sup>

197(11) The national press published articles and editorials warning that Sendero Luminoso was exercising territorial control within the Miguel Castro Castro Prison, that from within said center it was planning several attacks<sup>33</sup> and that they had turned their pavilions "into teaching centers."<sup>34</sup>

### ***Miguel Castro Castro Prison***

197(12) The maximum security prison Miguel Castro Castro is a prison for men and it is located in San Juan de Lurigancho, to the East of the city of Lima, capital of Peru.<sup>35</sup> It is made up by 12 pavilions of 4 floors each, identified as 1-A and 1-B up to 6-A and 6-B. Each of these pavilions has its own courtyard. The access to pavilions is through a central yard of an octagonal form, known as "Roundhouse". At the entrance of each pavilion there is a closed area called "Coop". The totality of the pavilions is surrounded by a sand yard known as "No man's land". The entrance to

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<sup>30</sup> *Cfr.* Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume V, section 2(22), The Prisons, page 697 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>31</sup> *Cfr.* Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume V, section 2(22), The Prisons, pages 697 through 721 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>32</sup> *Cfr.* Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 769 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); and argument of the State during the public hearing held before the Inter-American Court on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006.

<sup>33</sup> *Cfr.* Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 770 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>34</sup> *Cfr.* Newspaper article titled "*El Destape*" published in the Magazine *Caretas*, edition No. 1170 of July 30, 1991 (dossier of appendixes to the petition, appendix 264, folio 3041).

<sup>35</sup> *Cfr.* Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 769 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

the establishment consists of a yard and administrative office, known as "Admissions".<sup>36</sup>

197(13) In the time in which the events occurred, pavilion 1A of the Miguel Castro Castro Prison was occupied by around 135 female inmates and 50 male, and pavilion 4B was occupied by approximately 400 male inmates.<sup>37</sup> The inmates of pavilions 1A and 4B were accused or convicted for the crimes of terrorism or treason,<sup>38</sup> and they were allegedly members of the Sendero Luminoso.<sup>39</sup> Many of them had been accused and were awaiting conviction, and in some cases they were acquitted.<sup>40</sup>

197(14) On April 14, 1992 an inspection was carried out within pavilion 1A of the Miguel Castro Castro Prison. Directors of the criminal center, the delegate inmates of said pavilion and representatives of the Public Prosecutors' Office, among others, intervened in the mentioned inspection. In the records of the inspection it has been stated that no fire weapons, explosives, or excavations of tunnels were found.<sup>41</sup>

### ***"Operative Transfer 1"***

197(15) Law Decree No. 25421 of April 6, 1992 ordered the reorganization of the National Penitentiary Institute (INPE) and put the National Police of Peru in charge of the control of security at the penitentiaries. It was within the framework of this stipulation that "Operative Transfer 1" was planned and executed.<sup>42</sup> The official version was that said "operative" consisted in the transfer of the women that were

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<sup>36</sup> Cfr. Photographs of the Miguel Castro Castro Prison (dossier of appendixes to the petition, appendix 256, folios 2796 through 2823); and map of the Miguel Castro Castro Prison (dossier of appendixes to the petition, appendix 254, folios 2781 through 2787).

<sup>37</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume V, section 2(22), The prisons, page 703 and Volume VII, section 2(68) Extrajudicial killings in the criminal center Canto Grande, page 771 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); and argument of the State during the public hearing held before the Inter-American Court on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006.

<sup>38</sup> Cfr. lists of the inmates detained in pavilions 1A and 4B of the Miguel Castro Castro Prison (dossier of appendixes and appendixes to the petition, appendixes 13, 14, and 15, folios 167 through 262); and argument of the State during the public hearing held before the Inter-American Court on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006.

<sup>39</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume VII, section 2(68) Extrajudicial killings in the criminal center Canto Grande, page 770 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>40</sup> Cfr. Different testimonial statements offered by surviving inmates and the next of kin of surviving and dead inmates (dossier of appendixes to the petition, appendixes between 82 and 246, folios between 1226 and 2732); different forms of written statements offered by surviving inmates and the next of kin of surviving and dead inmates (dossier of appendixes to the brief of pleadings and motions, appendixes between 317 and 412, folios between 3643 and 4933); testimonial statement offered by Gaby Balcázar Medina in the public hearing held before the Inter-American Court of the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006; and different forms of statements offered by surviving inmates and the next of kin of surviving and dead inmates (evidence presented by the other group of representatives of the alleged victims and their next of kin).

<sup>41</sup> Cfr. Inspection records of April 14, 1992 (dossier of the processing of the case before the Commission, volume I, folio 4004).

<sup>42</sup> Cfr. Law decree No. 25421 issued by the President of the Republic of Peru on April 6, 1992, Article 2 (dossier of appendixes to the petition, appendix 7, folio 74).

imprisoned in pavilion 1A of the Miguel Castro Castro Prison, to the maximum security prison for women in Chorrillos.<sup>43</sup> The state authorities did not inform the Director of the criminal center, the prisoners, their next of kin or attorneys of the mentioned transfer.<sup>44</sup>

197(16) The real objective of the “operative” was not the mentioned transfer of the inmates, but instead it was a premeditated attack, an operative designed to attack the life and integrity of the prisoners located in pavilions 1A and 4B of the Miguel Castro Castro Prison. The acts of violence were directed against said pavilions, occupied at the time of the events by inmates accused or sentenced for terrorism crimes or treason.<sup>45</sup>

197(17) The judgment issued by the National Terrorism Chamber on February 3, 2004 indicated that “there are elements that generate a reasonable suspicion in the Court, regarding the fact that on the occasion of Operative Transfer One, the physical elimination of the inmates accused of terrorism that occupied pavilions One A and four B [...] was planned at the highest levels of government.” During the 7<sup>th</sup> and 12<sup>th</sup> days of May 1992 the press articles referring to the events that were occurring in the Criminal Center Castro Castro, described the visits made by the then Secretary of the Interior to the criminal center, as well as the meetings held by the Cabinet to evaluate the situation of the criminal center, and the visit made by Fujimori on May 10, 1992, to the inside of said penitentiary.<sup>46</sup>

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<sup>43</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003 in the city of Lima, Peru, Volume VII, section 2(68) Extrajudicial killings in the criminal center Canto Grande, page 771 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>44</sup> Cfr. Judgment issued by the National Terrorism Chamber of the Supreme Court of Justice of Peru on February 3, 2004 (dossier of appendixes to the petition, appendix 274, folio 3221); and different testimonial statements offered by the surviving inmates (dossier of appendixes to the petition, appendixes between 83 and 112, folios between 1237 and 1482).

<sup>45</sup> Cfr. Judgment issued by the National Terrorism Chamber of the Supreme Court of Justice of Peru on February 3, 2004 (dossier of appendixes to the petition, appendix 274, folio 3235); and arguments of the State during the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of May 2006.

<sup>46</sup> Cfr. Judgment issued by the National Terrorism Chamber of the Supreme Court of Justice of Peru on February 3, 2004 (dossier of appendixes to the petition, appendix 274, folio 3235); the book “Eye for an Eye” of Humberto Jara (dossier of appendixes to the petition, appendix 10, folios 98 and 99); newspaper article titled “*Terroristas se atrincheran en pabellón y atacan con balas, dinamitazos y ácido*” published in the newspaper “La República” on May 7, 1992 (dossier of appendixes to the petition, appendix 45, folios 1024 and 1027); newspaper article titled “*Ministro comprobó estado de rebeldía en el penal*” published in the newspaper “El Comercio” on May 7, 1992 (dossier of appendixes to the petition, appendix 46, folio 1031); newspaper article titled “*Durante dieciséis horas saldo de enfrentamiento entre terroristas en Canto Grande*” published in the newspaper “Expreso” on May 7, 1992 (dossier of appendixes to the petition, appendix 48, folio 1056); newspaper article titled “*Presidente evaluó con ministros y militares situación en penal*” published in the newspaper “Expreso” on May 8, 1992 (dossier of appendixes to the petition, appendix 49, folios 1063 and 1064); newspaper article titled “*Por sucesos en penales Fujimori demanda comprensión internacional*” published in the newspaper “El Nacional” on May 11, 1992 (dossier of appendixes to the petition, appendix 59, folios 1105 and 1107); newspaper article titled “*Dudas sobre el número total de muertos en el asalto al penal limeño de Canto Grande*” published in the newspaper “El País” on May 12, 1992 (dossier of appendixes to the petition, appendix 66, folio 1149); and order for the preliminary proceedings to commence issued on August 29, 2006 by the Second Supraprovincial Criminal Court of Peru (dossier on merits and possible reparations and costs, volume XI, folios 3173 to 3239).

***Development of "Operative Transfer 1": facts occurred between May 6 and 9, 1992 in the Miguel Castro Castro Prison***

197(18) The "operative" started on Wednesday May 6, 1992, female visiting day in the criminal center, reason for which outside the center there was a great number of relatives, mothers, sisters, wives, and children, who became aware, from the location, of what happened. Besides, on Sunday May 10, 1992 Mother's Day was celebrated in Peru.<sup>47</sup>

197(19) The next of kin that were outside the criminal center tried to receive information about what was happening inside and the state of health of their next of kin. However, they did not obtain a response. Some of them were insulted and beaten, water and tear gas bombs were thrown at them to force them to move away from the criminal center; and if they tried to climb a hill, to get a better look at what was happening inside the prison, they were scared away with gunshots.<sup>48</sup>

197(20) At approximately 4:00 hours of Wednesday May 6, 1992, officers of the security forces of Peru started the "operative". To this effect, the National Police knocked down part of the external wall of the yard of pavilion 1A using explosives. Three successive detonations were produced. Simultaneously, the police officers took control of the rooftops of the criminal center making holes in the same, through which they fired their weapons.<sup>49</sup>

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<sup>47</sup> Cfr. Written testimonial statements of Nila Cipriano Pacheco Neira, Lourdes Heredia Pacheco, Ana Barrera Crushing, and Norma Dávalos Díaz (dossier of appendixes to the petition, appendixes 243 and 245, folios 2665, 2698, 2702, and 2707).

<sup>48</sup> Cfr. Written testimonial statements of Priscila Rodríguez Osorio, Nila Cipriano Pacheco Neira, Vilma Company Rodríguez de Aranda, Avelina García Calderón, Lourdes Heredia Pacheco, Norma Dávalos Díaz, and Ana Barredo Crushing (dossier of appendixes to the petition, appendixes 242, 243, 244, and 245, folios 2655, 2664, 2681, 2692, 2698, 2707, and 2702); testimonial statements offered by Julia Peña Castillo and Lastenia Eugenia Caballero Mejía in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006; written testimonial statements of Edith Tinta, Rubeth Feria Tinta, and Liliana Peralta Saldarriaga (dossier on merits and possible reparations and costs, volume VII, folios 2090, 2095, 2096, 2097, and 1996); forms of testimonial statements offered by Guillerma Mendieta Galindo, Paulina Mitma Sulca, and Rosa María León Torres (dossier of appendixes to the brief of pleadings and motions, volume I, folios 3722, 3792, and 3890); forms of testimonial statements offered by Silvia Matto Primo de Aguirre, Julia Nereida Armas Vereau de Sedelmayer, Genoveva Torres Bonifacio, Norma Gloria Dávalos Díaz de Silva, Brígida Flores de Flores, Gloria Rosario Flores Flores, Oscar Flores Flores, Simón Flores Flores, Régulo Flores Flores, Rosa Mercedes Flores Flores, Claudio J. Flores Flores, María Jesús Yepes Cebrian, and Aurora Zoila Villanueva de Castillo (evidence presented by the other group of representatives of the alleged victims and their next of kin); newspaper article titled "*Familiares de presas lloraban y cantaban himnos senderistas*" published in the newspaper "Expreso" on May 7, 1992 (dossier of appendixes to the petition, appendix 48, folio 1053).

<sup>49</sup> Cfr. Different statements of surviving inmates and the next of kin of surviving and dad inmates (dossier of appendixes to the petition, appendixes between 82 and 246, folios between 1226 and 1733); Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, pages 771 and 772 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); judgment issued by the National Terrorism Chamber of the Supreme Court of Justice of Peru on February 3, 2004 (dossier of appendixes to the petition, appendix 274, folio 3227); newspaper article titled "*Terroristas se atrincheran en pabellón y atacan con balas, dinamitazos y ácido*" published in the newspaper "La República" on May 7, 1992, newspaper article titled "*Ministro comprobó estado de rebeldía en el penal*" published in the newspaper "El Comercio" on May 7, 1992, newspaper article titled "*Reclusos por terrorismo son trasladados definitivamente*" published in the newspaper "El Peruano" on May 7, 1992, newspaper article titled "*Los policías entraron desarmados y fueron emboscados dentro del penal*" published in the newspaper "Expreso" on May 7, 1992, newspaper article titled "*Durante dieciséis horas saldo de enfrentamiento entre terroristas en Canto Grande*" published in the newspaper "Expreso" on May



197(21) The state, police, and military agents used war weapons, explosives, tear gas, vomiting, and paralyzing bombs against the inmates, from the start of the operation.<sup>50</sup> The bullets and grenades used would fragment upon impact with the walls, injuring many inmates with splinters.<sup>51</sup> Snipers were located on the roofs and windows of the other pavilions.<sup>52</sup> During the development of the “operative” police officials, officers of the specialized units UDEX, SUAT, USE, DINOES, and officials of the Peruvian army participated.<sup>53</sup>

197(22) Between 9:00 and 9:30 hours of May 6<sup>th</sup> the National Police introduced grenades, white phosphorous gas bombs, and tear gas bombs in pavilion 1A, which produced asphyxia, and a burning feeling in the respiratory system, eyes, and skin of the inmates. Even though at the beginning the inmates used pieces of cloth with vinegar to resist the gases thrown in the closed spaces of the pavilions attacked, when the vinegar was finished they had to use their own urine for this purpose.<sup>54</sup>

197(23) At 10:00 hours the inmates of pavilion 4B started a protest for the attack on their female prison mates; the police reacted by shooting at them.<sup>55</sup>

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7, 1992 (dossier of appendixes to the petition, appendixes 45, 46, 47, and 48, folios 1024, 1031, 1047, 1053, and 1056).

<sup>50</sup> *Cfr.* Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 786 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); judgment issued by the National Terrorism Chamber of the Supreme Court of Justice of Peru on February 3, 2004 (dossier of appendixes to the petition, appendix 274, folios 3225 through 3228); and written testimonial statement of Mr. Pascual Utia Lozano (dossier of appendixes to the petition, appendix 130, folio 1724).

<sup>51</sup> *Cfr.* Written testimonial statements of Elmer de la Cruz Yarma, Gerardo Saravia López Castilla, Alberto Atunca Acevedo, and Nina Soria Alvarado Ruiz (dossier of appendixes to the petition, appendixes 124, 126, 129, and 104, folios 1674, 1691, 1715, and 1430), and written expert report offered by José Quiroga (dossier on the merits and possible reparations and costs, volume VII, folio 2148).

<sup>52</sup> *Cfr.* Written testimonial statements of Yuri Vanessa Conde Beltrán, Marisol Morán Cascire, Gertrudis Silva Breuery, Elena Alvarado Rojas, Hernán Collazos Rojas, and Pastor Cocha Nevado (dossier of appendixes to the petition, appendixes 88, 91, 97, 211, 222, and 246, folios 1286, 1305, 1371, 2411, 2501, and 2733); and testimonial statement offered by Luis Ángel Pérez Zapata in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006.

<sup>53</sup> *Cfr.* Judgment issued by the National Terrorism Chamber of the Supreme Court of Justice of Peru on February 3, 2004 (dossier of appendixes to the petition, appendix 274, folio 3225); order for preliminary proceedings to commence issued on June 16, 2005 by the Second Supraprovincial Criminal Court (dossier of appendixes to the respondent’s plea, folio 5395); and Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume V, section 2(22), The Prisons, page 703 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>54</sup> *Cfr.* Different statements of surviving inmates and the next of kin of surviving and dead inmates (dossier of appendixes to the petition, appendixes between 82 and 241, folios between 1226 and 2642); Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 772 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); testimonial statement offered by Gaby Balcázar Medina in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006; and written testimonial statements offered by Madelein Escolástica Valle Rivera and Miriam Rodríguez (dossier on the merits and possible reparations and costs, volume VII, folios 2019 and 2008).

<sup>55</sup> *Cfr.* Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center

197(24) There was underground communication between pavilions 4B and 1A, through conduits or tunnels through which the inmates moved from pavilion 4B to 1A or vice versa. Upon exiting said tunnels they faced a group of police officers, from which several deaths and injuries resulted.<sup>56</sup> In order to move toward pavilion 4B and avoid being reached by the bullets fired by the snipers, the inmates had to drag themselves on the floor, and go over the bodies of other inmates that had recently died.<sup>57</sup>

197(25) According to newspaper articles published on May 7, 1992, at approximately 13:00 hours the Secretary of the Interior and the General Director of the National Police Force arrived at the criminal center and supervised the actions.<sup>58</sup>

197(26) In the afternoon of May 6, 1992 the security agents entered the fourth floor of pavilion 1A, detaining a group of inmates that were injured from the gunshots and explosions. They were transferred first to the area called "admissions" and later to the criminal center "Santa Mónica" of Chorrillos.<sup>59</sup>

197(27) The inmates that had some medical or nursing knowledge installed an improvised clinic in pavilion 4B to attend around 70 wounded inmates.<sup>60</sup> The attacks continued all day long.<sup>61</sup>

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Canto Grande, page 773 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>56</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume V, section 2(22), The Prisons, page 702 and section 2(68) Extrajudicial killings in the criminal center Canto Grande, page 772 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); and newspaper article titled "*Pabellón de mujeres se comunica por túneles al de hombres*" published in the newspaper "El Comercio" on May 7, 1992 (dossier of appendixes to the petition, appendix 46, folio 1037).

<sup>57</sup> Cfr. Written testimonial statements of Daniel Grande Ascue, Miriam Rodríguez Peralta, Gertrudis Silva Breuery, and Yolanda Velarde González (dossier of appendixes to the petition, appendixes 128, 95, 97, and 101, folios 1707, 1335, 1371, and 1412); testimonial statement offered by Gaby Balcázar Medina in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006; and written expert opinion offered by José Quiroga (dossier on merits and possible reparations and costs, volume VII, folio 2148).

<sup>58</sup> Cfr. Newspaper article titled "*Terroristas se atrincheran en pabellón y atacan con balas, dinamitazos y ácido*" published in the newspaper "la República" on May 7, 1992, newspaper article titled "*Ministro comprobó estado de rebeldía en el penal*" published in the newspaper "El Comercio" on May 7, 1992, newspaper article titled "*Durante dieciséis horas saldo de enfrentamiento entre terroristas en Canto Grande*" published in the newspaper "Expreso" on May 7, 1992 (dossier of appendixes to the petition, appendixes 45, 46, and 48, folios 1027, 1031, and 1056).

<sup>59</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 774 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); and report of the Prosecutor Fiscal Mirtha Campos, official letter N° 142-92-1-OFPPPL-MP dated June 5, 1992, addressed to the Nation's Prosecutor (dossier of appendixes to the petition, appendix 12, folio 131).

<sup>60</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 775 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); and written testimonial statement of Pascual Utia Lozano (dossier of appendixes to the petition, appendix 130, folio 1724).

197(28) According to newspaper articles published on the 7<sup>th</sup> and 8<sup>th</sup> days of May 1992, at the end of the day of May 6, 1992, the then President of the Republic, Alberto Fujimori, met in the installations of the General Army Headquarters, known as the "Pentagonito" (Small Pentagon), with his Cabinet and police and military authorities, to evaluate the situation at the criminal center.<sup>62</sup>

197(29) On the second day, May 7, 1992, members of the National Coordinator of Human Rights and next of kin of the inmates tried to enter the criminal center and speak to the inmates, but they were forced by the police to move away from the center. The police agents warned the inmates, forcing them to exit the pavilions "in groups of four and with their hands in the air," order that was not obeyed.<sup>63</sup>

197(30) As indicated in the Final report of the CVR and in several newspaper articles, on that same day the President Alberto Fujimori met once again with his Cabinet and police and military authorities at the "Pentagonito" to evaluate the situation of the criminal center. Those sources stated that among other actions, the presence of human rights organizations in the surrounding areas of the criminal center was forbidden, the supply of electricity, water, and food to inmates was cut off, and the attacks with fire weapons and explosives was increased.<sup>64</sup>

197(31) In the afternoon, police officers and members of the Armed Forces intensified the attacks against pavilion 4B, using grenades, machine guns, and tear gas bombs.<sup>65</sup>

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<sup>61</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 773 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>62</sup> Cfr. Newspaper article titled "Terroristas se atrincheran en pabellón y atacan con balas, dinamitazos y ácido" published in the newspaper "La República" on May 7, 1992; and the newspaper article titled "600 senderistas se 'atrincheran' en pabellón de hombres" published in the newspaper "Expreso" on May 8, 1992 (dossier of appendixes to the petition, appendixes 45 and 49, folios 1024 and 1063).

<sup>63</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 776 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>64</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 776 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); article titled "*Operativo Mudanza 1 Visto de Cerca*" published in the magazine "Caretas" on May 11, 1992 (dossier of appendixes to the petition, appendix 267, folio 3048); newspaper article titled "*600 senderistas se 'atrincheran' en pabellón de hombres*" published in the newspaper "Expreso" on May 8, 1992; and article titled "*Canto Grande Por Dentro*" published in the magazine "Caretas" on May 18, 1992 (dossier of appendixes to the petition, appendixes 49 and 26, folios 1063 and 372).

<sup>65</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 776 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); and written testimonial statements of Marisol Morán Cascire, Margot Lourdes Liendo Gil, and Elena Morote Durand (dossier of appendixes to the petition, appendixes 91, 85, and 92, folios 1307, 1260, and 1318).

197(32) On May 8, 1992, the third day of the “operative”, the police and military officials continued the attack with rockets fired from helicopters, mortar fire, and grenades.<sup>66</sup>

197(33) A delegation of inmates exited the pavilions to speak with the Prosecutor Mirtha Campos, but only one of the inmates returned to inform of the agreements. As part of the negotiations approximately 30 wounded inmates exited to the “coop” area of pavilion 4B to be taken to the hospital, but this did not happen, instead they were kept outside, motionless.<sup>67</sup>

197(34) There were several intents of negotiation between delegates of the inmates and State authorities, but they were not able to reach an agreement, since the inmates demanded the presence of the Red Cross, of the Inter-American Commission on Human Rights, their attorneys, and their next of kin for their transfer to other criminal centers, as well as immediate medical attention for the wounded, who up to then had been attended to by the same inmates that threw medicines from other pavilions. On its part, the State demanded the surrender of the inmates without conditions and their exit from pavilion 4B, leaving the wounded and the dead inside so they could be attended to later.<sup>68</sup>

197(35) The State expressly refused the offer of intervention made by the International Red Cross, the Inter-American Commission on Human Rights, the Episcopal Commission of Social Action, and the National Human Rights Coordinator, whose representatives were outside the criminal center.<sup>69</sup> Likewise, help was denied to many inmates who were seriously injured.<sup>70</sup>

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<sup>66</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 777 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>67</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, pages 777 and 778 and Volume V, section 2(22), The Prisons, page 703 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); written testimonial statements of Fiorella Montaña, Madeleine Valle Rivera, Carlos Manuel Torres Mendoza, and Pascual Utia Lozano (dossier of appendixes to the petition, appendixes 86, 100, 125, and 130, folios 1269, 1408, 1682, and 1725); and written testimonial statement offered by Eva Challco (dossier on the merits and possible reparations and costs, Volume VIII, folio 2266).

<sup>68</sup> Cfr. Written testimonial statements of Marisol Morán Cascire, Sabina Quispe Rojas, María Saire Heredia, Margot Lourdes Liendo Gil, and Fiorella Concepción Montaña Freire (dossier of appendixes to the petition, appendixes 91, 82, 83, 85, and 86, folios 1307, 1227, 1228, 1239, 1240, 1231, and 1270); and Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 778 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>69</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 786 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); and report of the President of the Inter-American Commission on his visit to Peru on the 11<sup>th</sup> and 12<sup>th</sup> days of May 1992 (dossier of appendixes to the petition, appendix 41, folio 987).

<sup>70</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 786 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

197(36) May 9, 1992 was the last day of the “operative”, and at 6:00 hours the attack against pavilion 4B was reinitiated with greater intensity, with grenades, gunshots, explosions, and fires that caused several deaths and injuries.<sup>71</sup>

197(37) At approximately 18:00 hours of that same day the inmates announced to the state agents that they were coming out and they asked them to stop shooting. Groups of unarmed inmates, made up mainly by people labeled as members of the head of Sendero Luminoso, exited the pavilion, when they were reached by bursts of bullets fired by state agents. The majority of those inmates died. Later, a large number of inmates exited pavilion 4B, at a fast pace. The security agents of the State shot at them indiscriminately and in different parts of their bodies, even when they were injured on the floor. Later, between screams, insults, and struggles the police officers separated the men from the women and forced them to lie face down in the areas known as “no man’s land” and “admissions”.<sup>72</sup>

197(38) When the inmates were under the control of state agents, some were separated from the group and killed by state agents.<sup>73</sup> One of the bodies presented mutilations and signs of torture.<sup>74</sup>

197(39) The majority of the inmates that were killed presented between 3 and 12 bullet wounds to the head and thorax.<sup>75</sup>

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<sup>71</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, pages 778 and 779 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>72</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, pages 780 to 782 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); written testimonial statements of Luis Angel Pérez Zapata, Egdar Galán Martínez, Glicerio Aguirre Pacheco, Madeleine Valle Rivera, Miguel Enrique Cruz Suaña, and Hernán Collazos Roja (dossier of appendixes to the petition, appendixes 114, 157, 229, 100, 142, and 222, folios 1503, 1987, 2545, 1407, 1848, and 2502); and testimonial statement offered by Gaby Balcázar Medina in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006.

<sup>73</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume V, section 2(22), The Prisons, pages 703 and 704 and Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 782 to 784 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); police report No. 121-04-DIRINCRI PNP/DIVIHOM-DEPINLES.GOP. of the National Police Department of Peru, Homicide Division (dossier of appendixes to the response to the petition, folio 5207); and written testimonial statements of Carlos Manuel Torres Mendoza, Pablo Carranza Retuerto, Rafael Evaristo Fernandez, and Crisineo Neira Torres (dossier of appendixes to the petition, appendixes 125, 127, 131, and 138, folios 1683, 1698, 1742, and 1803).

<sup>74</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 784 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); and testimonial statement offered by Julia Peña Castillo in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006.

<sup>75</sup> Cfr. Autopsy certificates (dossier of appendixes to the petition, appendix 278, folios 3285 through 3324); expert forensic reports (dossier of appendixes to the petition, appendix 279, folios 3326 through 3384); and expert forensic ballistic reports (dossier of appendixes to the petition, appendix 281, folios 3409 through 3465).

197(40) During the events of May 6 to 9, 1992 a police officer died, as a consequence of having received bullet wounds in the head and thorax; and approximately 9 police officers were injured.<sup>76</sup>

**Events after May 9, 1992**

197(41) On May 10, 1992 a report was prepared with the material seized in the criminal center by specialized personnel of the National Police Force, in which there are 10 weapons (2 sub-machine guns, 4 revolvers, 1 rifle and 3 guns), 11 grenades, and 24 "Russian cheese" home explosive devices. The prosecutor signed said report.<sup>77</sup>

197(42) Once the majority of the surviving inmates exited the pavilions they were forced to remain in the areas of the criminal center called "no man's land" and "admissions", lying face down on the ground, in ventral cubitus position, without a coat, outdoors, being allowed to get up only to go to the bathroom, and they were object of constant beatings and aggressions. Those who were in these conditions for several days, only received bread and water on an irregular basis in the mornings and a watery soup, and they were guarded by armed security agents and with dogs, and if anyone moved or complained said agents would stand on top of the body of the survivor and insulted them. Among this group there were people that were injured<sup>78</sup> and women who were pregnant, who were also forced to lie face down, the same as the other inmates. Many remained in these conditions until May 22, 1992 (*infra* para. 197(46)).<sup>79</sup>

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<sup>76</sup> *Cfr.* Judgment issued by the National Terrorism Chamber of the Supreme Court of Justice of Peru, on February 3, 2004 (dossier of appendixes to the petition, appendix 274, folios 3229 and 3230); police report No. 121-04 issued by the National Police Department of Peru, Office of Criminal Investigation on May 26, 2004 (dossier of appendixes to the response to the petition, folio 5095); and autopsy certificate of José Hidrogo Olano (dossier of appendixes to the petition, appendix 278, folio 3292).

<sup>77</sup> *Cfr.* Report on the seizure of weapons of May 10, 1992 (dossier of appendixes to the petition, appendix 12, folio 136).

<sup>78</sup> *Cfr.* Communications sent to the Commission by some prisoners dated May 20 and 27, 1992 (dossier of the proceeding before the Inter-American Commission, volume II, folios 4705 and 4709); different testimonial statements of surviving inmates (dossier of appendixes to the petition, appendixes between 82 and 246, folios between 1229 and 2734); written testimonial statements of Raúl Basilio Gil Orihuela, Jesús Ángel Julcarima Antonio, and Eva Sofía Chalco Hurtado (dossier on the merits and possible reparations and costs, volumes VII and VIII, folios 2106, 2268, and 2206); newspaper article titled "*Dinamitan escombros en busca de más cadáveres*" published in the newspaper "El Nacional" on May 13, 1992 (dossier of appendixes to the petition, appendix 28, folio 385); article titled "Canto Grande Por Dentro" published in the magazine "Caretas" on May 18, 1992 (dossier of appendixes to the petition, appendix 26, folios 370 to 377); newspaper article titled "*Cifra de fallecidos llega*" published in the newspaper "*Expreso*" on May 12, 1992 (dossier of appendixes to the petition, appendix 27, folios 380 to 382); and Informative Report of International Amnesty, corresponding to the month of August 1992, vol. XV, No. 8 (dossier of appendixes to the petition, appendix 11, folio 105).

<sup>79</sup> *Cfr.* Written testimonial statement of Sabina Quispe Rojas (dossier of appendixes to the petition, appendix 82, folio 1229); written testimonial statements offered by Mrs. Eva Chalco (dossier of appendixes to the petition, appendix 212, folio 2419, and dossier on the merits and possible reparations and costs, Volume VIII, folio 2268); and testimonial statement offered by Gaby Balcázar Medina in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006.

197(43) On May 10, 1992 the President Alberto Fujimori Fujimori was present in the criminal center and walked among the prisoners lying face down on the floor of the yards of the prison.<sup>80</sup>

197(44) Some female inmates were transferred to the criminal center "Santa Mónica of Chorrillos" and others to the criminal center "Cristo Rey of Cachiche". The male inmates were kept in the yard of the criminal center until May 22, 1992, date on which some of them were relocated within the same Miguel Castro Castro Prison and others were transferred to other criminal centers such as "Lurigancha" and "Yanamayo". Some of the inmates that were injured, both men and women, were taken to the Police Sanitary Hospital, to later be relocated in the aforementioned criminal centers.<sup>81</sup>

197(45) Mr. Víctor Olivos Peña was transferred with life to the morgue of a hospital, where he was found and rescued by his mother and a doctor of said establishment.<sup>82</sup>

197(46) On May 22, 1992 State agents transferred the prisoners that were in "no man's land" and in "admissions" to the courtyard of pavilion 1A. During said transfer, the agents arranged themselves in parallel lines forming an alley through which the inmates had to walk, after they had been forced to take off their clothes, and they were beaten with blunt objects on the head, the kidneys, and other parts of their bodies.<sup>83</sup>

197(47) Many of the persons injured were maintained without medical attention for several days and the injured that were transferred to the hospital did not receive the medical attention required. These omissions caused complications in the health of some of the inmates and in others it caused their death.<sup>84</sup>

<sup>80</sup> Cfr. Newspaper article titled "*Por sucesos en penas Fujimori demanda comprensión internacional*" published in the newspaper "El Nacional" on May 11, 1992 (dossier of appendixes to the petition, appendix 59, folios 1105 and 1107); newspaper article titled "*Dudas sobre el número total de muertos en el asalto al penal limeño de Canto Grande*" published in the newspaper "El País" on May 12, 1992 (dossier of appendixes to the petition, appendix 66, folio 1149); written testimonial statements of Rafael Fernández Vázquez, Manuel Cotrina Mendoza, Pascual utia Lozano, Vladimir Enver Esquivel Carhuaz, and Alberto Atunca Acevedo (dossier of appendixes to the petition, appendixes 131, 180, 130, 139, and 129, folios 2154, 1745, 1728, 1819, and 1720); and the book "An Eye for an Eye" of Humberto Jara (dossier of appendixes to the petition, appendix 10, folios 100 and 101).

<sup>81</sup> Cfr. Different testimonial statements of surviving inmates (dossier of appendixes to the petition, appendixes between 82 and 246, folios between 1230 and 2734); testimonial statement offered by Gaby Balcázar Medina in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006; and newspaper article published in the newspaper "Expreso" on May 12, 1992 (dossier of appendixes to the petition, appendix 27, folios 380 and 381).

<sup>82</sup> Cfr. Written testimonial statement of Víctor Javier Olivos Peña (dossier of appendixes to the petition, appendix 123, folio 1652); and testimonial statement offered by Julia Peña Castillo in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006.

<sup>83</sup> Cfr. Different testimonial statements of surviving inmates (dossier of appendixes to the petition, appendixes between 116 and 209 and between 218 and 237, folios between 1547 and 2401 and between 2467 and 2606); and written expert opinion offered by José Quiroga (dossier on merits and possible reparations and costs, volume VII, folio 2149).

<sup>84</sup> Cfr. Different testimonial statements of surviving inmates (dossier of appendixes to the petition, appendixes between 85 and 245, folios between 1263 and 2722); testimonial statement offered by Gaby Balcázar Medina and Luis Ángel Pérez Zapata in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006; communication sent to the Commission by some prisoners dated May 20, 1992 (dossier of the proceedings before the Inter-American Commission, Volume II, folio 4705); Informative Report of International Amnesty, corresponding to the month of August 1992, vol. XV, No. 8

197(48) The transfers both to the hospital and to other criminal centers were done in trucks, where the inmates, including those that were injured, were thrown one on top of another. During said transfers they were beaten and insulted.<sup>85</sup>

197(49) Some of the injured inmates were transferred to the Police Sanity Hospital. Once there, their clothes were taken off and they were forced to remain without clothes for almost the entirety of the time they were in the hospital, which in some cases went on for several days and in others for weeks. In some cases they were given a robe after fifteen days had gone by, when they were transferred to the criminal centers where they were relocated. In the Hospital armed individuals, who were apparently members of the State's security forces, surrounded them. The female inmates were not allowed to shower, they were covered with only a sheet, and in some cases when they wanted to use the bathroom they were accompanied by an armed guard, who would not let them close the door and was pointing their weapon at them while they did their physiological needs.<sup>86</sup>

197(50) When she arrived at the Police Sanity Hospital one of the inmates was subject to a finger vaginal "inspection", performed by several hooded persons at the same time, with extreme abruptness, carried out with the excuse of examining her (*infra* paras. 309 through 313).<sup>87</sup>

197(51) The inmates transferred to the prisons of "Santa Mónica of Chorrillos" and of "Cristo Rey of Cachiche" were object of constant physical and psychological mistreatments. They were kept without contact with the outside world, without access to books, television, radios, or newspapers. They were not aloud to speak among themselves, read or study, or carry out manual labor of any kind, not even those that they tried to carry out with threads taken from their own clothes, with bread crumbs, or with the remains of "valvas de choro" that came in their soup. The violation of any of these prohibitions was a reason for a beating. Likewise, they did not have access to products of personal hygiene, such as soap, toilet paper, feminine pads, or additional underwear, as well as warm clothes. They remained locked up 23 hours and a half or 24 hours a day in a cell of two meters by two meters, which they shared with at least two other people. Said cells did not have access to any type of light, natural or artificial, and therefore they remained in constant darkness. Food

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(dossier of appendixes to the petition, appendix 11, folio 105); and written testimonial statements offered by Nieves Miriam Rodríguez Peralta, Jesús Ángel Julcarima Antonio, César Mamani Valverde, Alfredo Poccorpachi, Madelein Valle Rivera, and Raúl Basilio Orihuela (dossier on the merits and possible reparations and costs, volume VII, folios 2011, 2113, 2032, 2003, 2023, and 2107).

<sup>85</sup> *Cfr.* Written testimonial statement of Margot Lourdes Liendo Gil, Yuri Vanessa Conde Beltran, Marisol Morán Cascire, Victoria Obdulia Trujillo Agurto, and Mirian Virgilia Gamboa (dossier of appendixes to the petition, appendixes 85, 88, 91,96 , and 215, folios 1262, 1287, 1309, 1356, and 2439); and testimonial statement offered by Gaby Balcázar Medina in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006.

<sup>86</sup> *Cfr.* Written testimonial statements offered by Miriam Rodríguez (dossier of appendixes to the petition, appendix 95, folio 1337, and dossier on merits and possible reparations and costs, Volume VII, folio 2010); written testimonial statements of Margot Lourdes Liendo Gil, Mercedes Ríos Rivera, Victoria Trujillo Agurto, and Ana María Berríos Yenque (dossier of appendixes to the petition, appendixes 85, 98, 96, and 245, folios 1263, 1382, 1357, and 2728); and testimonial statement offered by Gaby Balcázar Medina in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006.

<sup>87</sup> *Cfr.* Written testimonial statement of Ana María Berríos Yenque (dossier of appendixes to the petition, appendix 245, folio 2728).



was scarce. They were the object of constant inspections, during which they were beaten, kicked, given electrical shocks and beatings to the soles of their feet with sticks, water was thrown on them, and they were threatened with being killed. Likewise, if they refused to sing the national anthem they were punished.<sup>88</sup>

197(52) The male inmates, which were rearranged within the criminal center Castro Castro, as well as those that were transferred to Lurigancho or Yanamayo, were object of physical and psychological treatments similar to those described in the previous paragraph.<sup>89</sup> The male inmates rearranged in the Miguel Castro Prison were, as a punishment, transferred to the cell known as "the hole".<sup>90</sup> Upon their transfer to the prisons of Lurigancho and Yanamayo the inmates were insulted and even beaten with poles on their backs.<sup>91</sup>

197(53) The criminal center of Yanamayo is located in Puno, at more than 3,800 meters in height, reason for which the temperature goes several degrees under zero. Inmates did not have enough protection. Besides, they could only receive visits from direct relatives, in visiting rooms with a double fence, and for half an hour a month. Due to the distance of the criminal center the inmates only received visits a couple of times a year.<sup>92</sup>

197(54) Once the "operative" had concluded, and even after they were transferred to hospitals or other penitentiaries, the inmates were not allowed to communicate with their next of kin and attorneys for several days, and in some cases during weeks or months.<sup>93</sup>

197(55) For several days the inmates' next of kin visited hospitals and morgues looking for their loved ones. They tried, unsuccessfully, to obtain information about what had happened within the criminal center, who was alive and who was dead, where they had been transferred, and their next of kin's state of health. They were

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<sup>88</sup> *Cfr.* Different written testimonial statements of the surviving inmates (dossier of appendixes to the petition, appendixes between 82 and 113, folios between 1231 and 1495); and testimonial statement offered by Mónica Feria Tinta in the hearing held on November 14, 2001 before the Inter-American Commission.

<sup>89</sup> *Cfr.* Different written testimonial statements of the surviving inmates (dossier of appendixes to the petition, appendixes between 114 and 209 and between 218 and 237, folios between 1505 and 2401 and between 2467 and 2606).

<sup>90</sup> *Cfr.* Written testimonial statements of Lorenzo Rodas Centeno, Guillermo Lázaro Rojas, Crisineo Neira Torres, Fernando Medina Puma, Amado Yangua Loilla, and Francisco Abad Telo Santos (dossier of appendixes to the petition, appendix 133, folio 1764, appendix 134, folio 1773, appendix 139, folios 1805 and 1806, appendix 140, folio 1828 and 1829, appendix 178, folio 2140, and appendix 192, folio 2260); and written expert opinion offered by the expert José Quiroga (dossier on merits and possible reparations and costs, Volume VII, folio 2149).

<sup>91</sup> *Cfr.* Different written testimonial statements of the surviving inmates (dossier of appendixes to the petition, appendixes between 114 and 209 and between 218 and 237, folios between 1505 and 2401 and between 2467 and 2606).

<sup>92</sup> *Cfr.* Written testimonial statement of Carlos Manuel Torres Mendoza, Pascual Utia Lozano, Máximo Talledo Astudillo, Isidoro Santiago Nunja García, José Ramírez Sánchez, and Agustí Machuca Urbina (dossier of appendixes to the petition, appendixes 125, 130, 132, 196, 219 y 220, folios 1684, 1730, 1735, 1751, 2294, 2475, and 2492).

<sup>93</sup> *Cfr.* Different written testimonial statements of the surviving inmates (dossier of appendixes to the petition, appendixes between 82 and 245, folios between 1230 and 2716).

not provided any help in looking and identifying the remains of their next of kin.<sup>94</sup> In the specific case of Mr. Mario Francisco Aguilar Vega his remains were never handed over to his next of kin.<sup>95</sup>

197(56) Once the solitary confinement applied to inmates for weeks ceased, the visiting regimen imposed on them only allowed them to communicate with their next of kin, including their children, once a month, which they did through a fence.<sup>96</sup>

197(57) It was proven before the Court that the inmates Eva Challco, Vicente Genua López, and Sabina Quispe Rojas were pregnant at the time of the events in Castro Castro. They were, respectively, 7, 5, and 8 months pregnant, The inmates Eva Challco and Sabina Quispe gave birth when they were, respectively, in the prisons of Cachiche and Chorrillos, and they did not receive medical attention until they were taken to the hospital for their labor. The inmate Sabina Quispe did not receive post-partum medical attention.<sup>97</sup>

197(58) The inmates considered alleged victims of this case have been classified as terrorists, even by the media, although many of them were imprisoned without a conviction and in various cases were acquitted in the corresponding processes. Likewise, their families were stigmatized and, in some cases, they have been rejected, excluded, and separated by the society and even by their most intimate circle.<sup>98</sup>

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<sup>94</sup> Cfr. Written testimonial statements of Priscila Rodríguez Osorio, Nila Cipriano Pacheco Neira, Avelina García Calderón, Lourdes Heredia Pacheco, Ana Barredo Crushing, and Norma Dávalos Díaz (dossier of appendixes to the petition, appendixes 242, 243, 245, and 254, folios 2655, 2665, 2693, 2698, 2698, 2702, and 2707); testimonial statements offered by Julia Peña Castillo and Lastenia Eugenia Caballero Mejía in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006; form of testimonial statements offered by Pedro Andrés Ninaquispe, Miriam Rivera Espinoza, Victoria Cáceres Loayza, Guillerma Mendieta Galindo, Joaquín Oscar Rodríguez León, Vilma Company Rodríguez, Paulina Mitma Sulca, Victoria Palomino Najarro, and Rosa María León Torres (dossier of appendixes to the brief of pleadings and motions, Volume I, folios 3644, 3664, 3859, 3724, 3874 and 3875, 3814, 3792, 3679, and 3890); written testimonial statements of Liliana Peralta Saldarriaga and Osilia Ernestina Cruzatt (dossier of merits and possible reparations and costs, Volumes VII and VIII, folios 1997, 1988 and 1989); and forms of testimonial statements of Liliana Vilma Paredes Rodríguez, Víctor César Chumpitaz Francia, Victoria Irene Aguirre, Silvia Matto Primo de Aguirre, Francisco Baras Sala, Otilia Tapia de Pinedos, Mirla Otilia Baras Tapia, Antonia Antaorco Espíritu, Genoveva Torres Bonifacio, Julia Nereida Armas Vereau de Sedelmayer, Oscar Flores Flores, Gloria Rosario Flores Flores, Rosa Mercedes Flores Flores, Claudio J. Flores Flores, María Jesús Yepes Cebrian, Aurora Zoila Villanueva de Castillo, and Ana Maria Peralta Andazabal (evidence preented by the other group of representatives of the alleged victims and their next of kin).

<sup>95</sup> Cfr. Testimonial statement offered by Lastenia Caballero Mejía in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006; and written statement of Lastenia Caballero Mejía (dossier of appendixes to the brief of pleadings and motions, appendix 326, folio 3742).

<sup>96</sup> Cfr. Different written testimonial statements of the surviving inmates (dossier of appendixes to the petition, appendixes between 82 and 241, folios between 1231 and 2650); and written testimonial statement offered by Eva Challco (dossier on merits and possible reparations and costs, Volume VIII, folio 2270).

<sup>97</sup> Cfr. Written testimonial statements offered by Mrs. Eva Challco and Sabina Quispe Rojas (dossier of appendixes to the petition, appendixes 212 and 82, folios 2416 through 2420 and 1228; and dossier on merits and possible reparations and costs, Volume VIII, folio 2270).

<sup>98</sup> Cfr. Newspaper article titled "*Identifican a terroristas cabecillas muertos en penal Castro Castro*" published in the newspaper "El Comercio"; newspaper article titled "*Cabecillas terroristas acribillaron a los que iban a rendirse*" published in the newspaper "El Comercio" on May 11, 1992; newspaper article titled "*Unos 600 terroristas siguen en evidente rebeldía*" published in the newspaper "El Comercio" on May 8, 1992 (dossier of appendixes to the petition, appendixes 30, 37, and 51, folios 393, 453, and 1068);

197(59) Between the days of May 6 and 12, 1992 several newspapers of Peru published articles in which they made reference to the inmates that occupied pavilions 1-A and 4-B of the criminal center classifying them as "inmates for terrorism", "terrorists", and "terrorist criminals". Some of the newspaper articles had the following titles: "*unos 600 terroristas siguen en evidente rebeldía*", "*600 terroristas hombres y mujeres amotinados en el pabellón 4B del penal Castro Castro, depusieron su actitud de rebelde y se rindieron*", "*470 terroristas se rinden tras infernal balacera en Canto Grande*", and "*pabellón 4B asilo para terroristas*".<sup>99</sup>

### ***Investigations and Processes in Judicial Courts***

197(60) On May 11, 1992 experts of the Central Criminal Laboratory performed a physical chemical exam in pavilions 4B and 1A. During the technical chemical inspection rubble and goods, as well as bodies were removed and transferred to the Central Morgue of Lima, in presence of the Examining Judge on Duty. Likewise, forensic medical, toxicological, and alcohol level, ballistic, and atomic absorption expert tests were performed.<sup>100</sup> Records of the removal of the bodies were not prepared. The autopsy certificates and forensic medical reports were limited to describing the wounds suffered by the mortal victims and the injuries found in some of the wounded. In said reports there is no mention of the bullets recovered from the victims' bodies.<sup>101</sup>

### ***Police Investigations***

197(61) On August 7, 1992 Police Report No. 322 IC-H-DDCV, which included the "result of the investigation of the events occurred in the Criminal Establishment 'Miguel Castro Castro' on the days of May 6 to 10, 1992", as a consequence of "Operative Transfer 1" was prepared. The mentioned report established, *inter alia*, that as a consequence of the execution of "Operative Transfer 1" 40 inmates accused of terrorism died, and that "the police personnel that participated in the dismantling of the riot movement within [the criminal center had] acted within the legal

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newspaper article titled "*Terroristas se atrincheran en pabellón y atacan con balas, dinamitazos y ácido*" published in the newspaper "La República" on May 7, 1992; newspaper article titled "*470 terroristas se rinden tras infernal balacera en Canto Grande*" published in the newspaper "La República" on May 10, 1992 (dossier of appendixes to the petition, appendixes 45 and 71, folios 1024 and 1170); written testimonial statement offered by César Mamani Valverde (dossier on merits and possible reparations and costs, Volume VII, folio 2031); different forms of written testimonial statements offered by surviving inmates and the next of kin of surviving and dead inmates (dossier of appendixes to the brief of pleadings and motions, appendixes between 317 and 412, folios 3643 through 4933); testimonial statement offered by Gaby Balcázar Medina in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006; and different forms of written testimonial statements offered by surviving inmates and the next of kin of surviving and dead inmates (evidence presented by the other group of representatives of the alleged victims and their next of kin).

<sup>99</sup> Cfr. Newspaper articles published in the newspapers El Exceso, La República, El Comercio, La Nación on May 7, 8, 10, and 12, 1992 (dossier of appendixes to the petition, appendixes 46, 51, 71, and 73, folios 1024, 1068, 1170, and 1180).

<sup>100</sup> Cfr. Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 784 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>101</sup> Cfr. Autopsy certificates and forensic medical reports (dossier of appendixes to the petition, appendixes 279 and 280, folios 3285 through 3385).

framework with support from the FF. AA.” Said report was prepared before the Special Military Court.<sup>102</sup>

197(62) In application of the Ministerial Ruling No. 456-90-IN-PNP and of Articles 35, 36, and 37 of the Rules of Procedure for Police Documentation, on April 13, 1998 the “passive documentation” produced by the Operative and Administrative Units of the Office of Criminal Investigation during the years 1990, 1991, and 1992 was incinerated, among which a great part of the internal case file of the present case was burned.<sup>103</sup>

197(63) Through Ruling No. 631-2002- MP-FN of April 17, 2002 the Specialized Prosecutors’ Office for Forced Disappearances, Extrajudicial Killings, and Exhumation of Clandestine Graves.<sup>104</sup>

197(64) On November 25, 2005 the mentioned Specialized Prosecutors’ Office for Forced Disappearances, Extrajudicial Killings, and Exhumation of Clandestine Graves issued a Ruling, that ordered that the police investigation be extended.<sup>105</sup>

197(65) The Office of Criminal Investigation of the National Police Force of Peru carried out an investigation included in Report No. 121 of May 26, 2004, extended through Report No. 468 of November 28, 2004, “in relation to the alleged Crime against the Life, Body, and Health (Aggravated Murder by PAF and Punishable Intent of Homicide with subsequent injuries by PAF) and alleged Extrajudicial Killings, occurred on May 9, 1992 between 17:30 and 18:30 hours approximately in offense of the inmates imprisoned for terrorism in the Criminal Establishment of Maximum Security Miguel Castro Castro.” In said investigations the direct responsible parties for the mentioned crimes were not individualized. Said report was given before the Specialized Prosecutors’ Office for Forced Disappearances, Extrajudicial Killings, and Exhumation of Clandestine Graves.<sup>106</sup>

### *Investigation and prosecution of four inmates*

197(66) In the year 1992 the prosecutor’s investigation regarding the events of the present case was directed to exclusively determining the responsibility of the inmates. On June 1, 1992 the Tenth Special Prosecutors’ Office for cases of

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<sup>102</sup> Cfr. Police report No. 322 of August 7, 1992 (dossier of appendixes to the petition, appendix 288, folios 3922 and 3923).

<sup>103</sup> Cfr. Incineration report of April 13, 1998 (dossier of appendixes to the petition, appendix 276, folio 3268); police report N° 004-2001-DIRINCRI-EM-O-DD.HH of July 12, 2001, section III acápite A (dossier of appendixes to the petition, appendix 275, folio 3249); and police report N°09-01 of June 27, 2001 and Police Report No. 006 of July 4, 2001 (dossier of appendixes to the petition, appendix 276, folios 3264 and 3267).

<sup>104</sup> Cfr. Police report No. 121-04 of the National Police Force of Peru, Office of Criminal Investigation, of May 26, 2004 (dossier of appendixes to the response to the petition, Volume I, folio 4999).

<sup>105</sup> Cfr. Police report No. 121-04 of May 26, 2004 and extended by Report No. 468 of November 28, 2004, issued by the National Police Force of Peru, Office of Criminal Investigation (dossier of appendixes to the response to the petition, Volume I, folios 4999 and 5001).

<sup>106</sup> Cfr. Police report No. 121-04 of May 26, 2004 and extended by Report No. 468 of November 28, 2004, issued by the National Police Force of Peru, Office of Criminal Investigation (dossier of appendixes to the response to the petition, Volume I, folios 4999 and 5247).

Terrorism formalized a criminal accusation against 4 of the inmates that are alleged victims in this case, for the crimes of terrorism, breach of personal liberty, exposition or abandonment of people in danger, illegal possession of weapons and explosive materials, and violence and resistance to authority against the State, based on the events occurred as a consequence of "Operative Transfer 1". Through judgment of April 20, 1996, issued by the Special Criminal Court of the Supreme Court of Justice of Lima, the accused were convicted to a life sentence. Said ruling was annulled and a new trial was started.<sup>107</sup>

197(67) On February 3, 2004 the National Terrorism Chamber of the Supreme Court of Justice of Peru issued a judgment in which, after months of investigations, hearings, and receiving statements, it acquitted the inmates that had been accused of the crimes previously mentioned.<sup>108</sup> In said judgment, the Terrorism Chamber established, *inter alia*, that "on May 6, 1992 the inmates of pavilions One A and four B were not rebellious, nor were they carrying out acts of force or violence whatsoever, that would have justified an intervention of the public forces of the characteristics [...] of 'Operative Transfer 1'." Likewise, it established that "the continuance by the inmates [...] of an armed resistance to the development of the operative for the four days mentioned, resulted materially impossible, due to the volume of fire (from long weapons) and the demolition suffered by the pavilions occupied by them." Besides, it stated that "[w]hat was previously established does not weaken the fact that when facing the first actions of the operative, there could have been an initial armed resistance by a sector of the inmates, which the Court [...] has established occurred after comparing not only the versions of the police officers that testified, but also the fact that the police officer José Idroho Olano died[, ...] as a consequence of having received the impact of bullets from fire weapons in the head, and the existence wounds in [several] police officers [...] produced some by splinters from explosives and others from bullets from fire weapons."<sup>109</sup>

#### *Investigation against members of the National Police Force*

197(68) A proceeding originated in an accusation against the police personnel that participated in "Operative Transfer 1" was brought before the Second Chamber of the Superior Council of Justice of the II Judicial Zone of the National Police Force of Peru. This proceeding finished with Ruling No. 41592 of November 5, 1992, that declared that there were not enough merits to commence the preliminary proceeding against the members of the National Police Force of Peru that intervened in the "operative" because they were performing an act of service and in compliance with the Law, and it ordered the definitive shelving of the accusation.<sup>110</sup>

<sup>107</sup> *Cfr.* Judgment issued by the Special Criminal Court of the Supreme Court of Justice of Lima on April 20, 1996 (dossier of appendixes to the petition, appendix 261, folios 2840, 2851, and 2860); Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center Canto Grande, page 785 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc); and Judgment issued by the National Terrorism Chamber of the Supreme Court of Justice of Peru on February 3, 2004 (dossier of appendixes to the petition, appendix 274, folios 3151 through 3153).

<sup>108</sup> *Cfr.* Judgment issued by the National Terrorism Chamber of the Supreme Court of Justice of Peru on February 3, 2004 (dossier of appendixes to the petition, appendix 274, folios 3151 through 3246).

<sup>109</sup> *Cfr.* Judgment issued by the National Terrorism Chamber of the Supreme Court of Justice of Peru on February 3, 2004 (dossier of appendixes to the petition, appendix 274, folio 3221).

<sup>110</sup> *Cfr.* Final Report of the Commission for Truth and Reconciliation, CVR, issued on August 27, 2003, in the city of Lima, Peru, Volume VII, section 2(68), Extrajudicial killings in the criminal center

*Proceedings before the Second Supraprovincial Criminal Court*

197(69) On May 31, 2005 the Specialized Prosecutors' Office for Forced Disappearances, Extrajudicial Killings, and Exhumation of Clandestine Graves presented criminal accusation No. 35-02, for the Crime against the Life, Body, and Health, Aggravated Murder, against the alleged victims that died in this case, based on the events that occurred in the Criminal Center Miguel Castro Castro between the days of May 6 and 10, 1992.<sup>111</sup>

197(70) On June 16, 2005 the Second Supraprovincial Criminal Court issued the Order for the Preliminary Proceedings to commence in process No. 0045-2005, corresponding to the investigation of the facts occurred in the Criminal Center Castro Castro between the days of May 6 and 9, 1992, against Juan Briones Dávila (former Secretary of the Interior), Adolfo Cuba y Escobedo (former General Director of the National Police Force), Miguel Barriga Gallardo (General of the National Police Force of Peru), Teófilo Vásquez (Colonel of the National Police Force of Peru), General Lieutenant Federico Gonzalo Hurtado Esquerre (former DINOES chief of the National Police Force of Peru), Colonel Jesús Artemio Konja Chacon (Head of the National Police Force of Peru in 1992), General Alfredo Vivanco Pinto (Colonel of the National Police Force of Peru), Colonel Jesús Manuel Pajuelo García (Sub chief of "Operative Transfer 1"), Commander Jorge Luis Lamela Rodríguez, Mayor Félix Guilleromo Lizarraga Lazo, Colonel Estuardo Napoleón Mestanza Bautista, and Mayor José Raúl Málaga Johnson for Crimes against Life, Body, and Health, Aggravated Murder - Murder, and against Gabino Marcelo Cajahuanca Parra (former Director of the Miguel Castro Castro Prison) for the crime of Improper Omission of Murder- Murder, against the alleged victims that died in this case. Additionally, a restricted order of appearance was issued against each of the accused, and certain proceedings, such as preliminary statements of the accused, testimonial statements, and preventive statements of the victims' next of kin were ordered.<sup>112</sup>

197(71) On November 7, 2005 the Second Supraprovincial Criminal Court declared process No. 0045-2005 complex, due to the number of evidentiary means that were still pending, the plurality of accused and offended, the series of facts subject of the preliminary proceedings, and the seriousness of the crime object of judicial investigation. Additionally, it ordered that the term of the preliminary proceedings be extended for six months, in order to perform certain diligences, such as the preliminary statement of an accused, receiving testimonial statements from 45 people, and diligences of expert ratification and judicial inspection.<sup>113</sup>

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Canto Grande, page 785 (dossier of appendixes to the petition, appendix 6, corresponding to a compact disc).

<sup>111</sup> *Cfr.* Accusation presented by the Specialized Prosecutors' Office for Forced Disappearances, Extrajudicial Killings, and Exhumation of Clandestine Graves, on May 31, 2005 (dossier of appendixes to the response to the petition, folio 5303).

<sup>112</sup> *Cfr.* Order for Preliminary Proceedings to Commence issued by the Second Supraprovincial Court of Peru on June 16, 2005 (dossier of appendixes to the response to the petition, folios 5373 to 5477).

<sup>113</sup> *Cfr.* Ruling Declaring the Complexity of the Proceedings issued by the Second Supraprovincial Court of Peru on November 7, 2005 (dossier of appendixes to the response to the petition, folio 5479).

197(72) On November 16, 2005 the Second Supraprovincial Criminal Court revoked the order of restricted appearance and issued an Arrest Warrant against Mr. Federico Hurtado Esquerre, since this accused party did not present himself to offer a statement.<sup>114</sup>

197(73) On May 25, 2006 the Second Supraprovincial Criminal Court extended the criminal process for a sixty-day term in order to carry out diligences.<sup>115</sup>

197(74) During the public hearing held before the Inter-American Court on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006, Mr. Omar Antonio Pimentel Calle, Judge of the Second Supraprovincial Criminal Court, who has led the judicial investigation of the facts object of the present case within the domestic realm, expressed which diligences have been performed: receipt of 12 preliminary statements of accused parties and 106 preliminary statements of police officers and inmates that witnessed the facts; expert ratification by 8 legal doctors issuers of the autopsy protocols of the dead inmates; expert ratification by 8 experts in ballistics issuers of the expert reports on forensic ballistics practiced on the dead inmates; 15 confrontation proceedings between the accused, as well as between the latter and the witnesses; 2 proceedings of preventive statements of the next of kin of the injured parties, who have been the only ones who have appeared before the court and have become a civil party; judicial inspection in the Miguel Castro Castro Prison, with the participation and presence of the accused, some inmates that are witnesses of the case, legal doctors and experts; and identification of victims within the preliminary proceedings. It also indicated that actions are being carried out in order to: locate the weapons seized at the end of "Operative Transfer 1"; establish the location of the bullets extracted from the dead bodies, as well as those found in the installations of pavilions 1A and 4B, the roundhouse, and esplanade called no man's land, that will permit the homologation in order to determine the weapons used; collection of information of the weapons assigned to the intervening personnel, as well as the names of said personnel, including that assigned to the different police units that participated in the "operative" such as DINOES, UDEX, SUAT, and USE.<sup>116</sup>

197(75) On August 29, 2006 the Second Supraprovincial Criminal Court ordered "to commence preliminary proceedings in the regular courts against Alberto Fujimori Fujimori, as the alleged author of the crime against the Life, Body, and Health, in the modality of Aggravated Murder, against [40 alleged victims that died in this case]." Likewise, it issued against him "the personal coercive personal of ARREST, ordering his immediate location and capture at a national and international level" and the preventive embargo was ordered for his goods and properties and his bank accounts. Finally, certain proceedings, such as testimonial statements, autopsy protocols, expert opinions, and the collection of information regarding the personnel

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<sup>114</sup> *Cfr.* Testimonial statement offered by Omar Antonio Pimentel Calle Medina in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006; and brief of the State's final arguments (dossier on merits and possible reparations and costs, Volume IX, folio 2733).

<sup>115</sup> *Cfr.* Brief with the State's final arguments (dossier on merits and possible reparations and costs, Volume IX, folio 2733).

<sup>116</sup> *Cfr.* Testimonial statement offered by Omar Antonio Pimentel Calle Medina in the public hearing before the Inter-American Court held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006.

that worked in the month of May at the Criminal Center Castro Castro, as well as of the inmates that were located there at the time of the events, were ordered.<sup>117</sup>

### **Costs and Expenses**

197(76) The alleged victims and the representatives carried out steps and procedures, and paid for the expenses corresponding to their actions before the Inter-American System of Protection for Human Rights.<sup>118</sup>

## **IX THE STATE'S INTERNATIONAL RESPONSIBILITY WITHIN THE CONTEXT OF THE PRESENT CASE**

198. As stated (*supra* para. 148), the acknowledgment of responsibility made by the State is a positive contribution to the development of this process and to the validity of the principles that inspire the American Convention.

199. Likewise, said acknowledgement can have great relevance in the domestic realm, since the facts that the State acknowledges in the proceedings before this Court, more than fourteen years after they occurred, are characterized for being extremely serious and for being actions carried out directly by State Agent, that therefore imply, serious violations to human rights protected in the American Convention. For many years these events were denied or classified in different ways both by different state authorities as by some sectors of civil society and the press, and on multiple occasions they were considered legitimate within the "fight against terrorism."

200. Given the specific characteristics of this case, the Court considers it convenient to expose in the present chapter some factors corresponding to the facts that characterize the State's international responsibility in relation to its obligation to respect and guarantee the rights enshrined in the Convention that were allegedly violated in this case, both in the aspects acknowledged by it like in those that must still be determined in the following chapters regarding the merits and the possible reparations. The Court does not intend to cover here all the factors that increase the seriousness of the facts of this case, which will be analyzed in the chapters corresponding to the violations to the Convention, but it does consider it necessary to point out some of those factors, such as the historical context in which the events occurred, and some characteristics of the so-called "Operative Transfer 1" that must be taken into consideration when analyzing the alleged breaches to the Convention.

### *The historical context in which the events occurred*

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<sup>117</sup> *Cfr.* Order for Preliminary Proceedings to Commence issued by the Second Supraprovincial Criminal Court of Peru (dossier on merits and possible reparations and costs, Volume X, folios 3173 to 3239).

<sup>118</sup> *Cfr.* Receipts of expenses presented by the common intervener of the representatives of the alleged victims and their next of kin (appendix 4 of the brief of final arguments of the common intervener, and part of the documentation presented by the intervener on October 4, November 14 and 20, 2006).



201. The State acknowledged the facts presented in the application regarding what happened from May 6 to 9, 1992 in the Miguel Castro Castro Prison, and it also referred to the context in which they took place, pointing out that they occurred within "a very serious situation of internal conflict," when the Government had moved away from the "democratic institutionality one month before the [facts]" and in the framework of a law "that declared the emergency of the criminal centers and offered 'legitimacy' to the events that the Court is currently [studying...]." Likewise, the State added that "it is evident" that "the acts of violence were committed against inmates of a specific orientation," since "they were directed against two pavilions, or mainly against one pavilion, pavilion 1A and pavilion 4B, occupied at the time of the events by inmates accused of crimes of terrorism linked to the communist party of Peru, Sendero Luminoso."

202. It is important to point out the context in which the events took place, since it constitutes a political and historical environment determining for the establishment of the juridical consequences in this case, comprehending both the breaches to the Convention as well as the corresponding reparations.

203. Peru was living a conflict between armed groups and agents of police and military forces, that had caused systemic breaches to human rights, among them tortures, extrajudicial killings, and forced disappearances of people suspected of belonging to armed groups at the margin of the law, carried out by state agents following orders of military and police superiors.<sup>119</sup> In this regard, the Court has heard several cases of breaches to human rights that occurred in this context,<sup>120</sup> and it has established that "said serious breaches violate the international *jus cogens*."<sup>121</sup> There is background of cases corresponding to the time that went from 1991 and 2000, in which persons accused of terrorism or treason were submitted to multiple violations of their human rights in the criminal centers where they were detained.<sup>122</sup>

204. After the time of internal conflict, which ended approximately in November 2000, different bodies of the State have issued decisions regarding the referred context of violations to human rights, in which even the events of the Miguel Castro Castro Prison have been analyzed in a specific manner.

205. In this regard, it is important to point out the creation of the Commission for Truth and Reconciliation (hereinafter "CVR") in 2001 (*supra* para. 197(3) to 197(7)), whose purpose was, *inter alia*, to clarify the process, facts, and responsibilities of terrorist violence and the violation of human rights occurred from May 1980 to November 2000, attributable both to terrorist organizations and State agents. From the analysis of the thousands of accusations it received, said Commission determined that the majority of the violations corresponded to actions attributed to State officials

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<sup>119</sup> Cfr. *Case of Baldeón García*, *supra* note 21, para. 72.2; *Case of the Gómez Paquiyauri Brothers*, *supra* note 21, para. 67.a); *Case of Cantoral Benavides*, *supra* note 21, para. 63(t); *Case of Castillo Páez*, *supra* note 21, para. 42; and *Case of Loayza Tamayo*, *supra* note 21, para. 46(l).

<sup>120</sup> *Supra* note 119.

<sup>121</sup> Cfr. *Case of Hermanos Gómez Paquiyauri*, *supra* note 21, para. 76.

<sup>122</sup> Cfr. *Case of García Asto and Ramírez Rojas*. Judgment of November 25, 2005. Series C No. 137, para. 97(27) and 97(56); *Case of Cantoral Benavides*, *supra* note 21, para. 63 (f, j, and k); and *Case of Loayza Tamayo*, *supra* note 21, para. 46(i).

or persons that acted under its acquiescence. In its final report of 2003 the CVR dedicated a section to the events occurred in the Miguel Castro Castro Prison titled "Extrajudicial killings in the criminal center of Canto Grande (1992)." In what refers to the context present in May 1992, that stated by the CVR is illustrative in the sense that as of the coup d'état of April 5, 1992, and with the objective of fighting subversive and terrorist groups, the State implemented in the prisons practices that were not compatible with the effective protection of the right to life and other rights, such as extrajudicial killings and cruel and inhuman treatments, as well as the "disproportionate use of strength in critical circumstances." Regarding a more general context CVR also stated that

as of the coup d'état of April 5, 1992 a regimen de facto that suspended the democratic institutionality of the country through an open intervention in the Judicial Power, in the Constitutional Court, in the Public Prosecutors' Office, and in other constitutional bodies was established. The action of governing was done through decree through the so-called "Government of Emergency and National Reconstruction", which concentrated for a brief period of time the State's executive and legislative functions, neutralizing in the practice political and judicial control over its actions.

206. It is also necessary to point out that in the mentioned final report of the CVR it was analyzed that, within this context of violations to human rights during the internal conflict, women were affected by the violence differently than men. In its report the CVR included a specific chapter on sexual violence against women and it also referred to the situation lived by the mothers detained in penitentiaries. Likewise, in said report it concluded that during the internal conflict and based on it, state agents were responsible for approximately 83% of the cases of sexual violations against women.

207. Similarly, another State act of acknowledgment of the gross breaches to human rights that occurred in the period between May 1980 and November 2000 was the enactment by the Peruvian Congress of Law No. 28592 of July 20, 2005, which "seeks to establish the Legal Framework of the Comprehensive Plan for Reparations –PIR for the victims of the violence occurred during [said] period," in order to follow the recommendations of the CVR.

208. It is also convenient to point out that the Ombudsman of the People of Peru has referred in several reports to said context, and he has followed up on the process of reparation of the victims of the violence of said time and, specifically, he has gone on record regarding the form in which the accusations for said violations to human rights have been investigated.<sup>123</sup>

209. The domestic investigation that should have been carried out regarding the facts of this case was affected by the prevailing situation of impunity in the Peru of that time of gross breaches to human rights. Recently, thirteen years after those events occurred, on June 16, 2005 a court opened a criminal proceeding corresponding to the investigation of the events that occurred in the Criminal Center Castro Castro between the 6 and 9 days of May 1992, aspects that will be analyzed in the chapter on the alleged violation to Articles 8 and 25 of the Convention (*infra* paras. 373 through 408). Almost three months ago it was ordered that the preliminary proceedings commence in an ordinary criminal proceeding against

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<sup>123</sup> Cfr. Ombudsman Report N° 97, "Two years after the Commission for Truth and Reconciliation", September 2005.

Alberto Fujimori Fujimori for some of the events of the present case (*supra* para. 197(75)); in said order to commence the criminal judge stated, *inter alia*, that:

it is concluded from the preliminary investigations, that ALBERTO FUJIMORI FUJIMORI is incriminated, in his quality of Former President of the Government of National Reconstruction and Supreme Chief of the Armed and Police Forces of Peru, for having ordered the planning and execution of a plan to kill leaders and members of Sendero Luminoso, events that occurred in the Criminal Establishment of a Special Closed Regimen Miguel Castro Castro, between May sixth and tenth nineteen ninety two, for which the accused, as part of his comprehensive strategy against terrorism, which he announced after the proclaimed self coup d'état of April fifth nineteen ninety two, issued Decree Law Number twenty five thousand four hundred and twenty one of April sixth nineteen ninety two, declaring the National Penitentiary Institute in state of reorganization [...].<sup>124</sup>

*The So-Called "Operative Transfer 1" that started May 6, 1992*

210. In the context described, the State carried out the so-called "Operative Transfer 1", which according to official sources was done to transfer the inmates that were in pavilion 1A of the Miguel Castro Castro Prison to another maximum-security prison for women. In that pavilion there were approximately 135 female inmates and 50 men (*supra* para. 197(13)). Likewise, it has been proven that the "operative" was also directed against pavilion 4B of said criminal center, in which there was approximately 400 male inmates. The inmates located in those pavilions of the criminal center were accused or convicted for the crimes of terrorism or treason, and they were allegedly members of Sendero Luminoso (*supra* para. 197(13)).

211. Regarding the start of this "operative", the parties coincide in that the first act happened on May 6, 1992 at approximately 4:00 hours, when Peruvian security officers started an incursion in pavilion 1A, throwing down part of the wall with explosives, for which three successive continuous detonations. Simultaneously, the police officers made holes in the roof, from which they fired their guns (*supra* para. 197(20)). The evidence included in the dossier of this case supports this.

212. The magnitude of the force used in that first act of the "operative" carried out in the dawn of May 6, 1992 has not escaped the Court's consideration. The Commission pointed out in its application that "the State's security forces employed, from the start of the 'operative', excessive force and even war type material that caused the partial destruction of the pavilions."

213. According to the State's explanations, at the time of the facts force was used because the inmates were organizing a riot. Regarding this matter, the Commission stated in its application that "the authorities found resistance" to carry out the transfer "operative" and that "resulted in the use of force," even though in its brief of final arguments it refers to an "alleged resistance to the transfer." In the same application it assumes a position that is not very clear when it indicates that "it does not matter who carried out the first aggression [...]." Likewise, in the application the Commission stated that a "massacre" was committed "[...] against the inmates of the Miguel Castro Castro Prison." In the application it is also stated that "[t]he fact that the inmates detained in pavilions '1A' and '4B' of the criminal center 'Castro Castro' had weapons, of a quantity, characteristics, and functionality unknown by the

<sup>124</sup> *Cfr.* Order to commence the preliminary proceedings issued by the Second Supraprovincial Criminal Court of Peru on August 29, 2006 (dossier on merits and possible reparations and costs, volume XI, folios 3173 through 3239).

Peruvian security forces was evidence of a resistance to the transfer operative[, ...] situation [that] authorized the gradual use of force." These last statements were not presented by the Commission in its brief of final arguments, but when it referred to the 'extra judicial killing of unarmed inmates," the Commission stated in said arguments that "in cases like those of the Criminal Center Castro Castro [...] it is proven that the use of fire weapons is not necessary and that[,] in any case, the motivation announced for the operation is not the real one."

214. The common intervener stated that there was no rebellious movement to justify the use of force by the State, and that "[n]one of the evidence presented during the proceedings before the Commission proved that in effect 'Operative Transfer 1' Operative was a legal operative with the objective of transferring prisoners." Likewise, the intervener indicated that "[t]he Commission [...] assents to the version of the facts presented in a report issued by a Peruvian State body (the CVR)," and that said report "contradicts all that presented before the Commission itself (evidence never objected by the Peruvian state) y even more important, that in its fundamental aspects contradicts the conclusions of the Peruvian judicial body (National Terrorism Court) that investigated the facts regarding that occurred in Castro Castro issued a judgment in the first months of 2004." Besides, the intervener made emphasis on the fact that "[i]f the objective had been a 'necessary' transfer of female prisoners to another prison 'because said criminal center did not have any more capacity', why did they keep taking prisoners precisely to said center up to the last week?"

215. It has not been proven before this Court that there was a riot when the first act of the "operative" was carried out, or any other situation that would require the legitimate use of force by State agents. On the contrary, the behavior observed by the security agents, high State authorities, and other State officials during the four days that the "operative" lasted, as well as after it, prove that it was an attack carried out to threaten the life and integrity of the inmates that were located in pavilions 1A and 4B of the Miguel Castro Castro Prison.

216. To reach the conclusion that there was no justifying cause for the legitimate use of force by state agents and that it was an attack carried out to threaten the life and integrity of the inmates located in pavilions 1A and 4B, the Court has taken into consideration, among others, the following actions and omissions in which the state authorities incurred at the time of the facts:

- the state authorities did not notify that they would carry out a transfer of the inmates on May 6, 1992 (*supra* para. 197(15));
- the first act of the "operative" was extremely violent and there is no evidence that the state agents recurred to the measures that must be necessarily adopted prior to using force; that is, the first and only resource was the attack against the female inmates;
- as of the first act explosives were used to knock down the external wall of pavilion 1A (*supra* para. 197(20));
- as of the first day of the "operative" and during the three following days weapons that the experts have classified as for war or characteristic of a "military incursion" were used (*supra* paras. 186 and 187), such as instalazza type grenades, bombs, rockets, artillery helicopters, mortars, and tanks, similarly tear gas, vomiting, and paralyzing bombs were used against the inmates. The expert Peerwani, who is a forensic expert (*supra* para. 187), pointed out that

high speed weapons were used, and that the later are characterized for producing greater destruction of the tissues and many internal injuries in the body, besides carrying a great amount of kinetic energy, that tends to bounce off its objective, causing even more damage;

- the magnitude of the force employed can also be concluded from the fact that agents from the police force, the army, and from special forces such as DINOES, UDEX, SUAT, and USE participated, and the latter were even located as snipers on the rooftops of the criminal center and fired at the inmates (*supra* para. 197(21));
- the type of injuries suffered by the inmates confirm that the prisoners dodged bullets directed to them; and some prisoners died due to explosions and burns (*supra* para. 187). Likewise, the prisoners presented injuries in their backs and extremities. Besides, the majority of the inmates that died presented between 3 and 12 bullet wounds in the areas of the head and thorax (*supra* para 197(39));
- despite that during the development of the "operative" several international bodies and other organizations offered to intervene so that the violence would cease, the State did not use other means different to their lethal force (*supra* para. 197(35));
- on the last day of the "operative" the state agents fired their weapons against the inmates that exited pavilion 4B, after they had requested not to be shot at; that is, they fired their weapons indiscriminately against inmates that were under the control of state authorities and did not represent a danger that called for the use of force (*supra* para. 197(37));
- some of the inmates that were under the control of state authorities were separated from the group and killed by police agents (*supra* para. 197(38));
- during the days of the "operative" it was published that, on at least two occasions (*supra* para. 197(28) and 197(30)), the then President of the Republic, Alberto Fujimori, met at the installations of the General Army Command, known as "Pentagonito (Small Pentagon)", with his Cabinet and police and military authorities, to evaluate the situation at the criminal center and to determine the actions to be followed. Likewise, on May 10<sup>th</sup> Fujimori went to the criminal center and walked among the prisoners lying face down on the floors of the prison's courtyards (*supra* para. 197(42));
- once the "operative" had finished and being the inmates under the control of state authorities, the State did not offer some of them the necessary medical attention, for hours and in some cases for days, which led to some of the dying and others resulting with permanent physical consequences (*supra* para. 197(43) and 197(47));
- after the "operative" had concluded some of the injured inmates that remained hours without medical assistance were taken to hospitals, where several of them did not receive the medications required (*supra* para. 197(47)); and
- state authorities incurred in gross omission in the collection, preservation, and analysis of evidence: toxicological tests were not performed; evidence such as bullet cases or metal fragments was not collected; fingerprints or the deceased's clothes were not collected (*supra* para. 187); the autopsy protocols and the expert forensic ballistic reports carried out on the dead inmates were incomplete; the weapons seized in the "operative" were not preserved, nor were the

bullets extracted from the bodies or those found in pavilions 1A and 4B, and in the "roundabout" and "no man's land" of the Criminal Center Castro Castro; and recently on April 21, 2006 a judicial inspection was carried out in the criminal center (*supra* para. 197(74)).

217. It is important to observe the differences that existed in the number of casualties: 41 identified inmates and one police officer, as well as in the number of inmates injured (approximately 190) in contrast to approximately 9 wounded police officers (*supra* para. 197(40)). The State has not established the cause of death of the police officer or of the injuries of the mentioned agents.

218. In this order of considerations it is necessary to make reference to that established in the judgment issued on February 3, 2004 by the National Terrorism Chamber of the Supreme Court of Justice of Peru (*supra* para. 197(67)), which acquitted the four inmates accused of terrorism, breach to personal liberty, exposure or abandonment of people in danger, illegal possession of weapons and explosive material, and violence and resistance to authority "against the State and others", based on the facts occurred as a consequence of the development of the "Operative Transfer 1". In said judgment the National Terrorism Chamber established, *inter alia*, that "on May 6, 1992 the inmates of pavilions One A and four B were not rebellious, or carrying out acts of force or displays of violence whatsoever that would have justified an intervention of the police with the characteristics of the operative "Transfer 1". The testimonial evidence offered before this Court also coincides in the fact that there was no riot of the inmates when the State started the attack (*supra* paras. 186 and 187).

219. Since this Court has considered as proven that there was no riot or any other situation that merited the legitimate use of force at the beginning of the "Operative Transfer 1", it is unnecessary and irrelevant to consider the controversy regarding the possession and use of weapons by inmates, matter regarding which there is no conclusive evidence.

220. In the present case it is clear that the State's actions in the so-called "Operative Transfer 1", which lasted four days, were widely diffused in the Peruvian society, they were treated by the press and publicly by state authorities as state actions tending to control a riot of inmates considered members of subversive groups, and they also meant a public exposure regarding the magnitude of force that the State was capable of using in the anti-subversive fight.

221. The events, carried out directly by state agents whose actions were protected by their authority, directed their actions toward people imprisoned in a state criminal center, that is, people regarding who the State had the responsibility to adopt security and special protection measures, in its condition of direct protector of their rights, since they were under its custody.<sup>125</sup>

222. Another important piece of information that this Tribunal will take into account when analyzing the State's international responsibility is that the referred

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<sup>125</sup> Cfr. *Case of the Penitentiary Center Capital Regional Yare I and II*, Provisional Measures. Ruling of the Inter-American Court of Human Rights of March 30, 2006, Ninth whereas; *Case of the Internado Judicial de Monagas (La Pica)*, Provisional Measures. Ruling of the Inter-American Court of Human Rights of February 9, 2006, Ninth whereas; and *Case of the Cárcel de Urso Branco*, Provisional Measures. Ruling of the Inter-American Court of Human Rights of June 18, 2002, Eighth whereas.

acts of extreme violence of the so-called "Operative Transfer 1" were directed, in first term, against the female inmates imprisoned in pavilion 1A of the Miguel Castro Castro Prison (*supra* para. 197(20)). Later the forces were directed against pavilion 4B of the criminal center (*supra* para. 197(23), 197(24), and 197(31)), once the female inmates started moving to that pavilion for protection, and that the inmates of 4B starting helping them. At the time of the facts, high state authorities considered that these women located in pavilion 1A were members of subversive organizations and that determined, in great measure, the state's actions.

223. When analyzing the facts and their consequences the Court will take into account that the women that were affected by the acts of violence differently than the men, that some acts of violence were directed specifically toward the women and others affected them in greater proportion than the men. Different Peruvian and international organizations have acknowledged that during the armed conflicts women face specific situations that breach their human rights, such as acts of sexual violence, which in many cases is used as "a symbolic means to humiliate the other party."<sup>126</sup>

224. It has been acknowledged that during domestic and international armed conflicts the confronting parties used sexual violence against women as a means of punishment and repression. The use of state power to breach the rights of women in a domestic conflict, besides affecting them directly, may have the purpose of causing an effect in society through those breaches and send a message or give a lesson.

225. In this regard, in its Final Report the Commission for Truth and Reconciliation of Peru stated that in the armed conflict there was "a practice [...] of rapes and sexual violence mainly against women," which "is attributable [...] in first term to state agents [...] and] in less measure to members of the subversive groups." Likewise, the CVR stated that during the mentioned conflict the acts of sexual violence against the women were intended to punish, intimidate, pressure, humiliate, and degrade the population.

226. The Court has verified that different acts that occurred in the present case in detriment of the women responded to the mentioned context of violence against women in said armed conflict (*infra* paras. 306 through 313).

227. Based on that presented in this chapter with regard to the context in which the events occurred and on the execution of the so-called "Operative Transfer 1", whose purpose was to endanger the life and integrity of the female and male inmates that were imprisoned in pavilions 1A and 4B of the Criminal Center Castro Castro, the Court considers as proven that in the present case there were multiple factors that determine the seriousness of said events and that will be considered by this Tribunal in the determination of the juridical consequences in the following chapters on the alleged violations to the American Convention.

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<sup>126</sup> Cfr. U.N., Committee for the Elimination of Discrimination Against Women, 11<sup>o</sup> meeting period. 19 General Recommendation "Violence against women". Doc. HRI/GEN/1/Rev. 1at84 (1994), para. 16; U.N., Human Rights Commission, 57<sup>o</sup> meeting period 2001, *Report of Mrs. Radica Coomaraswamy, Special Rapporteur on Violence against women, with inclusion of their causes and consequences*, presented pursuant to ruling 2000/45 of the Human Rights Commission, "Violence against women perpetrated and/or condoned by the State in times of armed conflicts (1997- 2000)", E/CN.4/2001/73, para. 44; and Ombudsman of the People of Peru. Defense Report No. 80, *Political Violence in Peru: 1980-1986 a rapprochement from the gender perspective, chapter IV, pages 34, 35, and 45.*

**X**  
**VIOLATION TO ARTICLE 4 (RIGHT TO LIFE)**  
**OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) OF THE SAME**

*Arguments of the Commission*

228. Regarding the alleged violation of Article 4 of the Convention, in relation to Article 1(1) of the same, the Commission argued, in synthesis, the following:

“Lack of prevention and excessive use of force”

- a) there was an express lack of prevision of Peruvian authorities in supervising and controlling inmates within the pavilions in which there was an alleged resistance to the transfer, and in the permitting the entrance of weapons;
- b) when initiating the operative the State did not recur to alternative mechanisms tending to achieve a negotiated solution to the transfer or to weakening the capacity of resistance of the inmates and expressly rejected the intervention of the representatives of the International Red Cross Committee, of the Episcopal Commission of Social Action, of the National Human Rights Coordinator, and of the Inter-American Commission of Human Rights. The State’s police officials employed, from the start of the operative, excessive force and even warlike material that caused the partial destruction of the pavilions object of the operative;
- c) all transfer action of detainees must be planned and controlled in order to reduce to a minimum the use of force and the risks to the life and physical integrity of the people involved, and it must have the necessary provisions in order to determine the responsibilities of state agents that use their weapons;
- d) the legitimate use of public force implies, among other factors, that it must be necessary and proportionate. The police and other officers in charge of enforcing the law must protect the rights to life, liberty, and security of the person, being able to employ force, only, in a case of direct or imminent danger of death or injuries for the agents themselves or other people;
- e) to resist the entrance of police officers to the criminal center, some of the inmates may have triggered fire weapons, with discrepancy between the parties regarding the number, power, scope, and functionality of said weapons. This situation cannot be clarified due to the irregular handling of evidence and the partial destruction of the results of the investigation;
- f) the evidence provided by the State proves that the majority of the fatal victims presented between 3 and 12 bullet wounds, some of these in their lower extremities, and that other fatal and injured victims presented injuries compatible with those produced by blunt or sharp objects and lacerations that could be the consequence of beatings. Additionally, it has been proven that the form in which the operative was carried out from its beginning, employing explosives to knock down walls, and up to its conclusion, with the partial demolition of pavilion 4B of the criminal center Castro Castro, which process an disproportionate use of force, and in an



indiscriminate manner against any inmate without attending to the fact that they had surrendered or turned themselves in;

g) the type of weapons employed during the incursion leads to conclude that the state agent's intention was to cause serious physical and psychological damage, as well as the elimination of the greatest number of inmates possible;

h) the authorities' lack of prevention in avoiding the entrance of weapons in the criminal center and their possession, the tenancy of home-made explosives by the inmates, and the disproportionate use of force throughout the 4 days that the incursion lasted, allow the attribution to the State of the deaths occurred as of the first day of the operative "Transfer 1" and up to the moments prior to the surrender of the inmates, on May 9, 1992, constituting violations to Article 4 of the American Convention and a failure to comply with the general obligation of respect and guarantee contemplated in Article 1(1) of the same;

#### "Extrajudicial killings"

i) in the final arguments it indicated that "the lack of training as well as the lack of control in the operative is evident, in cases such as that of the criminal center Castro Castro, in facts that result in the extra-legal execution of unarmed inmates. In these cases it is proven that the use of fire weapons is not necessary and that, in any case, the motives announced for the operation are not real;"

j) once the prisoners "were forced to yield" and they were notoriously defenseless, several of them being seriously injured, the State had the duty to treat those people in humanly manner under all circumstances, and to avoid any type of damage to them, without the use of lethal force being justifiable. After the prisoners' surrender, the police executed in a selective manner at least 11 inmates while they exited pavilion 4B; and afterwards at least 5 prisoners were separated by the police from the group of inmates that had surrendered and were located in the courtyard called "no man's land", showing up dead in other parts of the criminal center. Those 16 people, identified before the events as leaders of "Sendero Luminoso", were extra-legally executed, presumably in compliance with orders from the Army's Intelligence Director, the Commander of the Armed Forces, and the President of the Republic himself, therefore the Commission argues the violation of Article 4 of the Convention and of the general obligation of respect and guarantee contemplated in Article 1(1) of the same instrument, also for these events;

k) in its final arguments it stated that, at least in one case, one of the inmates was transferred alive to the morgue, where they planned to kill him, action prevented by his mother and a doctor of said establishment;

#### "Lack of investigation"

l) when the use of force has caused death, or even injuries, the State has an international obligation to determine, through independent and impartial judicial bodies, if the force used was excessive and, in its case, must punish the perpetrators and planners, as well as compensate the victims or

their next of kin. If it does not carry out an investigation in said terms, the State incurs in international responsibility related to its obligation to guarantee the right to life enshrined in the American Convention. Additionally, it would be creating an environment of impunity, in which these events contrary to the duty of respect and guarantee of the right of life may repeat themselves. Even when the individual perpetrator of the violation, it corresponds to the State to compensate the victim or his next of kin if said violation was committed by a state agent;

m) the fragmented documentation handed over by the State under the name of "autopsy certificates" and "forensic medical certificates" only includes incomplete descriptions of the injuries suffered by the lethal victims and the injuries found in some of the wounded, without determining their external location, possible cause, and form of production, antiquity, trajectory, and entrance or exit wounds (in the case of injuries caused by bullets). Similarly, said reports do not refer to the bullets recovered in the victims' bodies. Likewise, the absence of records of the removal of the bodies is a very important omission that contributes to the impossibility to technically determine the circumstances of death in relation with the perpetrators of the same, since they only evidence the Commission has in order to know how the deaths occurred are the written statements provided by the petitioners and not contested by the State, as well as the description from the report of the Commission for Truth and Reconciliation;

n) a part of the domestic case file was burned, under the protection of that stated in R.M.N° 456-90-IN-PNP and Article 35 of the Rules of Procedure of Police Documentation. The destruction of vital evidence for the complete elucidation of the events constitutes an obstruction to justice;

o) due to the pattern of obstruction to justice in the present case and before the State's failure to comply with its obligation to act with due diligence to clarify the "massacre" committed in the Criminal Center Castro Castro, Peru is responsible for the violation of the right to life and failure to comply with the general obligation of respect and guarantee contemplated in Article 1(1) of the Convention, in detriment of the people listed in section 42(1) of the application;

"The State's failure to comply with the obligation established in Article 1(1) of the American Convention"

p) in its brief of final arguments it indicated that almost a hundred of the victims of the present case are women, for who the consequences of the breaches to human rights analyzed resulted especially gross;

q) in its brief of final arguments it stated that the duties of prevention, investigation, and punishment that correspond to the State have been gathered in the Convention of Belém do Pará, which even though was not in force in Peru at the time of the facts, may be used in order to analyze the State's responsibility for the violations to Articles 4, 5, 8, and 25 of the American Convention, in virtue of the stated in Article 29 of the same; and

r) in its brief of final arguments it indicated that the right to be exempt of violence in the public and private sphere, stipulated in Article 3 of the

Convention of Belém do Pará, includes the right to the protection of other basic rights including life. Therefore, there is a comprehensive connection between the guarantees established in the Convention of Belém do Pará and the basic rights and liberties stipulated in the American Convention, which applies when dealing with the violence against women as a breach to human rights.

### *Arguments of the common intervener*

229. Regarding the alleged violation of Article 4 of the Convention, in relation to Article 1(1) of the same, the common intervener argued that:

"The flagrant violation of the principle of general law of the fundamental considerations of humanity in the case *sub judice*"

a) from the evidence it can be concluded that the facts were a "deliberate military attack by the State against persons imprisoned under its custody, defenseless, behind bars in a building, [without means of escape], among which there were people in advanced stages of pregnancy, elderly women, and handicapped persons, who were submitted to four days of an uninterrupted use of armed force by air and land, with weapons especially chosen to cause an atrocious and inhuman damage [...] with the objective of exterminating them." Said attack violated all consideration of humanity with regard to the life and integrity of the prisoners;

"The existence of an armed conflict and the right to life and integrity of the prisoners of pavilions 1A and 4B"

b) the people who were detained in the criminal center were civilians under the State's custody and, therefore, they were protected by common Article 3 of the Conventions of Geneva, which prohibits attacks against people who, within an armed conflict, are not taking part in the hostilities, are out of combat, or imprisoned;

"Hermeneutics of humanitarian law and the right to human rights"

c) the operative in the prison "Castro Castro" had the illegal purpose of murdering the prisoners in mass, "therefore the application of proportionality tests does not apply here. There are no 'proportionate and disproportionate massacres'. The massacres that have been planned, ordered, and directed as such are illegal acts under international law;"

d) white phosphorous gas weapons, classified as incendiaries, and high speed bullets were used. The use of these weapons against civilians and fighters, or as anti-personal weapons, is forbidden by humanitarian international law;

e) the violation to Article 4 of the American Convention also refers to behaviors directed to taking someone's life, "to such a point that any behavior of a State that constitutes an imminent threat against life (as occurred with all the survivors of the 4 days in question) constitutes a violation to the obligations of the Peruvian State under [this] Article;"

"The gender violence in the present case"

f) the massacre was initially directed against approximately 133 women who were located in pavilion 1-A of the prison Miguel Castro Castro, with the objective of exterminating them, thus becoming individualized targets of the attack against the prison. Many of the female inmates were murdered point blank;

g) in the final oral arguments she stated that at the time of the facts the inmate Eva Challco was approximately 7 months pregnant and she gave birth prematurely on June 27, 1992. Sadi, the son of Eva Challco, "should have been considered present in pavilion 1A, since he was about to be born and has been a direct victim of the entire attack as a person since he was physically there within Eva's womb;"

"State Crimes and the State's International Responsibility"

h) "the violations to human rights [...] were not an 'excess' of some police officers that did not know how to 'control' a situation of violence in the prison. It was a massacre planned from the highest levels of the Peruvian State, [...] there was a chain of command" from Alberto Fujimori, his cabinet, and the high military authorities of Peru;

"Crimes against Humanity"

i) "the violations object [of this case ...] constitute, at least, crimes against humanity;"

"Genocide"

j) "the violations object [of this case ...] were committed against the victims having as a target their alleged belonging to a specific group (or considered by the Peruvian State as 'permeable' to communist ideas), with the intention of destroying said group in all or in part." Even though in the present case the identity of the group of alleged victims is not a protected category under the definition of the Convention for the Prevention and Punishment of the Crime of Genocide, "the State of Peru [in its Criminal Code] has accepted a definition of genocide that expands the definition reflected in [said] Convention, including the 'social group' among the protected groups and therefore they are linked *vis a vis* under its jurisdiction to not submit those social groups to genocidal acts;" and

k) in the present case genocide occurs in virtue of the fact that the State "is responsible for murdering members of the group of prisoners in question," causing them serious physical and mental damage, as well as submitting said group to "life conditions calculated to cause their physical destruction in all or in part." Besides, these acts were committed against these prisoners "for considering them part of a specific group which was a State target." The "intent" or "malice *specialis*" required for the crime of genocide can be proven through different acts attributed to the State.

*Arguments of the State*

230. The State expressed:

a) in its response to the petition and observation to the brief of pleadings and motions, that "it accepts the failure to comply with the general obligation of respect and guarantee of human rights established in Article 1(1) of the American Convention[, ...] it accepts partial responsibility in the violations to the right to life[, ...] as long as the Judicial Power of Peru does not issue a ruling on the historical and detailed truth of the events that occurred between May 6 and 9, 1992;"

b) in its final oral arguments it stated that Peru, for twenty years, lived a extremely serious situation of internal conflict" and that "the facts of May 6 to 9[, 1992 ...] were committed against inmates of a specific orientation. The acts of violence were directed towards two pavilions, or mainly against one pavilion, pavilion 1A and pavilion 4B, occupied at the time of the facts by inmates accused of crimes of terrorism linked to Peru's communist party Sendero Luminos[. ...T]he act had a direct purpose: attack Sendero Luminoso;"

c) in its final written arguments that "even though individual responsibilities will be determined within the Domestic Jurisdiction, in the terms of the proceedings that are currently being followed before the Judicial Power [...,] the magnitude of the facts to which the present proceedings refer and the responsibility of the Peruvian State in the same cannot be ignored;" and

d) that "it acknowledges its responsibility for the facts that occurred between May 6 and 9, 1992."

*Considerations of the Court*

231. Article 1(1) of the Convention states that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

232. Article 4(1) of the Convention states that:

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

233. The Tribunal considers it convenient to analyze the violation of Article 4 of the Convention due to the seriousness of the facts, the circumstances in which they occurred, and the fact that Peru did not acknowledge the events that occurred after May 9, 1992 (*supra* paras. 150 through 152).

234. As indicated by the Court (*supra* para. 227), in the analysis of the present chapter the information mentioned that determine the seriousness of the facts of this case will be taken into account. Therefore, it is precise to start with the fact that what happened in the Miguel Castro Castro Prison was a massacre and that there are no grounds to state that the inmates represented a threat to state agents that called for an attack of that magnitude (*supra* paras. 215 through 219). When the first act of the "operative" there was no riot of the inmates, or any other cause that could determine the legitimate use of force by state agents (*supra* para. 215). On the contrary, the behavior observed by the security agents, high State authorities, and other state officials during the four days that the "operative" lasted, as well as after it, proves that it was an attack executed to endanger the life and integrity of the inmates that were located in pavilions 1A and 4B. In this sense, in the judgment issued by the National Terrorism Chamber on February 3, 2004 it indicated that "there are elements that generate a reasonable suspicion in the Judging Body, regarding the fact that with operative transfer 1 as an excuse the highest levels of the government planned [...] the physical elimination of those imprisoned for terrorism that occupied pavilions One A and four B." (*supra* para. 197(17))

235. In this regard, when acknowledging its international responsibility for the events of May 6 to 9, 1992, the State itself expressed that "the acts of violence were committed against inmates of a specific orientation," who were in "pavilion 1A and pavilion 4B, occupied at the time of the facts by inmates accused of crimes of terrorism linked to Peru's communist party, Sendero Luminoso." As expressed by the State, "the act had a direct purpose: attack Sendero Luminoso" and "from the military strategy of the Government of that time there was a steering of the actions towards that party, towards that group, there was a war logic [towards the] enemy."

236. This case presented itself within a context of a systematic violation to human rights, in which there were extrajudicial killings of people suspected of belonging to armed groups that operate at the margin of the law, such as Sendero Luminoso, and said practices were carried out by state agents following orders of military and police leaders (*supra* para. 203).

237. The Court has established that the right to life plays a fundamental role in the American Convention for being the essential prerequisite for the realization of the other rights.<sup>127</sup> The States have the obligation to guarantee the creation of the conditions required so that violations to that inalienable right do not occur, and the duty to prevent their agents from endangering it.<sup>128</sup> The compliance of Article 4, related to Article 1(1) of the American Convention, not only presupposes that nobody will be arbitrarily deprived of their life (negative obligation), but it also requires that the States adopt all the appropriate measures to protect and preserve the right to life (positive obligation),<sup>129</sup> pursuant to the right to guarantee the full and free

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<sup>127</sup> Cfr. *Case of the Pueblo Bello Massacre*, *supra* note 7, para. 120; *Case of the Indigenous Community Yakye Axa*. Judgment of June 17, 2005. Series C No. 125, para. 161; and *Case of the "Juvenile Reeducation Institute"*. Judgment of September 2, 2004. Series C No. 112, para. 156.

<sup>128</sup> Cfr. *Case of Montero Aranguren et al. (Detention Center of Catia)*. Judgment of July 5, 2006. Series C No. 150, para. 64; *Case of the Ituango Massacres*, *supra* note 7, para. 129; and *Case of Baldeón García*, *supra* note 21, para. 83.

<sup>129</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 75; *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 65; and *Case of the Ituango Massacres*, *supra* note 7, para. 130.

exercise of the rights of all the people under its jurisdiction.<sup>130</sup> This active protection of the right to life by the State not only involves its legislators, but the entire state institution and those that must protect the security, being these either police forces or armed forces.<sup>131</sup>

238. Based on the aforementioned, the States must adopt the necessary measures not only to prevent and punish the deprivation of life as a consequence of criminal acts, but also to prevent arbitrary executions by their own police force,<sup>132</sup> situation that is made worse when there is a pattern of violations to human rights.<sup>133</sup> The State must especially supervise that their police forces, which were attributed the use of legitimate force, respect the right to life of those under its jurisdiction.<sup>134</sup>

239. As can be concluded from the "Basic Principles of the Use of Force and Fire Arms by Law Enforcement Officials," the state police forces may only recur to the use of lethal weapons when it is "strictly inevitable to protect a life" and when less extreme measures result ineffective.<sup>135</sup>

240. As has been stated on previous occasions, this Court acknowledges the existence of the power and even the obligation of the State to guarantee security and maintain public order, especially within the prisons, using force if necessary.<sup>136</sup> In this sense, it has also established that by reducing the alterations to public order the State must do so in accordance with and in application of domestic legislation in seeking the satisfaction of public order, as long as this legislation and the actions taken when applying it adjust, at the same time, to the norms for the protection of human rights applicable to the subject.<sup>137</sup> The state's power is not limited; it is

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<sup>130</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 75; *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 65; and *Case of the Ituango Massacres*, *supra* note 7, para. 130.

<sup>131</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 75; *Case of the Ituango Massacres*, *supra* note 7, para. 131; and *Case of the Pueblo Bello Massacre*, *supra* note 7, para. 120.

<sup>132</sup> Cfr. *Case of Baldeón García*, *supra* note 21, para. 87; *Caso of the "Mapiripán Massacre"*, *supra* note 8, para. 232; and *Case of Huilce Tecse*, *supra* note 22, para. 66.

<sup>133</sup> Cfr. *Case of Baldeón García*, *supra* note 21, para. 87; *Case of the Gómez Paquiyauri Brothers*, *supra* note 21, para. 128; and *Case of Myrna Mack Chang*. Judgment of November 25, 2003. Series C No. 101, para. 139.

<sup>134</sup> Cfr. *Case of Servellón García et al.*, *supra* note 3, para. 102; and *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 66.

<sup>135</sup> Cfr. U.N., Basic Principles on the Use of Force and Fire Arms by Law Enforcement Officers, adopted by the Eight Congress of the United Nations for the Prevention of Crime and Treatment of Delinquents, Habana, Cuba, August 27<sup>th</sup> through September 7<sup>th</sup>, 1990, Principles 4 and 9. In the same sense, Cfr. *Case of Yare I and Yare II Capital Regional Penitentiary Center. Provisional Measures*, *supra* note 125, Fifteenth whereas, and *Monagas Judicial Confinement Center (La Pica). Provisional Measures*, *supra* note 125, Seventeenth whereas.

<sup>136</sup> Cfr. *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 70; *Case of Neira Alegría et al.* Judgment of January 19, 1995. Series C No. 20, para. 75; *Case of Godínez Cruz*. Judgment of January 20, 1989. Series C No. 5, para. 162; *Case of Yare I and Yare II Capital Regional Penitentiary Center. Provisional Measures*, *supra* note 125, Fifteenth whereas, and *Monagas Judicial Confinement Center (La Pica). Provisional Measures*, *supra* note 125, Seventeenth whereas; and *Case of Children Deprived of Liberty in the "Complejo do Tatuapé" of FEBEM. Provisional Measures*. Ruling of the Court of November 30, 2005, Twelfth whereas.

<sup>137</sup> Cfr. *Case of the Caracazo*. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of August 29, 2002. Series C No. 95, para. 127; *Case of Hilaire, Constantine and Benjamin et*

necessary that the State act "within the limits and pursuant to the procedures that permit both the preservation of public security as well as the fundamental rights of human beings."<sup>138</sup> In cases that have come before this Court in which the State has used force to maintain public order within criminal centers when there is a riot, which did not happen in the present case, the Tribunal has analyzed if there were sufficient elements to justify the magnitude of the force used.<sup>139</sup>

241. However, as was established (*supra* para. 215), at the time at which the State started the "operative" the inmates were not in mutiny and it has not been proven that there was any cause that called from the legitimate use or force by the state agents in that first act of the attack. The resistance presented by the inmates was after the attack, as a normal reaction to the offensive of the police officials, as the result of a natural instinct of defense of their life and physical integrity.

242. For the four days during which the so-called "Operative Transfer 1" lasted the inmates of pavilions 1A and 4B constantly saw their lives threatened due to the intensity of the attack, which implied the use of weapons of war and the participation of police and army agents, as well as special forces, and for the magnitude of the damages produced (*supra* para. 197(18) through 197(38)). According to the evidence included in the case file, the inmates spent four days looking for ways to survive the multiple and constant actions of the state that could lead to their death.

243. Likewise, according to the facts presented, 41 identified persons lost their life. From the analysis of the autopsy certificates it can be concluded that the majority of the victims presented between 3 and 12 bullet wounds to the head and thorax (*supra* para. 197(39)). Similarly from the physical exams performed by the expert José Quiroga, who describes the wounds of 13 of the survivors, it can be concluded that at least 4 people present wounds from firearms in parts of the body where one can assume that the result of the shot would be death, such as the head, neck, and thorax. For these reasons, among others, it can be concluded that the shots fired by the police agents did not seek to immobilize or persuade the inmates, but instead cause an irreparable damage to the lives of said people.

244. In the present case the police forces, in a attitude coherent with the purpose of the "Operative Transfer 1", did not make any effort to use other means different to the use of lethal force (*supra* para. 216); thus, rejecting the offer of intervention made by the International Red Cross, the Inter-American Commission on Human Rights, the Episcopal Commission for Social Action, and the National Human Rights Coordinator.

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*al.* Judgment of June 21, 2002. Series C No. 94, para. 217; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 of the American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 67.

<sup>138</sup> *Cfr. Case of Bulacio*. Judgment of September 18, 2003. Series C No. 100, para. 124; *Case of Juan Humberto Sánchez*. Judgment of June 7, 2003. Series C No. 99, para. 86; *Case of Yare I and Yare II Capital Regional Penitentiary Center. Provisional Measures*, *supra* note 125, Tenth whereas, and *Monagas Judicial Confinement Center (La Pica). Provisional Measures*, *supra* note 125, Seventeenth whereas; and *Case of Urso Branco Prison*. Provisional Measures. Ruling of the Inter-American Court of Human Rights of April 22, 2004, Tenth whereas.

<sup>139</sup> *Cfr. Case of the Caracazo. Reparations*, *supra* note 137, para. 127; *Case of Durand et al.* Judgment of August 16, 2000. Series C No. 68, para. 68; and *Case of Neira Alegría et al.*, *supra* note 136, para. 74.



245. The seriousness of the events of the present case can be clearly seen when analyzing the form in which some of the inmates, who on the last day of the "operative" announced to the state agents that they were going to exit pavilion 4B and requested that the shooting stop, were executed; however, when they came out they were received with gusts of bullets from shots fired by state agents (*supra* para. 197(37)). The other inmates that also decided to exit pavilion 4B faced the same luck (*supra* para. 197(37)). On that same day another group of inmates, who were under the control of state authorities, were separated from the group and executed by state agents (*supra* para. 197(38)). In this case the deliberate way in which the police officials acted in order to deprive the inmates of their life is notorious. Due to the situation of these inmates, there was no possible justification for the use of weapons against them, nor was there any need of self defense, or an imminent danger of death or serious injuries against the police officers.

246. Similarly, it has been proven that once the "Operative Transfer 1" concluded, some inmates were taken to hospitals and they died because they did not receive the medications or the medical attention required (*supra* para. 197(47)). Those omissions in the medical assistance to the injured inmates responded to deliberate decisions and no to mere carelessness or negligence, which resulted in arbitrary deprivations of life.

247. Regarding the dead inmates, the Court declares as victims the 41 people identified in the Commission's application, which coincide with the people identified as dead by the common intervener, and regarding which there is evidence of their death and identification.

248. The Tribunal considers it necessary to refer to that stated by the Commission and the intervener regarding the possibility of the existence of dead inmates that have not been identified. In its application the Commission made emphasis on the fact that "the petitioners have argued that the fatal victims were at least 86," but that the Commission would refer "only to the victims whose decease has been established in a convincing manner through the body of evidence offered by the parties and from the report prepared by the Commission for Truth and Reconciliation, without detriment to any new evidence that may arise in the future and prove the identity and circumstances of death or disappearance of the other victims referred to by the petitioners." The Commission in its application stated as deceased victims 41 people identified and one "N.N. autopsy report 1944 of 5/7/92." Likewise, it provided copy of 10 autopsy certificates of people identified, one of which corresponds to the police officer who dies (*supra* para. 197(40)). The Commission did not argue that none of those 10 people were victims of this case.

249. On its part, the common intervener presented as an appendix to the brief of pleadings and motions a list in which the same 41 dead victims identified and included in the application appear, but it added a "N.N. Protocol 2007, (man) who died burned" and included at the of its list 43 "unidentified prisoners", without indicating if there was any autopsy protocol or if the execution of one was pending.

250. In this sense, it is important to point out that:

- a) neither the Commission nor the intervener presented a copy of the "autopsy protocol 1944 of May 7, 1992" included in the Commission's list of victims;

- b) of the evidence included in the case file, the Court has verified that the nautopsy protocol that the intervener called "N.N. Protocol 2007, (male) died burned", actually corresponds to the autopsy protocol of Mr. Mario Francisco Aguilar Vega, which is N° 2007. Said document states that the diagnosis was "due to: bullets from firearms/ Carbonization". Said male is included within the 41 deceased identified and listed both by the Commission and the intervener. Likewise, from the testimonial and documentary evidence provided it could be concluded that the body of this man was never handed over to his next of kin;
- c) regarding that argued by the intervener, in the sense that there were 43 "unidentified prisoners", it is necessary to clarify that the evidence on which the intervener based their addition to her list of deceased are statements of other surviving inmates, in which they recount having seen inmates die, without identifying them. In this sense, the Court notes that these recounts could refer to the way in which the people who are already identified died; and
- d) it can not be concluded from the evidence included in the case file that there are currently bodies of victims that have not been identified.

251. Therefore, there is doubt regarding compliance by the State of the duty to identify all the inmates that died and hand over the remains to their next of kin, and it has been proven that in the case of the inmate Mario Francisco Aguilar Vega they were not handed over. With regard to the remains of the latter the Tribunal will decide the corresponding measure in the chapter on Reparations (*infra* para. 442). Likewise, this Tribunal considers that the State must adopt all the necessary measures to ensure that all inmates that died as a consequence of the attack be identified and their remains be handed over to their next of kin, pursuant with its domestic legislation. If the other inmates that died are identified, their next of kin may present the corresponding claims within the domestic courts.

252. According to the acknowledgment of partial responsibility made by the State and the considerations of the previous paragraphs, Peru is responsible for the violation of the right to life enshrined in Article 4 of the American Convention, in relation to Article 1(1) of the same, in detriment of the 41 dead inmates that have been identified, whose names have been included in Appendix 1 of victims of the present Judgment that for these effects forms part of the same.

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#### *Obligation to effectively investigate the facts*

253. The Court has established that in order to effectively guarantee the rights to life and integrity it is necessary to comply with the obligation to investigate the infringement of the same, which derives from Article 1(1) of the Convention along with the substantive right that must be protected or guaranteed.<sup>140</sup>

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<sup>140</sup> Cfr. *Case of Servellón García et al.*, *supra* note 3, para. 119; *Case of Ximenes Lopes*, *supra* note 3, para. 147; *Case of the Ituango Massacres*, *supra* note 7, para. 297; and *Case of Baldeón García*, *supra* note 21, para. 92.

254. In the present case, this Court understands that from the events that occurred in the Miguel Castro Castro Prison the obligation to investigate the violation of the right to life arose for the State, especially if you take into consideration that tens of people dies and many more were injured due to an “operative” that implied the use of force, with great intensity, during 4 days and in which police and army agents participated.

255. The duty to investigate is an obligation of means, not results. The same must be assumed by the State as its own juridical duty and not as a simple formality condemned beforehand to be fruitless,<sup>141</sup> or as a simple action of individual interests, which depends on the procedural initiative of the victims or their next of kin or of the private contribution of evidentiary elements.<sup>142</sup> The latter does not contravene the right that the victims of violations of human rights or their next of kin, to be heard during the investigation proceeding and the judicial processing of the case, as well as to participate amply in the same.<sup>143</sup>

256. At the light of this duty, once the state authorities become aware of the fact, they must begin *ex officio* and without delay, a serious, impartial, and effective investigation.<sup>144</sup> This investigation must be carried out through all legal means available and oriented to the determination of the truth and the investigation, persecution, capture, prosecution, and in its case, punishment of all those responsible for the facts, especially when state agents are involved.<sup>145</sup>

257. To determine if the obligation to protect the rights to life through a serious investigation of what has occurred, has been fully complied with, the procedures opened at an internal level destined to identifying those responsible for the facts of the case must be examined. This exam shall be made in the light of that stated in Article 25 of the American Convention and of the requirements imposed by Article 8 of the same for all proceedings, and it will be carried out in Chapter XV of the present Judgment.

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258. Due to all the aforementioned, the Court concludes that the State is responsible for the violation of the right to life enshrined in Article 4(1) of the Convention, in relation to Article 1(1) of said treaty, in detriment of the 41 dead inmates identified, whose names are listed in Appendix 1 of victims of the present Judgment that for these effects forms part of the same. The facts are especially

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<sup>141</sup> Cfr. *Case of Ximenes Lopes*, *supra* note 3, para. 148; *Case of the Ituango Massacres*, *supra* note 7, para. 296; and *Case of Baldeón García*, *supra* note 21, para. 93.

<sup>142</sup> Cfr. *Case of Goiburú et al.*, *supra* note 5, para. 117; *Case of Baldeón García*, *supra* note 21, para. 93; and *Case of the Pueblo Bello Massacre*, *supra* note 7, para. 144.

<sup>143</sup> Cfr. *Case of Goiburú et al.*, *supra* note 5, para. 117; *Case of the Ituango Massacres*, *supra* note 7, para. 296; and *Case of Baldeón García*, *supra* note 21, para. 93.

<sup>144</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 77; *Case of Servellón García et al.*, *supra* note 3, para. 119; and *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 79.

<sup>145</sup> Cfr. *Case of Goiburú et al.*, *supra* note 5, para. 117; *Case of Servellón García et al.*, *supra* note 3, para. 119; and *Case of Ximenes Lopes*, *supra* note 3, para. 148.

serious in reason of the considerations indicated in this chapter and in chapter IX on "International Responsibility of the State within the context of the present case."

**XI**  
**VIOLATION OF ARTICLE 5 (RIGHT TO HUMANE TREATMENT)**  
**OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) OF THE SAME, AND IN**  
**CONNECTION TO ARTICLES 1, 6, AND 8 OF THE INTER-AMERICAN CONVENTION TO PREVENT**  
**AND PUNISH TORTURE**

*Arguments of the Commission*

259. Regarding the alleged violation of Article 5 of the Convention, in relation to Article 1(1) of the same, the Commission stated, in synthesis, the following:

"Inmates injured during 'the confrontation'"

- a) approximately 175 inmates were injured during the operative called "Transfer 1", due to the shots fired and the explosions caused by the State's police officers, and to the fall of debris during the confrontation, as well as of the beatings and mistreatments committed by the state agents to the prisoners who surrendered once the assault concluded;
- b) the State itself, due to its lack of prevention in the entrance of weapons to the criminal center, created a situation in which the need to submit the inmates through the use of force and, therefore, cause them possible injuries to their personal integrity was predictable. Who carried out the first aggression is irrelevant, since even if the prisoners started a riot or fired weapons, there is sufficient evidence that the police used an excessive, unnecessary, unmeasured, and disproportionate force against the inmates, injuring many of them;
- c) several of the inmates were injured by the shots fired by the police officers while they exited pavilion 4B, after "having surrendered and disarmed;"
- d) the state did not investigate with the due diligence the injuries produced to the inmates during the confrontation, nor did it punish those responsible. Therefore, it is impossible for the Commission to determine if any of the injuries caused to the inmates were produced with a legitimate, necessary, and proportionate use of public force or in a legitimate defense by any of its agents;
- e) the analysis made by the Commission in relation to the lack of prevention and the excess in the use of force that caused violations to the right to life, results applicable *mutatis mutandi* regarding the violation of the right to humane treatment, in accordance with the general obligation of respect and guarantee contemplated in Article 1(1) of the Convention;

"Treatment offered to the inmates after taking of pavilions 1A and 4B"

f) in the days after the operative called "Transfer 1" and until May 22, 1992, included, the inmates listed in the petition were obliged to remain face down in the courtyards known as "no man's land" and "admission", without being supplied enough water and food, or without being allowed to change their clothes, or offered blankets to cover themselves, or a mattress where to lie down. The aforementioned, despite the fact that many of the inmates had been injured during the assault;

g) in its final written arguments it indicated that the injured inmates that were transferred to health centers received new mistreatments on the way to said establishments, as well as new intents of an extra-legal execution. They were submitted to inadequate and morally degrading sanitary conditions, which is especially serious in the case of the women. Many of those injured, even when they had not yet recovered, were released with the only purpose of taking them back to the prison, where the experiences lived by Mrs. Gaby Balcázar and Miriam Rodríguez, and of the son of Mrs. Julia Peña Castillo, Víctor Olivos Peña, recounted during the public hearing before the Court, stand out;

h) in the final written arguments it stated that the female inmates were treated by the state agents with special contempt and extreme cruelty from the beginning of the attack. The "[violating] situations had especially serious consequences for the female victims, several of which were pregnant." The assault started in the only pavilion of the prison occupied by women, and once the operative had concluded they were submitted to conditions that threatened their dignity as women. The female inmates that were relocated in prisons for women were the victims of physical and psychological mistreatment during their transfer and within the penitentiaries to which they were taken. Similarly, the women injured who were taken to hospitals had to take off their clothes and remain like that for weeks, surrounded by armed individuals, and they were not allowed to clean themselves or use the bathroom, except accompanied by an armed guard that did not let them close the door;

i) in its final written arguments it indicated that women have been the victims of a history of discrimination and exclusion due to their gender, which has made them more vulnerable to being abused when violent acts are carried out against specific groups for different reasons, such as inmates. The violence against women is a war strategy used by the actors of the armed conflict to advance in their control of both territory and resources. Additionally, these aggressions act as a tactic to humiliate, terrify, destroy, and injure the "enemy", the family or the community to which the victim belongs;

"Lack of medical assistance to the inmates that were injured"

j) after the surrender of the inmates, between May 10 and 22, 1992, around 160 inmates that were injured during the execution of the operative "Transfer 1" and that had been submitted by the forces of Peruvian security, did not receive an adequate and timely medical assistance which caused their injuries to become more serious, and in some cases resulted in permanent physical consequences;

k) in situations of serious injuries, resulting from the use of force by state authorities, the norm that enshrines the right to humane treatment demands that the State adopt immediate measures to protect the physical integrity of the person under police custody, judicial authorities or penitentiary authorities. The State has the specific positive duty to protect the physical integrity of any person deprived of their liberty, which includes the adoption of the actions necessary to maintain an adequate health standard. Lack of an adequate medical treatment in said situation must be qualified as inhuman treatment;

l) in the specific circumstance of the present case, the Commission requested that the Court declare that, once the operative "Transfer 1" had concluded, the lack of a timely and adequate medical attention to the injured parties listed in the application, as well as the lack of adoption of the actions necessary to guarantee in a timely and effective manner the procedures and medicines necessary to reestablish the highest health level possible in all the people injure during the events of the present case, constitute a violation to Article 5 of the Convention and a failure to comply with the general obligation of respect and guarantee contemplated in Article 1(1) of the same;

"Solitary Confinement"

m) once the operative "Transfer 1" had concluded, the male and female inmates were not allowed to communicate with their next of kin and attorneys for several days and in some cases for weeks. The latter places the individual in an unnecessary situation of vulnerability, where solitary confinement may be, in itself, a form of mistreatment. The Peruvian authorities should have allowed the survivors to communicate with their next of kin and attorneys in order to inform them of their situation and diminish the general uncertainty caused by the facts;

"Lack of information to the next of kin regarding the situation of the alleged victims"

n) in the final written arguments it indicated that the negligent or intentional inattention of the next of kin, who awaited in the surroundings of the prison, in the hospitals, and the morgues, constitutes in itself a violation to the right to humane treatment, due to the psychic anguish that the unjustified delay in informing on who died and who was injured caused in the next of kin;

o) in the final written arguments it stated that especially the mothers tried, unsuccessfully, to obtain information on the situation of their next of kin, receiving all type of insults and physical aggressions. Similarly, they had to go through terrible conditions to find their loved ones and recover their remains, once they were able to identify them. Mrs. Julia Peña was told on several occasions that her daughter was not in the morgue, and in order to be able to bury her she had to enter said place stealthily, opening the refrigerators, having to face the horror of decomposed and even cut up bodies of other victims, that had also been denied to their next of kin. During this entire process she did not receive any assistance from the officials in charge of the morgue; and

p) in its final written arguments it states that “[i]n virtue of [...] evidence presented to the process in a supervening manner, [...] it considers that the suffering experienced by said next of kin due to the lack of information, as well as the helplessness and anguish endured for years due to the inactivity of state authorities in elucidating the facts and punishing those responsible for the same, are reasons for which the victims’ next of kin must be considered victims of cruel, inhuman, and degrading treatments in the terms of Article 5 of the Convention, in relation to the general obligation of respect and guarantee established in the same treaty.”

#### *Arguments of the common intervener*

260. The common intervener argued the violation of Article 5 of the American Convention. It also argued the violation of Articles 1, 6, 7, 8, and 9 of the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women, appreciations that are not found in the application presented by the Inter-American Commission. The intervener argued, in synthesis, the following:

##### “Hermeneutics of Humanitarian law and the right to human rights”

- a) “the asphyxia, deprivation of water and food, the forced overcrowding, the severe mental suffering inflicted by the attack and the specific weapons chosen for it constitute a flagrant violation of the prohibition against torture;”
- b) “the attack was designed as a reproduction of hell.” This attack included the cutting off of electricity, bombings, and firebombs that produced an orange light, in an environment of complete darkness and of screaming voices. This was “intentionally planned” so that it would remain in the survivor’s neurons;

##### “Solitary confinement as a form of torture”

- c) the conditions of solitary confinement applied at the prisons of Santa Mónica, Castro Castro and Cachiche to the survivors of the “operative”, included total isolation from the exterior world, “without access to radios, newspapers, television, books, work or study activities, 24 hours per day, in cells of 2 by 2 meters, with at least another 2 people, with toilet included, without an adequate access to running water, any type of light, with a prohibition to talk among themselves, without bathroom materials, warm clothes, or medical attention.” These conditions lasted more than 5 months and constituted torture for the inmates, who on many occasions “went crazy” as a result of said conditions;
- d) the prisoners of Santa Mónica did not see their next of kin until September 1992, or the light of day until months after the massacre, which led them to lose pigmentation in their faces and dizziness. Besides, they remained with the same bloody clothes of the massacre, without even being able to change her underwear or obtain a coat for the cold;

e) she requests "that the prolonged solitary confinement to which the prisoners were submitted be acknowledged as torture due to its extent, [...] conditions, and the specific purpose of its application;"

"Isolated confinement from the world and total control of the human being: its total institutionalization for its slow destruction"

f) the regimen of absolute solitary confinement wanted to achieve complete control of the inmate's environment, with two additional objectives: inflict mental suffering on the inmate due to lack of contact with their next of kin, and restrict the support and communication with the outside world. Lack of communication with the next of kin was also used to control the inmates' will;

g) the confinement of the prisoner to a 24-hour immobilization, as well as deprivation of light and exercise were a severe way to inflict human suffering. There was a specific order to keep them inactive, "they could only eat, defecate, and sleep;"

h) according to a study "methods such as sensorial deprivation, isolation, sleep deprivation, forced nakedness, cultural and sexual humiliation, the use of military trained dogs to instigate fear, simulated killings, and threats of violence or death of detainees or their loved ones are forms of psychological torture;"

"The use of forced nakedness, the use of dogs without muzzles against detainees"

i) dogs without muzzles were used to intimidate and degrade helpless prisoners, in violation of Article 5 of the Convention and of the Manual of the United Nations in its Protocol of Istanbul;

j) the nakedness to which the prisoners were submitted, accompanied by "brutal and sadistic beatings, and the exposure [to the] cold or the night for long hours" constituted severe suffering;

"Electroshocks, phalanx, and blunt beatings on sensible parts of the body as a form of torture"

k) the prisoners and the injured who survived the massacre were stripped of their clothes and beaten with irons, sticks, and electroshocks on the head, back, soles, ankles, lungs, spinal cord, ribs, hips, hands, liver, and kidneys. The aforementioned caused severe physical damage in the survivors, and in some cases made it impossible for them to walk for several days. She requests that these beatings be acknowledged by the Court as a form of torture, in breach of Article 5 of the American Convention;

"Punishment Cells: The hole"

l) the torture of the survivors included the use of a special punishment cell called "the hole". This cell was made of metal; it measured approximately 1.70x2 mts., with a 10x10 cm. window, filled with water, rats, without water, and with a nauseating smell. The inmates secluded in the cell had to remain standing all day and night due to lack of space. There, the director of the



criminal center personally tortured them through beatings with a stick on their testicles, the leg, and feet. Also, the alleged victims were fed in a dirty plastic bucket used to feed the kitchen dogs;

“The general imprisonment conditions applied to the survivors constituted torture because they were an dishonor for the prisoners’ human dignity”

m) “the general imprisonment conditions applied to the survivors and described in detail in each of the statements presented before the Inter-American Court and recorded in the document List of Victims constituted torture because it was a regimen intentionally inflicted on them;”

“Gender violence in the present case”

n) the female inmates were seriously injured during the massacre and were dragged over dead bodies, without being allowed to receive help from other people;

o) the violence was also directed against the mothers, sisters, and wives of the alleged victims that went to visit their next of kin, submitting them to psychological tortures for having had to witness the massacre, as well as to physical and verbal attacks by the authorities of the operative. During those attacks they were thrown water and tear gas bombs, they were shot at and beaten. Several of the women were pregnant or were accompanied by children. The mothers also received death threats if they did not leave the place where “the operative” was taking place;”

p) it is meaningful that the State carried out the military operation on a female visiting day to the prison, even more so, “the attack was carried out [...] the week of Mother’s Day.” The State’s violence “had been planned in such a way that the exemplary punishment of the female and male political prisoners [...] be witnessed by their own mothers and sisters.” On Mother’s Day, the prisoners’ mothers would be picking up bodies at the morgue or visiting hospitals to find out if their loved ones had survived. Similarly, “several prisoners that were mothers would always [...] remember the connection between [Mother’s Day] and their extreme suffering in each killing.” The Castro Castro massacre was carried out so that “each Mother’s Day, [the] women would relive the suffering caused,” as well as to influence in “mothers or wives deny[ing] there children the possibility to join [the senderista lines];

q) “[t]here is no torture that does not take the victim’s gender into account. There is no [...] ‘neutral’ torture [...]. Even when a form of torture is not ‘specific’ for women[, ...] its effects will have specific results on women.” Due to the aforementioned, “even though not all forms of violence in this case were specific for women, [...] it constitue[d] a gender violence since it was directed [...] to attacking female identity;”

r) “the type of insults directed to [the women], the way in which they were beaten, and the prison regimen that denied them access to artifacts of feminine care, gynecological attention, [and] maternity rights, along with the offering of a ‘prize’ system to those who ‘abandoned’ their freedom of thought in exchange for ‘returning them’ their femininity giving them access to

implements such as comb, lipstick, etc., and to be reintegrated into their role of being a 'good mother' (those who accepted submission could see their children again) prove the gender aspects included in the torture inflicted and the specific damage caused to women *vis a vis* with men;"

s) "the regimen applied to the survivors of the massacre constituted an attack against their dignity, and a sustained violation to their right to be free of torture, as acknowledged by Article 4 of the American Convention." Besides, the suffering caused in the women of the present case falls under the definition of violence against women defined in Article 2 of the Convention of Belém do Pará;

t) "covering the period as of July 12, 1995, said violations constituted a violation to the object and purpose of the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women[, ...] which was signed by Peru on July 12, 1995[,] and violations [to] Article[s] 4 and 7 of the same Convention for the period that covers from 1996 on, as of when Peru ratified said treat on June 4, 1996." The State of Peru intentionally inflicted violence against the female political prisoners as punishment for their double transgression of the prevailing system: the use of the gender factor to cause damage and torture prisoners;"

#### "Post-Massacre physical and psychological violence"

u) "the State [...] inflicted brutal physical violence and serious psychological violence that as a whole constituted torture in the survivors of the massacre." This violence included frequent beatings, behaviors that intentionally denied the prisoners with children to effectively comply with the roles as mothers, intentional denial of adequate pre and post natal medical attention to pregnant women, as well as of basic condition within the prison that would respect the human dignity of women;

v) the solitary confinement measures affected women in a specific manner because they affected their relationship with their small children. Generally, the children that could only see their mothers through bars for small moments at a time started losing emotional control with them and many became unacquainted with them;

w) the imprisonment conditions imposed on the survivors violated Articles 4, 5, and 12 of the Convention for the Elimination of All Forms of Discrimination Against Women;

#### "Sexual violence" and "women's rape as a form of torture"

x) violence against women in the case included sexual violence of several kinds. This violence "was not limited to sexual rape, but instead the women were submitted [to] a more ample range of sexual violence that included acts that did not involve penetration or [...] physical contact." At least in one case there is evidence that one survivor of the Castro Castro massacre was sexually raped at the Police Hospital, and there are allegations of sexual violence with the "tips of the bayonets" with regard to the prisoner "extra-legally executed, Julia Marlene Peña Olivos;"

y) “the vaginal revisions or inspections of the prisoners in the context of rounds of inspection [...] carried out by male hooded police officers, using force, and without any other purpose than intimidating and abusing them constitutes flagrant breaches to the inmates’ rights, constituting violence against women.” Likewise, the vaginal revision practiced on the survivors’ female visitors “in complete absence of regulations, practiced by police, and not health, personnel, and as a measure of first and not last resource in the objective of maintaining the prison’s security constituted violence against women;” and

z) other forms of sexual violence included threats of sexual acts, “touching”, sexual insults, forced nudity, beatings on their breasts, between their legs, and buttocks, beatings to the wombs of pregnant women, and other humiliating and damaging acts that were a form of sexual aggression.

### *Arguments of the State*

261. In synthesis, the State argued the following:

a) in its response to the petition and observations to the brief of pleadings and motions, it stated that “it accepts the failure to comply with the general obligation of respect and guarantee of human rights established in Article 1(1) of the American Convention[, ...] it accepts partial responsibility in the violations to the right [...] to humane treatment, as long as the Judicial Power of Peru does not issue a ruling on the historical and detailed truth of the events that occurred between May 6 and 9, 1992;”

b) in its final oral arguments it stated that “the facts [...] cannot be hidden, the pain cannot be hidden, [...] those injured cannot be hidden, the pain of the victims’ next of kin cannot be hidden;”

c) in its final written arguments it stated that “even though individual responsibilities will be determined within the Domestic Jurisdiction, in the terms of the proceedings that are currently being followed before the Judicial Power [...], the magnitude of the facts to which the present proceedings refer and the responsibility of the Peruvian State in the same cannot be ignored;” and

d) that “it acknowledges its responsibility for the facts that occurred between May 6 and 9, 1992.”

### *Considerations of the Court*

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

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

263. Article 5 of the American Convention 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.  
[...]
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

264. Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture state that:

The State Parties undertake to prevent and punish torture in accordance with the terms of the [...] [Inter-American] Convention [Against Torture].

[...]

In accordance with the terms of Article 1 [of the Inter-American Convention against Torture], the states Parties shall take effective measure to prevent and punish torture within their jurisdiction.

[...]

The States Parties shall guarantee that any person making an accusation of having been subjected to torture within their jurisdiction shall have the right to an impartial examination of his case.

Likewise, if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

265. With regard to the alleged breach of the Inter-American Convention to Prevent and Punish Torture, this Court reiterates its jurisprudence in relation to the possibility that the representatives of the alleged victims may argument rights different to those stated by the Commission,<sup>146</sup> which also applies to the allegation of other instruments that grant the Court competence to declare violations, regarding the same facts object of the petition.

266. As it has done in other cases,<sup>147</sup> the Court will exercise its material competence to apply the Inter-American Convention to Prevent and Punish Torture and determine the State's responsibility pursuant to that treaty, ratified by Peru on March 28, 1992, that was in force when the facts occurred. Articles 1, 6, and 8 of said treaty oblige the States Parties to adopt all effective measures to prevent and punish all acts of torture within their jurisdiction.

267. As indicated by the Court (*supra* para. 148), the State's acknowledgment of responsibility with regard to the events occurred between May 6 and 9, 1992 in the Miguel Castro Castro Prison constitutes a positive contribution. In referenced to those

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<sup>146</sup> Cfr. *Case of Claude Reyes et al.*, *supra* note 19, para. 111; *Case of Acevedo Jaramillo et al.* Judgment of February 7, 2006. Series C No. 144, para. 280; and *Case of López Álvarez*. Judgment of February 1, 2006 Series C No. 141, para. 82.

<sup>147</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 94; *Case of Blanco Romero et al.* Judgment of November 28, 2005. Series C No. 138, para. 61; and *Case of Gutiérrez Soler*. Judgment of September 12, 2005. Series C No. 132, para. 54.

facts, Peru stated, *inter alia*, that "they cannot be hidden, the pain cannot be hidden, [...] those injured cannot be hidden, the pain of the victims' next of kin cannot be hidden." (*supra* para. 135)

268. However, due to the gross circumstances in which the facts occurred and that Peru did not acknowledge the events following May 9, 1992 (*supra* para. 152), the Tribunal considers it convenient to analyze the violation to Article 5 of the Convention.

269. As indicated by the Court (*supra* para. 227), in the analysis of the present chapter the elements that determine the seriousness of the facts of this case will be taken into consideration.

270. Likewise, it is important to point out that, in one of its reports, the Obudsman of the People of Peru concluded that the involvement of women in the armed conflict changed the perception of women and caused "a more cruel and violent treatment regarding those women considered 'suspects'."<sup>148</sup> It has already been proven in this case that the attack started specifically in the prison's pavilion occupied by the female inmates accused or convicted of crimes of terrorism and treason (*supra* para. 197(13) and 197(20)).

271. This Tribunal has indicated that torture and cruel, inhuman or degrading punishment or treatment are strictly prohibited by international human rights law. The absolute prohibition of torture, both physical and mental, is currently part of the international *jus cogens*. Said prohibition subsists even under the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crimes, martial law or a state of emergency, civil commotion or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or catastrophes.<sup>149</sup>

272. Likewise, it has acknowledged that the threats and real danger of submitting a person to physical injuries produces, in certain circumstances, a moral anguish of such degree that it may be considered psychological torture.<sup>150</sup>

273. The Court has established that the State is responsible, in its condition of guarantor of the rights enshrined in the Convention, of the observance of the right to humane treatment of any individual under its custody.<sup>151</sup> It is possible to consider the State responsible for the tortures, cruel, inhuman, or degrading treatments suffered by a person under the custody of state agents, if the authorities have not carried out a serious investigation of the facts followed by the prosecution of

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<sup>148</sup> Cfr. Obudsman of the People of Peru. Defense Report No. 80, Political Violence in Peru: 1980-1996, page 33.

<sup>149</sup> Cfr. *Case of Baldeón García*, *supra* note 21, para. 117; *Case of García Asto and Ramírez Rojas*, *supra* note 122, para. 222; and *Case of Caesar*. Judgment of March 11, 2005. Series C No. 123, para. 59.

<sup>150</sup> Cfr. *Case of Baldeón García*, *supra* note 21, para. 119; *Case of Tibi*. Judgment of September 7, 2004. Series C No. 114, para. 147; and *Case of Maritza Urrutia*. Judgment of November 27, 2003. Series C No. 103, para. 92.

<sup>151</sup> Cfr. *Case of Ximenes Lopes*, *supra* note 3, para. 138; *Case of Baldeón García*, *supra* note 21, para. 120; and *Case of López Álvarez*, *supra* note 146, paras. 104 to 106.

whoever appears as responsible for them.<sup>152</sup> The obligation to provide a satisfactory and convincing explanation of what occurred and disprove the allegations regarding its responsibility, through adequate evidentiary elements falls upon the State.<sup>153</sup>

274. In what refers to peoples deprived of their freedom, the Article 5(2) itself of the Convention states that they will be treated with the due respect to the inherent dignity of the human person. Pursuant to Article 27(2) of the Convention this right forms part of the non-revocable nucleus that is not susceptible of suspension in cases of war, public danger, or other threats to the independence or security of the States Parties.<sup>154</sup>

275. Below, the Tribunal will analyze the consequences of the facts acknowledged by the State that occurred from May 6 to 9, 1992, and of the facts that happened after that date and that the Court has considered as proven, in what refers to the humane treatment of the inmates and their next of kin. When it corresponds, the Tribunal will specify the particular effects of the events regarding the female inmates in general and the pregnant inmates.

276. Similarly, with regard to the mentioned aspects specific to violence against women, this Court will apply Article 5 of the American Convention and will set its scope, taking into consideration as a reference of interpretation the relevant stipulations of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, ratified by Peru on June 4, 1996, and the Convention on the Elimination of all Forms of Discrimination against Women, ratified by Peru on September 13, 1982, in force at the time of the facts, since these instruments complement the international *corpus juris* in matters of protection of women's right to humane treatment, of which the American Convention forms part.<sup>155</sup>

## **A) REGARDING THE INMATES**

### *1) Violations to the right to humane treatment of inmates as a consequence of "Operative Transfer 1"*

277. The violations to the right to personal integrity of the inmates as a consequence of the so-called "Operative Transfer 1" are framed within the considerations made by the Tribunal in the chapter on the violation of Article 4 (Right to Life) of the Convention, in what refers to the illegitimate use of force, the

<sup>152</sup> Cfr. *Case of Baldeón García*, *supra* note 21, para. 120; and *Case of the "Street Children" (Villagrán Morales et al.)*, Judgment of November 19, 1999. Series C No. 63, para. 170. In the same sense, *cfr.* Eur.C.H.R., *Yavuz v. Turkey*, Judgment of 10 January 2006, App. No. 67137/01, para. 38; Eur.C.H.R., *Aksoy v. Turkey*, Judgment of 18 December 1996, App. No. 100/1995/606/694, paras. 61 y 62; y Eur.C.H.R., *Tomasi v. France*, Judgment of 27 August 1992, Series A no. 241-A, paras. 108-111.

<sup>153</sup> Cfr. *Case of Baldeón García*, *supra* note 21, para. 120; and *Case of Juan Humberto Sánchez*, *supra* note 138, para. 111.

<sup>154</sup> Cfr. *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 85; and *Case of the Pueblo Bello Massacre*, *supra* note 7, para. 119.

<sup>155</sup> Cfr. *Case of the Gómez Paquiyauri Brothers*, *supra* note 21, para. 166; *Case of the "Juvenile Reeducation Institute"*, *supra* note 127, para. 172; Advisory Opinion OC-18/03 of September 17, 2003. Series A No. 118, para. 120; and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 152, para. 194.

magnitude of the force used, the type of weapons, explosives, and gases used against the inmates that were in pavilions 1A and 4B of the Miguel Castro Castro Prison.

278. The Court refers to these considerations on the factors that affect the seriousness of the facts. It is clear that the use of that force by state agents against the inmates implied the breach of their right to humane treatment.

279. This Tribunal has stated that the simple threat of the occurrence of a behavior prohibited by Article 5 of the American Convention, when it is sufficiently real and imminent, may constitute in itself a transgression of the norm dealt with. To determine the violation to Article 5 of the Convention, not only physical suffering but also psychic and moral anguish must be taken into account. The threat of suffering a serious physical injury may constitute a form of "psychological torture."<sup>156</sup>

280. To determine the seriousness of the injuries and the suffering caused the Court will take into consideration the expert reports offered before the Court as well as any other relevant evidence.

281. The effects described by the expert witness Quiroga (*supra* para. 186) with regard to some gases that are the most used are consistent with the statements offered by inmates that lived the attack, who described burning sensations, asphyxia, and breathing difficulties.

282. In what refers to the use of white phosphorous gas bombs, the expert witness Peerwani indicated that when this chemical product comes into contact with human tissue, "it causes very severe burns". In his experience as a forensic expert he has observed that these burns penetrate human tissue "until [they reach t]he bone." Likewise, these white phosphorous bombs produce a lot of smoke, which "is very dangerous", and their use "is not recommended within closed environments." The witness Gaby Bálcazar referred to the effect caused by these bombs, stating "that they could not even breath, you felt you body burning, like if your body wanted to leave you," and she referred to the measures they were forced to adopt due to that (*supra* para. 187). The witness Raúl Basilio Gil Orihuela indicated that when said chemical comes into contact with the human body it produces a burning sensation in uncovered areas, the nasal cavities, as well s asphyxia and chemical "burning" of internal organs and skin (*supra* para. 186).

283. It has been proven that 185 inmates were injured as a result of "Operative Transfer 1", thus affecting their physical integrity. All inmates against who the attack was directed experimented the suffering inherent to an attack of such magnitude, which includes both the inmates that died as well as those that survived (injured and uninjured).

284. The attack was carried out with very harmful weapons, with explosions, gases and smoke, with indiscriminate gunshots, in complete darkness, in a closed area and in overcrowded conditions. The inmates suffered injuries due to bullets, explosions,

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<sup>156</sup> Cfr. *Case of Baldeón García*, *supra* note 21, para. 119; *Case of Tibi*, *supra* note 150, para. 147; and *Case of 19 Merchants*. Judgment of July 5, 2004. Series C No. 109, para. 149. In the same sense, Cfr. Eur.C.H.R., *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A Vol. 161, para. 111; and U.N., Human Rights Committee, *Miguel Angel Estrella v. Uruguay* (74/1980), pronouncement of March 29, 1983, paras. 8(3) and 10.

gases, splinters, grenades, bombs, and the falling of debris during the four days the attack lasted. Regarding the type of injuries suffered by the inmates, the expert witness Peerwani stated that they were "strange wounds", among which there were "chafing made with firearms, injuries on their feet, legs, extremities, and other uncommon angles," as well as on their backs and extremities. In the expert's opinion, this type of injuries put in evidence that the shots were fired randomly, in an arbitrary manner, reason for which the inmates made an effort to dodge the bursts directed at them (*supra* para. 187).

285. All the inmates faced additional conditions of infliction during those four days, such as the deprivation of food, water, electricity, and medical attention.

286. In his expert opinion, the expert witness Deutsch pointed out that the inmates experienced "intense psychological and emotional suffering due to the fact that the injured did not receive attention and [...] they had to witness [said] situation helplessly." (*supra* para. 186)

287. According to the expert opinions offered in these proceedings and the statements presented, the male and female inmates that lived the attack in May 1992 still suffer serious psychological consequences. The expert witnesses Deutsch and Quiroga stated that the psychological consequences of the attack correspond to post traumatic stress syndrome.

288. The Court considers that the inmates that survived the attack experienced psychological torture due to the constant threats and the real danger generated by the state's actions, which could result in their death and serious injuries to their physical integrity.

289. It is also important to point out that the body of the inmate Julia Marlene Olivos Peña presented "clear signs of torture" (*supra* para. 197(38)). This circumstance shows the extreme violence with which the state's agents acting during the "operative".

290. The attack started against the women's pavilion 1A of the Miguel Castro Castro Prison. The inmates that were located in that pavilion, including the ones that were pregnant, were forced to run from the attack directed to pavilion 4B. This transfer was especially dangerous due to the aforementioned conditions of the attack; the inmates suffered various injuries. A piece of information that shows the extreme conditions in which the attack was carried out was that the prisoners had to crawl on the ground, and climb over dead bodies, in order to avoid being hit by the bullets. This circumstance was especially serious in the case of the women who were pregnant who had to crawl over their stomach.

291. These characteristics of the attack lived by the inmates, who witnessed the death of their prison mates and saw injured pregnant women crawling on the floor, generated, as was described by the witness Gaby Balcázar, "a climate of despair among the women," in such a way that they felt they were going to die. In the same sense, the expert witness Deitsch concluded that during the four days of the attack "[t]he inmates remained with the fear that they were going to die[, which] caused an intense psychological and emotional suffering."

292. It is important to clarify that the evidence provided to the Court and from the statements given by the inmates one can conclude that the pregnant inmates were



also victims of the attack to the criminal center. The pregnant women who lived through the attack experimented an additional psychological suffering, since besides having seen their own physical integrity injured, they had feelings on anguish, despair, and fear for the lives of their children. The pregnant inmates that have been identified before this Court are Mrs. Eva Chalco, who approximately one month after the attack had her son Said Gabriel Chalco Hurtado; Vicenta Genua López, who was five months pregnant; and Sabina Quispe Rojas, who was eight months pregnant (*supra* para. 197(57)). In this sense, besides the protection granted by Article 5 of the American Convention, it is necessary to point out that Article 7 of the Convention of Belem do Pará expressly states that the States must ensure that the state authorities and agents abstain from any action or practice of violence against women.

293. Based on the aforementioned, this Tribunal considers that the State is responsible for the violation of the right to humane treatment of the inmates that were injured during the events of May 6 to 9, 1992, which constituted a violation to Article 5 of the American Convention. Likewise, the Court considers that, in the circumstances of the present case, the totality of the acts of aggression and the conditions in which the State deliberately puy the inmates (those that died and those that survived) during the days of the attack, which caused all of them a serious psychological and emotional suffering, constituted a psychological torture carried out in offense of all the members of the group, with violation of Articles 5(1) and 5(2) of the American Convention, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. Besides, this Court considers that the violation to the right to humane treatment of Mrs. Eva Chalco, Sabina Quispe Rojas, and Vicenta Genua López was exacerbated by the fact that they were pregnant, thus the acts of violence had a greater effect on them. Likewise, the Court considers that the State is responsible for the acts of torture inflicted on Julia Marlene Olivos Peña, in violation of Article 5(2) of the American Convention and of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

*2) Treatments received by the inmates after May 9, 1992 and during their transfer to other criminal centers and to hospitals*

294. The inhuman conditions in which the majority of the inmates had to remain once the attack of May 9, 1992 had concluded have been proven (*supra* para 197(42)). It has also been proven that on May 10, 1992 the former President of Peru, Alberto Fujimori Fujimori, was at the Miguel Castro Castro Prison and walked among the inmates lying face down on the ground of the courtyards of said establishment (*supra* para. 197(43)), directly verifying the conditions in which they were in.

295. The Court finds it especially gross that the inmates that were injured and kept in the areas of the mentioned criminal center known as “no man’s land” and “admissions” did not receive medical attention (*supra* para. 197(42)). The State had the duty to offer them the medical attention required, considering that it was the direct guarantor of their rights.

296. It has also been proven that a minority of the inmates were transferred to the Police Sanity Hospital on May 9, 1992 (*supra* para. 197(44)) and that during their transfers they suffered new breaches to the physical, psychic, and moral integrity. They were transferred in overcrowded conditions and they were beaten by the police

agents, despite the fact that they were injured (*supra* para. 197(48)). The victim Gaby Balcázar stated that she thought “that this treatment was not even given to animals.” (*supra* para. 187). This fact is just one more element of the especially gross treatment given to inmates during the “operative” and after it. The expert witness Quiroga described the way in which the injured inmates were transferred to the hospitals as “acts of great cruelty” (*supra* para. 186).

297. In this same sense, when the inmates that were in “no man’s lands” and in “admissions” of the Criminal Center Castro Castro (*supra* para. 197(42)) were transferred to other criminal centers or relocated in the same criminal center Castro Castro they suffered new violations to their physical, psychic, and moral integrity, since they were beat more than once, even with blunt objects, on the head, kidneys, and other parts of their bodies (*supra* para 197(46) and \*\* 197(48)). As part of these aggressions, a great part of the male inmates were submitted to what expert witness Quiroga describes as the “Dark Alley”, a form of punishment that consists in forcing the detainee to walk through a double line of agents that beat them with blunt elements, such as sticks and metallic or rubber batons, and whoever falls to the floor receives more blows until he reaches the other end of the alley. The expert witness stated that this form of collective punishment, “due to its severity and physical and psychological consequences[, is] consistent with torture.”

298. Among the inmates that were in the conditions describes there were pregnant women. The state agents did not have any consideration regarding their specific condition. Only Mrs. Eva Challco, Sabina Quispe Rojas y Vicenta Genua López were identified before the Court (*supra* para. 197(57)). The face down position in which they had to remain is especially serious in the case of pregnant women. To witness this treatment towards them caused greater anguish among the other inmates.

299. Likewise, the Court points out the specific case of Mr. Víctor Olivos Peña, who being alive but seriously injured was taken to a hospital morgue, where he was rescued by his mother and a doctor (*supra* para. 197(45)).

300. The Court considers that the treatments described in the previous paragraphs constituted an inhuman treatment in violation of Article 5 of the American Convention. This breach was worse regarding those inmates who were injured and the women who were pregnant.

### 3) *Treatments received in the health centers to which the inmates were transferred during the attack or once it had concluded*

301. It was proven that the inmates transferred to the Police Hospital did not receive adequate medical treatment (*supra* para. 197(47)). The twenty-fourth Principle for the Protection of All Persons Submitted to Any Form of Detention or Imprisonment states that “[...] any person detained [...] will be provided [...] medical care and treatment whenever necessary [...]”.<sup>157</sup> This Court has established that “the

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<sup>157</sup> Cfr. U.N., Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment, Adopted by the General Assembly in its resolution 43/173, of December 9, 1988, Principle 24. In the same sense Cfr. *Case of De la Cruz Flores*. Judgment of November 18, 2004. Series C No. 115, para. 133; and *Case of Tibi*, *supra* note 150, para. 154.

State has the duty to provide the detainees with [...] adequate [medical] care and treatment whenever necessary."<sup>158</sup>

302. The State should have complied with this duty, with greater reason, regarding the people who were injured in a criminal center and through the action of the police officers. It is evident that all those injured as a consequence of the so-called "Operative Transfer 1" and of the acts that followed that operation required urgent medical attention, especially if you take into consideration the magnitude of the attack, the type of wounds caused, and the characteristics of the weapons used during that "operative". The lack of adequate medical attention caused additional psychological and physical suffering, and determined that the injuries caused were not adequately attended to and resulted in chronic suffering.

303. With regard to the treatment that must be offered to women who are detained or arrested, the High Commissioner for Human Rights of the United Nations has stated that "they must not be the object of discrimination, and they must be protected from all forms of violence or exploitation." Similarly, it has stated that female detainees must be supervised and checked by female officer and pregnant and nursing women must be offered special conditions during their detention.<sup>159</sup> The Committee on the Elimination of Discrimination against Women has stated that said discrimination includes violence based on gender, "that is, the violence directed towards a woman because she is a woman or that affects her in a disproportionate manner," and that "acts that inflict damages or suffering of a physical, mental, or sexual nature, threats of committing those acts, coercion, and other forms of deprivation of freedom."<sup>160</sup>

304. It was proven that at the Police Hospital the injured inmates, who were in deplorable conditions, were also stripped of their clothes and forced to remain without clothes during almost the entire time they were at the hospital, which in some cases lasted several days and in others weeks, and they were watched over by armed agents (*supra* para. 197(49)).

305. The Court considers that all inmates that were submitted to the mentioned nudity during said prolonged period of time were victims of a treatment that violated their personal dignity.

306. In relation to the aforementioned, it is necessary to make emphasis on the fact that said forced nudity had especially serious characteristics for the six female inmates who, as proven, were submitted to this treatment. Likewise, during the entire time they were in this place, the female inmates were not allowed to clean themselves up and, in some cases, in order to use the restroom they had to do so in the company of an armed guard who did not let them close the door and who aimed

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<sup>158</sup> Cfr. *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, paras. 102 and 103; *Case of De la Cruz Flores*, *supra* note 157, para. 132; and *Case of Tibi*, *supra* note 150, para. 157.

<sup>159</sup> Cfr. U.N., *Minimum rules for the treatment of prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, paras. 23 and 53.

<sup>160</sup> Cfr. U.N., Committee on the Elimination of Discrimination against Women, 11<sup>o</sup> meeting. General recommendation 19 "Violence against women". Doc. HRI/GEN/1/Rev. 1at84 (1994), para. 6.

their weapon at them while they performed their physiological needs (*supra* para. 197(49)). The Tribunal considers that these women, besides receiving a treatment that violated their personal dignity, were also victims of sexual violence, since they were naked and covered only with a sheet, while armed men, who apparently were members of the State police force, surrounded them. What classifies this treatment as sexual violence is that men constantly observed the women. The Court, following the line of international jurisprudence and taking into account that stated in the Convention to Prevent, Punish, and Eradicate Violence against Women, considers that sexual violence consists of actions with a sexual nature committed with a person without their consent, which besides including the physical invasion of the human body, may include acts that do not imply penetration or even any physical contact whatsoever.<sup>161</sup>

307. The Court points out the context in which said acts were carried out, since the women who suffered them were subject to the complete control and power of State agents, absolutely defenseless, and they had been injured precisely by State police officers.

308. Having forced the females inmates to remain nude in the hospital, watched over by armed men, in the precarious health conditions in which they were, constituted sexual violence in the aforementioned terms, which caused them constant fear of the possibility that said violence be taken even further by the police officers, all of which caused them serious psychological and moral suffering, which is added to the physical suffering they were already undergoing due to their injuries. Said acts of sexual violence directly endangered the dignity of those women. The State is responsible for the violation of the right to humane treatment enshrined in Article 5(2) of the American Convention, in detriment of the six female inmates that suffered those cruel treatments, and whose names are included in Appendix 2 of victims of the present Judgment, that for these effects is considered part of the same.

309. On the other hand, in the present case it has been proven that one female inmate who was transferred to the Police Sanity Hospital was object of a finger vaginal "inspection", carried out by several hooded people at the same time, in a very abrupt manner, with the excuse of examining her (*supra* para. 197(50)).

310. Following the jurisprudential and legal criterion that prevails both in the realm of International Criminal Law as in comparative Criminal Law, the Tribunal considers that sexual rape does not necessarily imply a non-consensual sexual vaginal relationship, as traditionally considered. Sexual rape must also be understood as an act of vaginal or anal penetration, without the victim's consent, through the use of other parts of the aggressor's body or objects, as well as oral penetration with the virile member.

311. The Court acknowledges that the sexual rape of a detainee by a State agent is an especially gross and reprehensible act, taking into account the victim's vulnerability and the abuse of power displayed by the agent.<sup>162</sup> Similarly, sexual rape

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<sup>161</sup> Cfr. ICTR, *Case of Prosecutor v. Jean-Paul Akayesu. Judgment of September 2, 1998. Case No. ICTR-96-4-T, para. 688.*

<sup>162</sup> Cfr. Eur.C.H.R., *Case of Aydin v. Turkey* (GC). Judgment of 25 September 1997, App. No. 57/1996/676/866, para. 83.

is an extremely traumatic experience that may have serious consequences<sup>163</sup> and it causes great physical and psychological damage that leaves the victim “physically and emotionally humiliated”, situation difficult to overcome with time, contrary to what happens with other traumatic experiences.<sup>164</sup>

312. Based on the aforementioned and taking into consideration that stated in Article 2 of the Inter-American Convention to Prevent and Punish Torture, this Tribunal concludes that the acts of sexual violence to which an inmate was submitted under an alleged finger vaginal “examination” (*supra* para. 309) constituted sexual rape that due to its effects constituted torture. Therefore, the State is responsible for the violation of the right to humane treatment enshrined in Article 5(2) of the American Convention, as well as for the violation of Articles 1, 6, and 8 of the mention Inter-American Convention to Prevent and Punish Torture, in detriment of the female inmate indicated in Appendix 2 of victims of the present Judgment that for these effects is considered part of the same.

313. The Special Rapporteur of the UN for Violence against Women has established, referring to the violence against women within a context of an armed conflict, that “[s]exual aggression is often considered and practiced as a means to humiliate the adversary” and that “sexual rape is used by both parties as a symbolic act.”<sup>165</sup> This Tribunal acknowledges that sexual violence against women has devastating physical, emotional, and psychological consequences for them,<sup>166</sup> which are exacerbated in the cases of women who are imprisoned.<sup>167</sup>

#### 4) *General detention conditions to which the inmates were submitted after “Operative Transfer 1”*

314. Criminal sanctions are an expression of the State’s punitive power and “they imply detriment, deprivation, alteration of a person’s rights, as a consequence of an

<sup>163</sup> Cfr. U.N., Human Rights Commission. 50° meeting session. *Matter of the human rights of all persons submitted to any form of detention or imprisonment, and especially torture and other cruel, inhuman, or degrading treatments or punishments. Report of the Special Rapporteur, Mr. Nigel S. Rodley, presented in accordance to resolution 1992/32 of the Human Rights Commission.* Doc. E/CN.4/1995/34 of January 12, 1995, para. 19.

<sup>164</sup> Cfr. Eur.C.H.R., *Case of Aydin v. Turkey* (GC), Judgment of 25 September 1997, App. No. 57/1996/676/866, para. 83.

<sup>165</sup> Cfr. U.N., Human Rights Commission, 54° meeting period. *Report presented by Mrs. Radhika Coomaraswamy, Special Rapporteur on violence against women, with the inclusion of its causes and consequence, pursuant to resolution 1997/44 of the Commission.* Doc. E/CN.4/1998/54 of January 26, 1998, paras. 12 and 13.

<sup>166</sup> Cfr. U.N., Human Rights Commission, 54° session. *Report presented by Mrs. Radhika Coomaraswamy, Special Rapporteur on violence against women, with the inclusion of its causes and consequences, pursuant to resolution 1997/44 of the Commission.* Doc. E/CN.4/1998/54 of January 26, 1998, para. 14.

<sup>167</sup> Cfr. Oral presentation before the Human Rights Commission of the Special Rapporteur of the United Nations on Torture, Peter Kooijmans, included in: U.N., *Commission on Human Rights. 48° session. Summary Record of the 21st Meeting, Doc. E/CN.4/1992/SR.21 of February 21, 1992*, para. 35; and U.N., Human Rights Commission. 50° session. *Matter of the human rights of all persons submitted to any form of detention or imprisonment, and especially torture and other cruel, inhuman, or degrading treatments or punishments. Report of the Special Rapporteur, Mr. Nigel S. Rodley, presented in accordance to resolution 1992/32 of the Human Rights Commission.* Doc. E/CN.4/1995/34 of January 12, 1995, para. 16.

unlawful behavior.”<sup>168</sup> However, the injuries, suffering, health damages or general damages suffered by a person while they are imprisoned may be a form of cruel punishment when, due to the conditions of the confinement, there is a deterioration of physical, psychic, and moral integrity, strictly prohibited by subparagraph 2 of Article 5 of the Convention, which is not a natural and direct consequence of the deprivation of freedom itself. When dealing with convicted individuals, the situations described are contrary to the “essential purpose” of a prison term, as established in subparagraph 6 of the mentioned Article, that is, “the reform and social readaptation of the prisoners”. Judicial authorities must take these circumstances into consideration when applying or evaluating the punishments established.<sup>169</sup> The previous considerations are applicable, in what is relevant, to provisional or precautionary deprivation of liberty, with regard to the treatment that must be offered to the prisoners, since the international legislation that governs it includes rules applicable both to inmates in preventive detention and convicted prisoners.<sup>170</sup>

315. Pursuant to Article 5 of the Convention, any person deprived of their liberty has the right to live in a situation of imprisonment compatible with the personal dignity.<sup>171</sup> On other opportunities, this Tribunal has stated that imprisonment in overcrowded conditions, isolation in a reduced cell, with lack of ventilation and natural light, without a bed to lie in or adequate hygiene condition, and solitary confinement or unnecessary restrictions to visitation regimens constitute a violation to the right to humane treatment.<sup>172</sup> As responsible for the detention establishments, the State must guarantee inmates conditions that respect their fundamental rights and protect their dignity.<sup>173</sup>

316. In the analysis of the seriousness of the acts that may constitute cruel, inhuman, or degrading treatments or torture it is necessary to weigh in all the circumstances of the case, such as the duration of the treatments, their physical and

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<sup>168</sup> Cfr. *Case of García Asto and Ramírez Rojas*, *supra* note 122, para. 223; *Case of Lori Berenson Mejía*. Judgment of November 25, 2004. Series C No. 119, para. 101; and *Case of Baena Ricardo et al.* Judgment of February 2, 2001. Series C No. 72, para. 106.

<sup>169</sup> Cfr. *Case of García Asto and Ramírez Rojas*, *supra* note 122, para. 223; and *Case of Lori Berenson Mejía*, *supra* note 168, para. 101.

<sup>170</sup> Cfr. United Nations, Office of the High Commissioner for Human Rights. *Minimum rules for the treatment of prisoners*, adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977.

<sup>171</sup> Cfr. *Case of López Álvarez*, *supra* note 146, para. 105 to 106; *Case of García Asto and Ramírez Rojas*, *supra* note 122, para. 221; and *Case of Raxcacó Reyes*. Judgment of September 15, 2005. Series C No. 133, para. 95.

<sup>172</sup> Cfr. *Case of García Asto and Ramírez Rojas*, *supra* note 122, para. 221; *Case of Raxcacó Reyes*, *supra* note 171, para. 95; and *Case of Fermín Ramírez*. Judgment of June 20, 2005. Series C No. 126, para. 118. In the same sense, *cf.* U.N., *Minimum rules for the treatment of prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, Rules 10 and 11.

<sup>173</sup> Cfr. *Case of García Asto and Ramírez Rojas*, *supra* note 122, para. 221; *Case of Raxcacó Reyes*, *supra* note 171, para. 95; and *Case of Fermín Ramírez*, *supra* note 172, para. 118.

mental effects, and in some cases, the victim's gender, age, and health conditions, among others.<sup>174</sup>

317. Physical and psychic tortures are acts "prepared and carried out deliberately against the victim in order to suppress their psychic resistance and force him to incriminate himself or confess certain criminal behaviors or to submit him to punishment modalities additional to deprivation of liberty itself."<sup>175</sup> Within the notion of torture established in Article 2 of the Inter-American Convention to Prevent and Punish Torture is inflicting physical or mental suffering in a person with any purpose.<sup>176</sup> In situations of massive violation of human rights, the systematic use of torture generally seeks to intimidate the population.<sup>177</sup>

318. At the light of the aforementioned criteria, and based on the body of evidence of the case, this Tribunal will examine the body of conditions of detention and treatment to which the inmates were submitted in the criminal centers to which they were transferred or relocated after the "Operative Transfer 1" (*supra* para. 197(44)).

319. Within gross imprisonment conditions we can mention (*supra* para. 197(51) and 197(52)): location in overcrowded cells that do not allow an adequate mobility nor did they ensure reasonable hygiene and health conditions, without access to natural or artificial lighting; precarious feeding conditions; lack of adequate medical attention and of supply of medicines, despite the fact that there inmates that were injured and others that acquired illnesses in the prison; lack of warm clothes, even for those who were in the prison of Yanamayo where the temperatures drop several degrees under zero; severe regimen of solitary confinement; lack of attention to women's physiological needs when they were denied materials of personal hygiene, such as soap, toilet paper, feminine pads, and underwear in order to be able to change; lack of attention to pre and post natal health needs; prohibition to talk among themselves, read, study, and carry out manual labor. The damages and suffering experimented by women in general and especially the pregnant women and by the inmates that were mothers were especially gross in the terms described below (*infra* paras. 330 to 332).

320. Among the treatments that breached the inmates' right to humane treatment, the majority were perpetrated as collective punishments, such as: beatings with metal rods on their soles, commonly identified as *falanga* beatings; application of electrical shocks; beating carried out by many agents with sticks and spurns that included blows to the head, the hips, and other bodyparts where the victims were injured; and the use of punishment cells known as the "hole". The State recurred to force without there being determining reasons to do so and it applied cruel

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<sup>174</sup> Cfr. *Case of the Gómez Paquiyauri Brothers*, *supra* note 21, para. 113; *Case of Bámaca Velásquez*. Judgment of November 25, 2000. Series C No. 70, para. 162; and *Case of the "Street Children" (Villagrán Morales et al.)*, *supra* note 152, para. 176. In this same sense, *cfr.* Eur.C.H.R., *Case of Aktaş v. Turkey* (3<sup>rd</sup>), Judgment of 24 April 2003, App. No. 24351/94, para. 312; y Eur.C.H.R., *Case of Ireland v. The United Kingdom* (GC), Judgment of 18 January 1978, App. No. 5310/71, para. 162.

<sup>175</sup> Cfr. *Case of Tibi*, *supra* note 150, para. 146; *Case of Maritza Urrutia*, *supra* note 150, para. 93; and *Case of Cantoral Benavides*, *supra* note 21, para. 104.

<sup>176</sup> Cfr. *Case of the Gómez Paquiyauri Brothers*, *supra* note 21, para. 116; *Case of Tibi*, *supra* note 150, para. 146; and *Case of Maritza Urrutia*, *supra* note 150, para. 91.

<sup>177</sup> Cfr. *Case of the Gómez Paquiyauri Brothers*, *supra* note 21, para. 116.

punishments that are absolutely prohibited pursuant to Article 5 of the American Convention and other international norms for the protection of human rights applicable to the subject.

321. Within the context of the events of the present case, those imprisonment conditions and treatments meant an infringement of the inmates' right to live in an imprisonment regimen compatible with their personal dignity, and they included punishment modalities besides the deprivation of freedom itself, which resulted in serious injuries, suffering and damages to the health of the inmates. The State took advantage the power and control it had over the people in the detention centers in order to cause them severe damages to their physical, psychic, and moral integrity through said conditions and treatments.

322. Below the Court will refer to some parameters and pronouncements with regard to said detention conditions and treatment of the inmates. Likewise, it will analyze the special consequences that some of them had on women in general, pregnant women, and the inmates who were mothers.

323. In what refers to the solitary confinement, the Court has already referred, in other cases, to the effects it causes of the inmates,<sup>178</sup> and it has indicated, *inter alia*, that "prolonged isolation and coercive solitary confinement are, in themselves, cruel and inhuman treatments, damaging to the person's psychic and moral integrity and the right to respect of the dignity inherent to the human person."<sup>179</sup> Likewise, it has established that solitary confinement may only be used in an exceptional manner, taking into account the gross effects it generates, since "isolation from the outside world produces in any person moral suffering and psychic perturbations, places them in a situation of particular vulnerability and increases the risk of aggression and arbitrariness in prisons."<sup>180</sup> In this same sense, the European Court of Human Rights has determined that total sensorial isolation used along with complete social isolation may destroy an individual's personality; and therefore constitutes an inhuman treatment that is not justifiable by adducing need of security.<sup>181</sup>

324. In the present case this solitary confinement was especially serious if you take into consideration that the inmates had suffered the attack of May 6 to 9, 1992 and that after it they were not allowed to communicate with their next of kin, who were naturally worried about what had happened to them. This impossibility to inform their next of kin that they had survived the attack and contact them after said events generated among the inmates additional feeling of anguish and concern.

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<sup>178</sup> Cfr. *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 94; *Case of Raxcacó Reyes*, *supra* note 171, paras. 95 and 96; and *Case of Lori Berenson Mejía*, *supra* note 168, para. 103.

<sup>179</sup> Cfr. *Case of De la Cruz Flores*, *supra* note 157, para. 128; *Case of Maritza Urrutia*, *supra* note 150, para. 87; and *Case of Bámaca Velásquez*, *supra* note 174, para. 150.

<sup>180</sup> Cfr. *Case of De la Cruz Flores*, *supra* note 157, para. 129; *Case of Maritza Urrutia*, *supra* note 150, para. 87; and *Case of Bámaca Velásquez*, *supra* note 174, para. 150.

<sup>181</sup> Cfr. Eur.C.H.R., *Case of Öcalan v. Turkey*(GC), Judgment of 12 May 2005, App. No. 46221/99, para. 191.



325. The confinement in a dark cell,<sup>182</sup> such as the one described by the male inmates and called the “hole” violates international norms regarding detention. In this sense, the expert witness Quiroga expressed that “[t]he prisoners were frequently punished being forced to remain several days in punishment rooms known as the “Hole”[; said] rooms were small and were fill[ed] completely with standing prisoners, in such a way that none of them could sit or [l]ie down.” (*supra* para. 186). The United Nations Committee against Torture has stated that the isolation cells of 60 x 80 centimeters, without light or ventilation, and where you can only stand or squat, “constitute in themselves a form of torture.”<sup>183</sup>

326. During the so-called “rounds of inspection” to which the inmates were exposed, the authorities inflicted on them blows with metal rods on their soles, treatment commonly known as *falanga* beatings. In the public hearing held before the Court the expert witness Wenzel expressed that the use of these beatings “is a practice that [...] creates a very long permanent pain [and] very difficult to treat,” and “they affect the entire nervous system [since the] soles of feet have a high density of nervous sensors.” (*supra* para. 187). In this same sense, the expert witness Quiroga stated that this practice known as *falanga* among the experts in torture victims, “produces local bruises and an intense acute pain with walking difficulty” and that “some victims may suffer from chronic pain due to swelling of the plantar aponeurosis and even a fracture of the bones of the metatarsus.” (*supra* para. 186). The expert witness stated, “this method of punishment was [...] collective [and] due to its severity and physical and psychological consequences [is] consistent with torture.” In this same sense, the Istanbul Protocol establishes that *falanga* is a form of torture.<sup>184</sup>

327. Regarding the application of electricity, the European Court determined in a case in which it was argued that the victim had received electrical shocks on his ears, that said circumstance, along with the beatings, psychological suffering, and other treatments inflicted on the victim, had constituted torture.<sup>185</sup> The expert witness Quiroga expressed that the punishment with electricity applied on inmates generated an “intense pain” (*supra* para. 186)

328. In the opinion of the expert witness Deutsch the inmates were “subject to psychological torture [through] the prohibition to work, read, go outside to the courtyard, and the prohibition to receive visitors.” (*supra* para. 186). Similarly, he stated that “[a]ll these measures along with the physical suffering [...] put the prisoners in a state of great stress and interrupted a life rhythm that led to confusion and states of anxiety and despair due to the impossibility to change or prevent being affected by these measures.” (*supra* para. 186)

<sup>182</sup> Cfr. U.N., Minimum rules for the treatment of prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, Rule 31; and *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 94.

<sup>183</sup> Cfr. U.N., General Assembly. *Report of the Committee Against Torture on Turkey*. Forty-eighth Meeting, 1994, A/48/44/Add.1, para. 52.

<sup>184</sup> Cfr. U.N., Office of the United Nations High Commissioner for Human Rights. *Istanbul Protocol*, 2001, para. 202.

<sup>185</sup> Cfr. Eur.C.H.R., *Case of Mikheyev v. Russia* (1<sup>st</sup>), Judgment of 26 January 2006, App. No. 77617/01, paras. 20, 129 y 135.

329. When offering his expert report in the public hearing held before the Court, the expert witness Wenzel concluded that the type of treatment given to the inmates “was definitively not normal in containing the prisoners.” (*supra* para. 187) Similarly, he stated, *inter alia*, that the withdrawal of incentives such as the lack of light, prohibition to exercise, hear music and read has psychological and biological effects. Specifically, he indicated that the lack of “light [for] a prolonged period of time [...] causes depression[, ...] causes a pretty strong damage on the psychological system and the glands [of the] brain, [as well as affectations] on the body’s hormonal structures.” The expert witness added that this type of conditions “may [...] activate other psychological effects [or] affect an area[,] a vulnerable point [of an inmate.] and this may lead to long-term problems including chronic psychosis among others.” (*supra* para. 187) Similarly, he concluded that in this case there was a systematic psychological torture. The expert witness Quiroga indicated that “[t]he people who have survived the torture without an important visible physical damage suffer from chronic pain in 90% [of the case and it is consistent] with the examples [analyzed by him].” (*supra* para. 186)

330. The severe solitary confinement had specific effects on the inmates that were mothers. Several international organizations have made emphasis on the States’ obligation to take into consideration the special attention that must be offered to women due to maternity, which implies, among other measures, ensuring that appropriate visits be permitted between mother and child. The impossibility to communicate with their children caused an additional psychological suffering in the inmates that were mothers.

331. Another aspect that affected women was the lack of attention to their physiological needs (*supra* para. 319). The International Committee of the Red Cross has established that the State must ensure that “sanitary conditions [in the detention centers] are adequate to maintain the hygiene and the health [of the prisoners], allowing them regular access to toilets and allowing them to bathe and to wash their clothes regularly.”<sup>186</sup> Likewise, said Committee also determined that special arrangements must be made for female detainees with their period, pregnant, or accompanied by their children.<sup>187</sup> The commission of those excesses causes special and additional suffering to imprisoned women.

332. It was proven that in the case of the inmates Eva Chalco and Sabina Quispe Rojas the State did not attend to their basic prenatal health needs, and that regarding the latter it did not offer her postnatal medical attention as well (*supra*

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<sup>186</sup> Cfr. International Committee of the Red Cross. *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*, 2001, sec. III, ref. 0798 and available at <http://www.icrc.org>. In the same sense, cfr. U.N., *Minimum rules for the treatment of prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, paras. 15-19.

<sup>187</sup> Cfr. International Committee of the Red Cross. *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*. 2001, ref. 0798 and available at <http://www.icrc.org>, section III. In the same sense, cfr. U.N., *Minimum rules for the treatment of prisoners*, Adopted by the First United Nations Congress on the Prevention of Crime and Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663C (XXIV) of July 31, 1957 and 2076 (LXII) of May 13, 1977, para. 23.

para. 197(57)), which implied an additional violation to their right to humane treatment.

333. This Tribunal considers that the totality of detention and treatment conditions to which the inmates were submitted in the criminal centers where they were transferred or relocated after the so-called "Operative Transfer 1", constituted physical and psychological torture inflicted on all of them in violation of Articles 5(2) of the American Convention and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

## **B) REGARDING THE INMATES' NEXT OF KIN**

334. At the light of the aforementioned criteria, and based on the body of evidence of the case, this Tribunal will carry out an analysis of different state actions and omissions in relation to the treatment that was proven was given to some of the inmates' next of kin during the four days of the "operative" and after it.

335. The Court reiterates that the next of kin of the victims of certain violations of human rights may be, at the same time, victims of violating acts.<sup>188</sup> In this line the Court has considered the right to mental and moral integrity of the victims' next of kin violated based on the additional suffering they have undergone as a consequence of the specific circumstances of the violations committed against their loved ones and based on the subsequent actions or omissions of state authorities regarding these facts.<sup>189</sup>

336. It has been concluded from the evidence that 28 of the inmates' next of kin who were outside the criminal center between May 6 and 9, 1992, awaiting official information about what was happening, were insulted, beaten, and forced to move away through gunshots, water, and teargas bombs (*supra* para. 197(19)). Besides receiving this violent treatment by state agents, the mentioned next of kin had to undergo the pain and anguish of witnessing the magnitude of the attack directed to the pavilions of the criminal center where the next of kin were detained, which even led them to think that they could have died (*supra* para. 187). The mentioned state actions, completely unjustified, generated damages to the physical, psychic, and moral damages in detriment of said next of kin of the inmates. The names of those 28 next of kin have been included in Appendix 2 of victims of the present Judgments that for these effects is considered part of the same.

337. Similarly, the evidence helped determine that, once the attack had concluded, 36 of the inmates' next of kin had to face new mistreatments and important omissions by state authorities when they looked for information regarding what had happened in the criminal center, who was alive and who was dead, where they had been transferred and the state of health of their next of kin (*supra* para. 197(55)). The mentioned next of kin of the inmates had to visit hospitals and morgues looking for their loved ones, without receiving the due attention at those state establishments. The names of those 36 next of kin have been included in Appendix 2

<sup>188</sup> Cfr. *Case of Goiburú et al.*, *supra* note 5, para. 96; *Case of Vargas Areco*, *supra* note 3, para. 83; and *Case of Servellón García et al.*, *supra* note 3, para. 128.

<sup>189</sup> Cfr. *Case of Goiburú et al.*, *supra* note 5, para. 96; *Case of Vargas Areco*, *supra* note 3, para. 96; and *Case of Servellón García et al.*, *supra* note 3, para. 128.

of victims of the present Judgments that for these effects is considered part of the same.

338. The statement offered by Mrs. Julia Peña is illustrating of the suffering that said search caused the next of kin (*supra* para. 187). Mrs. Peña found her son at a hospital morgue, he was still alive, although seriously injured; in another morgue she found the body of her dead daughter. Mrs. Lastenia Caballero Mejía stated that the search for her next of kin at the morgue and hospitals was something she “will never [...] forget, [it left her] scarred, like a very large footprint.” (*supra* para. 187). In their statements some of the next of kin pointed out that an additional element of suffering was the fact of being in that situation of uncertainty and despair on Mother’s Day” (Sunday May 10, 1992).

339. The expert witness Deutsch stated that the next of kin were “submitted to the horrible experience of having to look for their loved ones in the morgue where the bodies were in piles [and] dismembered,” and that “[t]he unjustified delay in the handing over of [the same] caused [the bodies] to be decomposed” and having seen “their loved ones in those conditions added another suffering that could have been avoided.” (*supra* para. 186)

340. Finally, the evidence has led to the conclusion that 25 of the inmates’ next of kin suffered to the strict solitary confinement and visiting restrictions applied by the State to the inmates after the attack on the criminal center (*supra* para. 197(54) and 197(56)). This suffering implied a violation of the psychic integrity of said next of kin. The names of those 25 next of kin have been included in Appendix 2 of victims of the present Judgments that for these effects is considered part of the same.

341. The Court considers that this type of measures of solitary confinement cause special damage to children due to the deprivation of contact and relationship with their imprisoned mothers, and therefore presumes said suffering with regard to the inmates’ children who were under the age of 18 at the time of the solitary confinement (*supra* paras. 197(54) and 197(56)). It has been proven that Yovanka Ruth Quispe Quispe, daughter of the inmate Sabina Virgen Quispe Rojas, and Gabriel Said Chalco Hurtado, son of the inmate Eva Chalco were in said condition (*supra* para. 197(57)). Since the Court does not have sufficient evidence to identify all the children of the inmates that at that time were under the age of 18, it is necessary that said people present themselves before the competent State authorities, within the 8 months following the notification of this Judgment and prove their relationship and age that proves that they were in the mentioned supposition and, are therefore, victims of said violation.

342. Due to the aforementioned, the Court concludes that the State violated the right to humane treatment enshrined in Article 5(1) of the American Convention, in relation to Article 1(1) of the same, in detriment of the inmates’ next of kin identified in Appendix 2 of victims of the present Judgment that for these effects is considered part of the same.

#### *Obligation to effectively investigate the facts*

343. The analysis of the obligation to effectively investigate the violating facts to the right to humane treatment is done taking into consideration the parameters referred to by the Court in paragraphs 253 through 256 of the present Judgment.

344. Specifically, regarding the obligation to guarantee the right acknowledged in Article 5 of the American Convention, the Court has stated that it implies the duty of the State to investigate possible acts of torture or other cruel, inhuman, or degrading treatments.<sup>190</sup> Similarly, since Peru ratified the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women on June 4, 1996, as of that date it had to observe that stated in Article 7(b) of said treaty, which obliges it to act with the due diligence in the investigation and punishment of said violence. The obligation to investigate is also reinforced by that stated in Article 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, according to which the State is obliged to “take[...] effective measures to prevent and punish torture within their jurisdiction,” as well as to “prevent and punish [...] other cruel, inhuman, or degrading treatment or punishment.” Likewise, according to that stated in Article 8 of this Convention

if there is an accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction, the States Parties shall guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process.

345. In this same sense, the Tribunal has previously stated that:

in the light of the general obligation to guarantee all persons under their jurisdiction the human rights enshrined in the Convention, established in Article 1(1) of the same, along with the right to humane treatment pursuant to Article 5 (Right to Humane Treatment) of said treaty, there is a state obligation to start ex officio and immediately an effective investigations that allows it to identify, prosecute, and punish the responsible parties, when there is an accusation or well-grounded reason to believe than an act of torture has been committed.<sup>191</sup>

346. In the present case, the Court considers that from the facts declared as a violation of the right to humane treatment arises for the State the obligation to investigate the infringements of the same, which derives from Article 1(1) of the American Convention along with the mentioned substantive law protected in Article 5 of the same, applying the mentioned provisions of the Inter-American Convention to Protect, Punish, and Eradicate Violence Against Women and of the Inter-American Convention to Prevent and Punish Torture. Said provisions are applicable to the case since they specify and complement the State's obligation with regard to the compliance of the rights enshrined in the American Convention.

347. In definitive, the duty to investigate constitutes an imperative obligation of the state that derives from international law and cannot be disregarded or conditioned by domestic acts or legal provisions of any nature.<sup>192</sup> As has been stated by this Tribunal, in cases of serious breaches to fundamental rights the imperious need to avoid the repetition of said facts depends, in good measure, of the avoidance

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<sup>190</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 78; *Case of Ximenes Lopes*, *supra* note 3, para. 147; and *Case of the Moiwana Community*. Judgment of June 15, 2005. Series C No. 124, para. 92.

<sup>191</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 79; *Case of Gutiérrez Soler*, *supra* note 147, para. 54; and *Case of Baldeón García*, *supra* note 21, para. 156. In the same sense, *cfr.* Eur.C.H.R., *Case of Ilhan v. Turkey* [GC], Judgment of 27 June 2000, App. No. 22277/93, paras. 92 y 93; y Eur.C.H.R., *Case of Assenov and others v. Bulgaria*, Judgment of 28 October 1998, App. No. 90/1997/874/1086, para. 102.

<sup>192</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 81; *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 141; and *Case of the Ituango Massacres*, *supra* note 7, para. 402.

of their impunity<sup>193</sup> and satisfying the right of both victims and society as a whole to access to the knowledge of the truth of what happened.<sup>194</sup> The obligation to investigate constitutes a means to guarantee said rights; and failure to comply brings about the State's international responsibility.<sup>195</sup>

348. To determine if the obligation to protect the right to humane treatment through a serious investigation of what has occurred has been complied with, it is necessary to examine the procedures started at a domestic level destined to investigating the facts of the case and identifying and punishing those responsible for the same. This exam will be done in the light of that stated by Article 25 of the American Convention and of the requirements imposed by Article 8 of the same for all proceedings, and it will be done in Chapter XV of the present Judgment.

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349. For all the aforementioned, the Court concludes that the State is responsible for the violation of the right to humane treatment enshrined in Article 5(1) and 5(2) of the Convention, in relation to Article 1(1) of said treaty, in connection to Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, in detriment of the 41 dead inmates identified and of the inmates that survived, who have been identified in Appendix 2 of victims of the present Judgment that for these effects are considered part of the same. The facts are especially serious due to the considerations indicated in this chapter and in Chapter IX on the "State's International Responsibility within the context of the present case".

350. Similarly, the Court concludes that the State is responsible for the violation of the right to humane treatment enshrined in Article 5 of the Convention, in relation to Article 1(1) of said treaty, in detriment of the inmates' next of kin determined in paragraphs 336, 337, 340, and 341 of this chapter and identified in Appendix 2 of victims of the present Judgment that for these effects is considered part of the same.

## XII ARTICLE 11 (RIGHT TO PRIVACY) OF THE CONVENTION IN RELATION TO ARTICLE 1(1) OF THE SAME

351. The Commission did not argue any violation to Article 11 of the Convention.

### *Arguments of the common intervener*

352. The common intervener of the representatives argued that the State violated Article 11 of the Convention, appreciation that does not appear in the application presented by the Commission. The intervener indicated that:

<sup>193</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 81; *Case of Goiburú et al.*, *supra* note 5, para. 165; and *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 137.

<sup>194</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 81; *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 139; and *Case of the Ituango Massacres*, *supra* note 7, para. 289.

<sup>195</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 81

- a) "the State labeled all people detained up to May 1992 in pavilions 1A and 4B of the prison Castro Castro as 'terrorists' despite the fact that 90% of the same were in preventive detention." Up to this date it still refers to them as terrorists;
- b) the label of "terrorist" also stigmatized the victims' next of kin. Up to this date a victim is still referred to as a "terrorist that died in the prison Castro Castro," despite having a release order by acquittal; as is the case of an attorney, that for having defended the case has become a "terrorist";
- c) "as stated by sociologists that have studied the phenomenon, this was the result of a psychosocial strategy of the State that considers that the creation of public opinions is just another battlefield of the counter-subversive war;" and
- d) calling this group of people "terrorists" violates these people's and their next of kin's right to privacy.

353. The State did not present arguments regarding the alleged violation of Article 11 of the American Convention.

#### *Considerations of the Court*

354. Article 11 of the American Convention states that:

- 1. Everyone has the right to have his honor respected and his dignity recognized.
- 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
- 3. Everyone has the right to the protection of the law against such interference or attacks.

355. Regarding the alleged violation of Article 11 of the Convention, this Court reiterates its jurisprudence on the possibility that the alleged victims or their representatives may argue rights different to those included in the Commission's application, without adding facts to those included in the latter.<sup>196</sup>

356. The common intervener has argued that 90% of the inmates that were located in pavilions 1A and 4B of the Miguel Castro Castro Prison at the time of the facts were in preventive detention and that in some cases acquittals were later issued. Said statement was not objected by the State.

357. Likewise, it has been proven that all inmates located in pavilions 1A and 4B of the Miguel Castro Castro Prison at the time of the facts were treated by the press as "terrorists" (*supra* para. 157(59)), despite the fact that the majority of them had not been convicted. Similarly, their next of kin were stigmatized as "next of kin of terrorists."

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<sup>196</sup> Cfr. *Case of Claude Reyes et al.*, *supra* note 19, para. 111; *Case of Acevedo Jaramillo et al.* Judgment of February 7, 2006. Series C No. 144, para. 280; and *Case of López Álvarez*, *supra* note 146, para. 82.

358. From the evidence presented to the Tribunal, it has concluded that different newspaper articles published between May 6 and 10, 1992 transcribed or made reference to two official press releases issued by the Ministry of the Interior of Peru on May 6 and 9, 1992, in which it referred to all the inmates located in pavilions 1A and 4B with the qualifying adjective "terrorists of Sendero Luminoso", "terrorist criminals", and "prisoners for terrorism". Likewise, Police Report No. 322 (*supra* para. 197(61)) refers to the dead inmates as "terrorist criminals", and a press release issued by the Peruvian Embassy in England on May 7, 1992 refers to "prisoners for terrorism" that were located in pavilions 1A and 4B of the criminal center.

359. Said classification presented by State bodies implied an insult to the honor, dignity, and reputation of the surviving inmates who had not been convicted at the time of the facts, of their next of kin, and of the next of kin of the dead inmates that also had not been convicted, since they were perceived by society as "terrorists" or the next of kin of "terrorists", with all the negative consequences this implies.

360. However, the Tribunal does not have enough evidence to allow it to determine who would be the inmates that at the time of the facts had been accused and were awaiting conviction, and therefore, cannot determine who their next of kin were. Consequently, the Court cannot declare the State's responsibility for the violation of Article 11 of the American Convention on Human Rights, in relation to Article 1(1) of the same.

**XIII**  
**ARTICLE 7 (RIGHT TO PERSONAL LIBERTY) OF THE CONVENTION**  
**IN RELATION TO ARTICLE 1(1) OF THE SAME**

361. The Commission did not argue that Article 7 of the Convention was violated.

*Arguments of the common intervener*

362. The common intervener of the representatives indicated that the State had violated Article 7 of the Convention, appreciation that is not included in the application presented by the Commission. The intervener stated that:

- a) "the State of Peru systematically violated Article 7 of the American Convention [...] in detriment of the survivors of the events of Castro Castro [due to] the arbitrary nature of the deprivation of freedom of the survivors," since "[a]fter the massacre [t]he prisoner's deprivation of physical liberty [...]was] outside all law[ because] the people were tortured and they were kept incommunicado for a prolonged period of time without any judicial protection." Likewise, the State violated Article 7 of the Convention for "maintaining a prisoner[, Patricia Zorrilla,] detained for a longer time than her conviction as a result of the trial against her for the events of Castro Castro," since "after fulfilling her conviction (end of 2004) she was imprisoned approximately 3 more months;" and
- b) "the threats against the personal liberty of the legal representative of the present case, also a survivor of the facts, reopening against her a case that is already *res judicata* and issuing international arrest warrants against her, for the mere fact of having tried to stop the international litigation of the



present case are also, with regard to her, a violation to Article 7(1), since that threat is continuous and flagrant.”

363. The State did not present arguments on the alleged violation of Article 7 of the American Convention.

#### *Considerations of the Court*

364. This Tribunal will not issue a ruling with regard to the alleged violation of Article 7 of the Convention made by the common intervener because a part of the arguments of the intervener refer to the alleged fact that Mrs. Patricia Zorrilla, alleged victim, had completed her sentence of a crime “at the end of 2004”, but she was deprived of her freedom for three more months, and that fact is not part of the object of the *litis* in the present case, defined as of the application presented by the Commission on September 9, 2004. Likewise, the Tribunal will not issue a ruling on the alleged violation of Article 7 of the Convention because the other arguments presented have already been taken into consideration when analyzing the violation of Article 5 of the American Convention, and of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, especially when examining the detention conditions to which the inmates were submitted after the “Operative Transfer 1”.

### **XIV**

#### **ARTICLES 12 (FREEDOM OF CONSCIENCE AND RELIGION) AND 13 (FREEDOM OF THOUGHT AND EXPRESSION) OF THE CONVENTION IN RELATION TO ARTICLE 1(1) OF THE SAME**

#### *Arguments of the Commission*

365. The Commission did not argue that Articles 12 and 13 of the Convention were violated.

#### *Arguments of the common intervener*

366. The common intervener of the representatives indicated that the State had violated Articles 12 and 13 of the Convention, appreciations that were not included in the application presented by the Commission. The intervener stated that:

- a) the inmates were taken before the flag to sing the National Anthem, whose first verse says “we are free”, against their own awareness that they were not. The purpose of these practices was that inmates embrace a nationalist ideology in the State’s terms. If they refused to do so, they were submitted to mistreatment; and
- b) the final objective of their complete reclusion, being both incommunicado and immobilized, was to attack the mind, reason for which “it is precisely their freedom of thought what was being attacked and the obliteration of the mind of the people imprisoned with the use of torture was a flagrant violation of the freedom of conscience.”

*Arguments of the State*

367. The State did not present arguments on the alleged violation of Articles 12 and 13 of the American Convention.

*Considerations of the Court*

368. This Tribunal will not examine the alleged violation to Articles 12 and 13 of the American Convention, because it has already taken into consideration the arguments presented by the intervener in this sense when analyzing the violation of Article 5 of the American Convention, and of Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, especially when examining the detention conditions to which the inmates were submitted after "Operative Transfer 1".

**XV**  
**VIOLATION TO ARTICLES 8 AND 25 OF THE AMERICAN CONVENTION**  
**(RIGHT TO A FAIR TRIAL AND RIGHT TO JUDICIAL PROTECTION)**  
**IN RELATION TO ARTICLE 1(1) OF THE SAME, AND IN CONNECTION TO**  
**ARTICLES 7 OF THE INTER-AMERICAN CONVENTION TO PREVENT, PUNISH, AND**  
**ERADICATE VIOLENCE AGAINST WOMEN, AND 1, 6, AND 8 OF THE INTER-AMERICAN**  
**CONVENTION TO PREVENT AND PUNISH TORTURE**

*Arguments of the Commission*

369. The Commission argued the violation of Articles 8 and 25 of the Convention, regarding which it stated that:

- a) the extra-judicial killings of the fatal victims constituted violent events carried out by State agents that, due to their form and handling, demanded that officials of the judicial police, the public prosecutors' office, and the courts in charge of the investigation employ all their efforts in starting an immediate search, with the urgent and necessary inquiries;
- b) Peru is responsible for the lack of an adequate investigation regarding the facts that gave place to the present case. The most elementary measures of investigation have not been included. Among the serious deficiencies of the investigation carried out by the State are the destruction of the police file and the lack of timely recollection of statements from the surviving inmates. This deficient behavior of the police and the Public Prosecutors' Office has, after more than 14 years since the "massacre" in the criminal center "Castro Castro", led to a lack of identification and punishment of those responsible and, therefore, the alleged victims and their next of kin have not been able to promote a recourse in order to obtain a compensation for the damages suffered. Therefore, this is "a case of complete concealment of the facts and responsibilities of all the perpetrators [...] of this gross violation of human rights;"

- c) the lack of due diligence in the investigation process and in the preservation of the essential evidence, without which judicial proceedings cannot be carried out, characterized a violation to Articles 8 and 25 of the American Convention, especially in cases such as the present in which the authorities must act *ex officio* and impulse the investigation, not letting this burden fall on the initiative of individuals. The State has not offered a satisfactory explanation regarding the excessive delay in this investigation process;
- d) the State's obligation to investigate requires that the perpetrators and planners of the events that violate human rights be punished;
- e) the investigation refers only to the death of victims, and it does not include the investigation of the injuries, mistreatments, and tortures. Besides, the investigation referred only to that occurred between May 6 through 9, 1992;
- f) in its final written arguments it stated that almost a hundred of the victims of the present case are women, for whom the consequences of the violations to their human rights resulted especially severe. Even though the Convention of Belém do Pará was not in force in Peru at the time of the facts, in virtue of that stated by Article 29 of the American Convention this treaty may be used to the effects of analyzing the State's responsibility for the violations to Articles 4, 5, 8, and 25 of the American Convention. The Convention of *Belém do Pará* establishes the State's obligations to act with due diligence to prevent, investigate, and punish violence against women;
- g) the acquittal by the Second Chamber of the Supreme Council of Justice of the II Judicial Area of the National Police Force of Peru on November 5, 1992 in favor of the police personnel that participated in the operative "Transfer 1", does not satisfy the requirements for justice in the present case, because the seriousness of the actions and the consequences of the operative constitute common crimes and some crime against humanity that must be prosecuted by independent and impartial courts. The fact that the investigation that involves Police officers was confined to that same police force, presents serious doubts regarding their independence and impartiality;
- h) the access to justice of the alleged victims or their next of kin has been prevented, even in the realm of an economic compensation, since the procurement of a civil reparation for the damages caused as a consequence of an illegal act criminally defined, is subject to the establishment of the crime in a process of criminal nature;
- i) despite the fact that the State has declared that after the adoption of the Commission's report it has started a new investigation of the facts through the special prosecutor for forced disappearances and extrajudicial killings, the violations to Articles 1, 8, and 25 of the Convention were consumed as of the moment in which the State omitted carrying out the investigations and sufficiently rigorous internal proceedings to counteract the concealment made;
- j) in its brief of observations of September 22, 2006 (*supra* para. 113) it indicated that "the supervening evidence offered by the State on August 25,

2006[, in relation to the criminal accusation presented against the former President Alberto Fujimori Fujimori ..., ] puts in evidence the adoption of positive steps toward the complete elucidation of the facts [and] the prosecution and punishment of those responsible." However, "the inquiry must be expanded to the troop members of the police and the Peruvian armed forces that participated in the attack [... and] it should not be limited temporarily to May 6 to 9, 1992, but instead include the preparation of the attack, the acts that followed the capture of pavilions 1A and 4B, and the obstruction of justice by the agents involved; and it should not refer only to the death of the at least 42 fatal victims of the events, but also to the injuries suffered by at least 175 inmates and the mistreatments to which they rest of the survivors were submitted during the attack and after it concluded;" and

k) in its brief of observations of October 5, 2006 (*supra* para. 116) the Commission reiterated its conclusions of the brief of September 22, 2006, and added that "the supervening evidence presented by the State to the Tribunal on September 20, 2006 is of the receipt and it proves the adoption of positive steps toward the complete elucidation of the facts, the prosecution, and punishments of those responsible."

#### *Arguments of the common intervener*

370. The common intervener argued the violation of Articles 8 and 25 of the American Convention. Besides, it stated the existence of violations to Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, and of Articles 4 and 7 of the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women, appreciations that were not included in the application presented by the Inter-American Commission. In synthesis, the intervener stated the following:

a) the events of this case have not been punished, the denial of judicial protection and of a simple and quick recourse for the protection of the integrity and lives of the alleged victims occurred as of the time in which the facts were perpetrated, and it has continued until now. "More than 13 years after the facts nobody, that is none of the perpetrators, has been convicted for the Castro Castro massacre or for the systematic tortures carried out against the survivors," even though five years have gone by since the fall of the Fujimori regimen. The fact that no one has been detained contrasts the seriousness of the facts (which are crimes against humanity);

b) the opening of a judicial investigation does not make the violation to those rights cease, "nor does it free the State of its responsibility regarding judicial protection." The alleged victims consider that the effects of the violations have not been reimbursed and they are still in force, they do not participate in the domestic proceedings referred to by the State;

c) a serious investigation has to prosecute the main agents responsible for the massacre of the Castro Castro prison and of the torture regimen applied to the survivors;

d) "the actual investigation [... before] the Second Supraprovincial Criminal Court [...] does not fulfill the requirements of the investigation due

by the State [...] because it does not include all the criminal facts occurred [...] the definition of the crime is [...] inadequate [...] it does not cover all the crimes committed [...], only those dead are considered 'victims' [...] and [...] it does not prosecute all the individuals who participated in the specific crime;"

e) the prisoners were denied all remedy for the violations suffered, without having access to "legal recourses", or to their right to truth, thus violating Articles 8 and 25 of the American Convention. They were denied their right to an equal legal protection in virtue of a Decree Law that established that it was not possible to present the habeas corpus in the cases of those accused for terrorism;

f) "for the effects of the present case [...] the people deprived of freedom in the criminal center Castro Castro must be considered civil population imprisoned;"

g) in its brief of observations of August 31, 2006 (*supra* para. 110) stated that "the indictment against Alberto Fujimori Fujimori is an important step [...] to punish the crimes perpetrated in the Castro Castro prison." However, it stated that "the State [...] must start a preliminary proceeding against all those responsible of said violations" and reiterated that the definition of murder does not cover all the crimes committed. Besides, "the public prosecutor, or in its defect, the judge in charge of the proceedings against Fujimori must correct the definition of the crime in said case and use the criminal definition of crimes against humanity;"

h) in its brief of September 29, 2006 (*supra* para. 115) it argued that "it does not consider that the investigation has up to now 'restituted' the violations of Articles 8 and 25." Likewise, it indicated its concern regarding the fact "that the investigation carried out by the State [is being carried out] as if the proceedings before the Court [...] did not exist and [the] acknowledgment [of the facts] would not have occurred," and that those "who ordered said crimes" continue "being considered 'witnesses';"

i) Peru should have requested this case within the request made to Chile for the extradition of Alberto Fujimori. "If this is not done, the impunity for these events will continue to exist;" and

j) the Convention of Belém do Pará is directly applicable since June 4, 1996, day on which the State ratified this treaty, since the "denial of justice and the persecution os several of the survivors has continued until the present."

### *Arguments of the State*

371. In its brief of final arguments, the State expressed that:

a) it arranged the creation of Specialized Public Prosecutors' Offices for Forced Disappearances, Extrajudicial Killings, and the Exhumation of Clandestine Grave, as well as Supraprovincial Criminal Courts, through an Administrative Resolution;

- b) on November 26, 2001 it started the investigation of the facts, which has been subject to several expansions due to its complexity. On May 30, 2005 a formal accusation was presented regarding the facts and on June 16<sup>th</sup> of the same year, the preliminary proceedings were started, with the attendance of a great number of witnesses;
- c) currently members of the police force are being prosecuted in the ordinary venue, without applying procedural norms for its substitution;
- d) the "body of principles and guarantees that make up the so-called [d]ue [p]rocess, are being respected." The accused and the civil parties identified have been permitted a defense with the defense counsel of their choice. Similarly, they have had the right to participate in the judicial proceedings, present evidence, and present the corresponding defense;
- e) in the criminal process the preliminary statements of 12 defendants have been received, thus missing only the preliminary statement of one defendant. 106 testimonial statements have also been received, including 95% of the statements unofficially requested by the prosecutor and the Ministry of Justice. Likewise, proceedings of expert ratification have been carried out by 8 legal doctors who issued the autopsy protocols of the fatal victims, and of 8 ballistic experts who issued the expert reports of forensic ballistics practiced on the fatal victims; as well as 15 confrontation proceedings and a judicial inspection at the Miguel Castro Castro Prison. Similarly, 2 proceedings of preventive statements of the next of kin of the injured parties have been performed, for being the only ones that have come forward and have been constituted as civil parties in this instance, notifying them of all the proceedings and actions performed, without having been able to locate the next of kin of the other victims. The inquiries regarding the name and domicile of the other injured parties continues;
- f) in the criminal process it is also trying to "establish the location of the weapons allegedly seized upon the conclusion of the Transfer Operative I from the inmates, as well as establishing the location of the bullets fired and extracted from the deceased, as well as those found in the women's pavilion 1A, the men's pavilion 4B, the roundhouse, and no man's land" of the criminal center;
- g) on the date of the brief of final arguments the "[case] file is at the Public Prosecutors' Office awaiting the corresponding judgment prior to prosecution;"
- h) considers its firm intention "of punishing the facts and avoiding impunity" proven and it stated that the "determination of the individual responsibilities that derive from the actions of the Judicial Power, will offer solid grounds to guarantee the non-repetition of facts such as those of the present proceedings;"
- i) "it is seeking a sound justice to correct the historical truth and [...] that the solution to all these situations affect society as a whole." There are sufficient means to obtain this justice and complete security "that the

demands of the victims [and] their next of kin will be taken into consideration by the corresponding domestic venue;"

j) on August 25, 2006 the State presented a brief (*supra* para. 108) in which it stated that "[t]he indictment presented [against Alberto Fujimori Fujimori] irrefutably [...] proves the State's interest [...] in providing Justice and punishing those responsible of the tragic events that took place in the Criminal Center 'Miguel Castro Castro' in May 1992 and, therefore, be coherent with its international commitments in matters of human rights [...];"

k) on September 14, 2006 the State presented a brief (*supra* para. 112) through which it stated that the opening of the "preliminary proceedings with an arrest warrant" against the former President Alberto Fujimori Fujimori for the facts of the case proves the State's firm intention to achieve his "immediate location and capture both at a national and international level." The State added that in said order to commence it "expressly" invoked the compliance of the recommendations made by the Inter-American Commission regarding case 11,015; and

l) it requested that the Court declare that it "has complied with restoring the right to judicial protection that corresponds to the victims' next of kin[, since] all guarantees are currently being offered by the domestic jurisdictional body for the full exercise of this right on their part and all the conditions necessary to completely clarify the facts are being offered, thus guaranteeing [...] an effective punishment of those responsible[, w]hich will guarantee the non-repetition of facts like those dealt with in the present proceedings."

### *Considerations of the Court*

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

[e]very 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.

373. Article 25(1) of the 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.

374. Paragraph 264 of this Judgment has indicated that stated by Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture regarding the obligation to investigate and punish.

375. Article 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women states that:

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish, and eradicate such violence and undertake to:

[...]

- b. apply due diligence to prevent, investigate, and impose penalties for violence against women;

376. Regarding the possibility that the interveners argue the violation of the Inter-American Convention to Prevent and Punish Torture and of the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women, the Court refers to that indicated in paragraph 265 of this Judgment.

377. According to the international obligations acquired by Peru, the latter has the duty to guarantee the right to access justice pursuant to that established in the American Convention, but also pursuant to the specific obligations imposed upon it by the specialized Conventions it has signed and ratified in matters of prevention and punishment of torture and violence against women (*supra* para. 376).

378. In order to comply with the obligation to investigate the State must observe that stated in paragraph 256 of this Judgment, in the sense that "once the state authorities become aware of the fact, they must start, *ex officio* and without delay, a serious, impartial, and effective investigation." Similarly, since Peru ratified the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women on June 4, 1996, it must comply with that stated in Article 7(b) of said treaty, which obliges it to apply the due diligence to investigate and punish said violence. Regarding the acts that constituted torture, cruel, inhuman, or degrading treatments, the State must also observe the obligation imposed by the Inter-American Convention to Prevent and Punish Torture in the sense that it must "take [...] effective measures to prevent and punish" said violations (*supra* para. 344) and the obligation imposed by Article 8 of said treaty that before an "accusation or well-grounded reason to believe that an act of torture has been committed within their jurisdiction" it shall "guarantee that their respective authorities will proceed properly and immediately to conduct an investigation into the case and to initiate, whenever appropriate, the corresponding criminal process."

379. According to that stated in the previous paragraph, the Court will analyze if the State has complied with its obligation to investigate stated in Articles 8 and 25 of the American Convention, applying the mentioned provisions of the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women and the Inter-American Convention to Prevent and Punish Torture. Said provisions are applicable to the case since they specify and complement the State's obligations with regard to compliance of the rights enshrined in the American Convention.

380. In the present case the Court has determined that the State breached the rights to life and humane treatment, in the terms indicated in paragraphs 231 to 258 and 262 to 350. Therefore, the State has the duty to investigate the infringements to said rights as part of its duty to guarantee them, as deduced from Article 1(1) of the American Convention.

381. The Court has held that, according to the American Convention, the States Parties are obliged to offer the victims of human rights' violations effective judicial recourses (Article 25), that must be substantiated pursuant to the rules of the due process of law (Article 8(1)), all this within the general obligation, of the same States, to guarantee the free and full exercise of the rights acknowledged by the Convention to all person under its jurisdiction (Article 1(1)).<sup>197</sup>

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<sup>197</sup> Cfr. *Case of Goiburú et al.*, *supra* note 5, para. 110; *Case of Servellón García et al.*, *supra* nota 3, para. 147; and *Case of Ximenes Lopes*, *supra* note 3, para. 175.



382. Likewise, this Court has stated that the power of access to justice must ensure, within a reasonable period of time, the right of the alleged victims or their next of kin that everything possible be done to know the truth of what happened and that the possible responsible parties be punished.<sup>198</sup>

383. This Tribunal has specified that the effective determination of the truth within the framework of the obligation to investigate a death must be evident from the first proceedings with all diligence. In this sense, based on the Manual on the Prevention and Effective Investigation of Extrajudicial, Arbitrary, and Summary Killings of the United Nations<sup>199</sup> the Court has stated the principles that must orient said proceedings. State authorities that carry out an investigation must, *inter alia*, a) identify the victim; b) recover and preserve the evidentiary material related to the case; c) identify possible witnesses and obtain their statements with regard to the death that is being investigated; d) determine the cause, form, place, and moment of death, as well as any proceeding or practice that could have caused it, and e) distinguish between a natural death, an accidental death, a suicide, or a homicide. Besides, it is necessary to thoroughly investigate the crime scene, autopsies and competent professionals employing the most appropriate procedures must carefully practice analysis of the human remains.

384. On the other hand, the European Court of Human Rights has stated that the evaluation on the use of force that has implied the use of weapons must be done regarding all circumstances and the context of the facts, including the planning and control actions of the facts under examination.<sup>200</sup>

385. Regarding the actions adopted by the State between May 1992 and the opening of the first ordinary criminal proceeding in June 2005, the Court points out that the state authorities incurred in important omissions regarding the recovery, preservation, and analysis of the evidence, such as: records were not prepared for the removal of the bodies; in the record on the seizure of the weapons found within the criminal center the exact place or circumstances of the findings were not specified; the autopsy certificates and the forensic medical reports limited themselves to describing the injuries suffered by the mortal victims and the injuries found in some of the wounded parties, without indicating the bullets recovered from the victims' bodies (*supra* paras. 196 and 197). Likewise, the lack of preservation of the evidence and of the police actions referred to in the facts of the present case catches the attention of this Court. It has been proven that in application of a Ministerial Resolution and a Bylaw great part of the domestic case file referred to in this case was burned (*supra* para. 197(62)).

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<sup>198</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 101; *Case of the Ituango Massacres*, *supra* note 7, para. 289; and *Case of the Pueblo Bello Massacre*, *supra* note 7, para. 171.

<sup>199</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 91; *Case of Servellón García et al.*, *supra* note 3, para. 120; *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 140; and U.N., *Manual on the Prevention and Effective Investigation of Extrajudicial, Arbitray, and Summary Killings of the United Nations*, E/ST/CSDHA/12 (1991).

<sup>200</sup> Cfr. *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 82. In the same sense *cf.* Eur.C.H.R., *Case of Erdoğan and Others v. Turkey* (4<sup>th</sup>), Judgment of 25 April 2006, App. No. 19807/92, para. 68; Eur.C.H.R., *Case of Makaratzis v. Greece* (GC), Judgment of 20 December 2004, App. No. 50385/99, para. 59; y Eur.C.H.R., *Case of McCann and Others v. United Kingdom* (GC), Judgment of 27 October 1995, App. No. 18984/91, para. 150.

386. It has been established that in the present case, on June 16, 2005, the State initiated a criminal proceeding before the Second Supraprovincial Criminal Court in order to investigate a part of the facts, with the purpose of prosecuting and punishing those responsible for the same (*supra* para. 197(70)). That is, the first criminal proceeding before the ordinary justice to investigate the criminal responsibility for the violations committed was initiated approximately 13 years after they occurred. In those criminal proceedings only the deaths of the inmates that resulted from the events of the Criminal Center Castro Castro from May 6 to 10, 1992 are being investigated, and in it 13 people appear in their quality of defendants (*supra* para. 197(70)). Similarly, almost three months ago a preliminary proceeding was initiated against Aberto Fujimori Fujimori, with the same purpose of investigating said deaths (*supra* para. 197(75)).

387. In first term, this Court considers that the time that has gone by since the time of the events and the initiation of the criminal proceeding for the investigation of the same exceeds without doubt a reasonable period for the State to carry out the first evidentiary and investigative actions in order to have the elements necessary to present an indictment, especially since to that period of time one must add the time it will take to carry out the criminal proceedings, with its different stages, up to the final judgment. This lack of investigation for such a prolonged period of time constitutes a violation to the right to access justice of both the victims and their next of kin, since the State has failed to comply with its obligation to adopt all the measures necessary to investigate the violations, punish the possible responsible parties and repair the victims and their next of kin.

388. The Court acknowledges that the State is currently carrying out criminal proceedings in its ordinary jurisdiction, in which people who at the time of the facts occupied high positions, such as the former President of the Republic, the former director of the Criminal Center Castro Castro, the former Director of the National Police Force, and the former Minister of the Interior, appear as defendants, as well as ten officers of the National Police Force of Peru (*supra* para 197(70)). According to the evidence presented to the Court, in these processes the State has respected the principle of reasonable time and within the times established in domestic legislation a large number of evidentiary proceedings have been carried out (*supra* paras. 197(70) to 197(74)).

389. Besides, the Tribunal considers that the mentioned omissions that occurred with regard to the recovery, preservation, and analysis of the evidence prior to the development of the criminal proceedings in course (*supra* para. 385), have affected their development. According to the statement offered in the public hearing before the Court, on June 26 and 27, 2006, by the criminal judge that has directed the process regarding these facts (*supra* paras. 187 and 197(74)), actions have been carried out in order to clarify the content of the existing but incomplete autopsy protocols of the dead inmates and the forensic ballistic expert reports, in order to determine: the external location of the injuries; the possible cause and form of production; the trajectory and distance of the bullets shot from fire weapons; the trajectory and entrance and exit wounds in the bodies of the deceased; and the direct cause of death. Likewise, said criminal judge informed that they are "trying to locate the weapons seized upon the conclusion of the Operative Transfer 1[, ... and] they are trying to establish the location of the bullets that were extracted from the deceased as well as those found in the installations of the women's pavilion 1A, the men's pavilion 4B, the roundhouse, and no man's land." In the same sense, the

expert witness Nizam Peerwani (*supra* para. 187) stated that the evidence was not duly collected or preserved, since it would have been very useful to collect air samples and conserve some of the clothes the inmates were wearing, evidence currently impossible to recover, and he explained that an adequate forensic evaluation should include an analysis of the deceased's clothes.

390. Even though the initiation of those proceedings constitute positive steps towards determining and prosecuting those responsible for the deaths that resulted from the events of May 6 to 9, 1992, the Court considers that the fact the said proceedings do not cover the totality of the facts that violated human rights analyzed in the present Judgment is in itself a violation of the right to justice, and its seriousness is evident. Both the accusations presented by the Public Prosecutors' Office and the orders for preliminary proceedings to commence the criminal proceedings issued by the Second Supraprovincial Criminal Court refer only to the crimes of murder.

391. In the present case, the State has not offered the Court an explanation regarding the reasons why it has not initiated a criminal proceeding for all the violations, despite its acknowledgment of international responsibility for the events of May 6 to 10, 1992 and it expressed that "the facts [...] cannot be hidden, the pain cannot be hidden, the pain cannot be hidden, [...] those injured cannot be hidden, the pain of the next of kin of the victims cannot be hidden."

392. In order to find an explanation regarding this lack of inclusion of all the violations in the criminal proceedings followed before the Second Supraprovincial Criminal Court, the Court asked the judge in charge of that court questions when he offered his statement before this Tribunal at the public hearing held on the 26<sup>th</sup> and 27<sup>th</sup> days of June 2006 (*supra* para. 187), to which he basically responded that the exclusive prosecution of the crime corresponds to the Nation's Public Prosecutors' Office, and therefore the judge does not have the power to order the initiation of preliminary proceedings for another crime. Likewise, the witness stated that in the case of the Criminal Center Castro Castro "the competent prosecutor has been notified in what corresponds" so that he may issue his opinion regarding two aspects: the first being that the records and the investigation state that there were many injured parties, as well as other acts that have violated different juridical rights that not only resulted in deaths; and the second is that the civil party requested the appearance of former president Fujimori in the proceedings.

393. According to the evidence presented by Peru after said public hearing, the Public Prosecutors' Office effectively presented an accusation against Alberto Fujimori Fujimori, but for the same crime of murder, and the judge ordered the initiation of the preliminary proceedings in the ordinary courts for said crime. That is, only the deaths continue to be investigated. The Court considers that this lack of investigation of all the violations to human rights of which the State is responsible constitute a violation to the right to justice of both the victims and their next of kin, since the State has failed to comply with its obligation to adopt all measures necessary to investigate the violations, punish the possible responsible parties and repair the victims and their next of kin.

394. This Court has established that "[a]ccording to international law the obligations imposed by it must be complied with in good faith and domestic

legislation may not be invoked to justify its non-compliance.”<sup>201</sup> Therefore, the State must adopt all measures necessary to comply with the obligation to investigate all the acts that constitute the violations to human rights declared in this Judgment and for that it must take into account that decided by this Court in the present Judgment, including the considerations made regarding the victims of the events, the rights declared violated, and the determination of the seriousness and magnitude of the same. That also implies that the State take into consideration the seriousness of the facts that constitute violence against women, taking into consideration the obligations imposed on it by the treaties it has ratified in this subject.

395. Besides, the long delay in the opening of the criminal proceedings has had specific aftereffects on all the victims of the case, since in Peru, as has been pointed out in other cases,<sup>202</sup> civil reparation for the damages caused as the result of an illegal act criminally defined is subject to the determination of the crime in a proceeding of a criminal nature. That is, the lack of criminal justice has prevented the victims from obtaining a compensation for the acts perpetrated, thus affecting their right to receive adequate reparation.

396. The Court has proven that in August 1992 Police Report NO. 322 IC-H-DDCV was prepared regarding the investigation of the events that occurred in the Miguel Castro Castro Prison, through which it determined, without greater analysis, “that the police personnel that intervened in the weakening of the riot within the criminal center [...had] acted within the legal framework with support from the FF. AA.” (*supra* para. 197(61)) In the same manner, on November 1992, the Superior Council for Justice of the II Judicial Area of the National Police Force of Peru stated that there were not merits to commence the preliminary proceedings against the members of the National Police Force who participated, since they were in an Act of Service and in compliance of the Law, disposing of the final case file of the accusation that originated it (*supra* para. 197(68)).

397. Once again, these provisions did not result as effective measures to comply with the obligation to investigate, not only due to the results of the investigation, but mainly because they were not proceeding held before an independent and impartial judicial body.

398. On April 20, 1996 4 inmates that are also victims in this case were convicted to life in prison due to the events that took place in the Miguel Castro Castro Prison from May 6 to 9, 1992. It was not until 2004 the National Terrorism Chamber of the Supreme Court of Justice of Peru acquitted these inmates of said conviction by (*supra* para. 197(67)).

399. Both the Commission and the common intervener argue the lack of prosecution of all the perpetrators of the facts of the present case. In this regard it is important to point out that in the criminal proceedings that are being carried out, only 14 people appear as alleged responsible parties (*supra* paras. 197(70) and 197(75)). This determination contrasts the previously established fact that many

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<sup>201</sup> Cfr. *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. 35; and *Case of Almonacid Arellano et al.*, *supra* note 15, para. 125.

<sup>202</sup> Cfr. *Case of Baldeón García*, *supra* note 21, para. 154.

officers of the police department and the Peruvian army, and even members of the specialized units of the police department participated in "Operative Transfer 1" (*supra* para. 197(21)). Likewise, the Court has pointed out that it is just now that proceedings are being carried out to determine which agents participated in said events (*supra* para. 197(74)). As has been stated above the State must take into consideration that established by this Tribunal with regard to the facts and the violations declared in order to comply with its obligation to guarantee the victims' access to justice (*supra* para. 394). Peru must also take into consideration, for the compliance, of its obligation to investigate, persecute, prosecute, and, in its case, punish those responsible for the violation of human rights, the seriousness of the facts, and the violations of human rights in this case, as well as the magnitude of the "operative" itself.

400. Regarding the different arguments presented by the parties regarding the participation of the victims in the domestic criminal proceedings, this Tribunal has established that the State's responsibility for not having repaired the consequences of the violations to human rights, is not annulled or decreased by the fact that next of kin of the victims have not tried to use the civil or administrative proceedings indicated by the State in said case. The obligation to repair the damage caused is a juridical duty of the State itself that must not depend exclusively to the victims' procedural activity.<sup>203</sup>

401. The State also argued that it has "reestablish[ed] the right to judicial protection that corresponds to the next of kin of the victims[, since] they are currently being offered all guarantees [...] for the full exercise of this right [...]". In this regard this Tribunal reiterated its jurisprudence in the sense that the State's responsibility arises with the international violation attributed to it.<sup>204</sup>

402. Besides, this Court finds that in May 1992, moment as of which the events of the present case occurred, the commission of crimes against humanity, including murder<sup>205</sup> and torture<sup>206</sup> executed within a context of a generalized of systematic attack against sectors of the civil population, was violatory of a pressing norm of international law. As established by this Court in the case of Almonacid Arellano, said

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<sup>203</sup> Cfr. *Case of Goiburú et al.*, *supra* note 5, para. 122; *Case of the Ituango Massacres*, *supra* note 7, para. 340; and *Case of the Pueblo Bellos Massacre*, *supra* note 7, para. 209.

<sup>204</sup> Cfr. *Case of Baldeón García*, *supra* note 21, para. 149; *Case of Ricardo Canese*. Judgment of August 31, 2004. Series C No. 111, para. 71; and *Case of the Gómez Paquiyauri Brothers*, *supra* note 21, para. 75.

<sup>205</sup> Cfr. *Case of Almonacid Arellano et al.*, *supra* note 15, para. 96 and 99.

<sup>206</sup> Cfr. *Case of Goiburú et al.*, *supra* note 5, para. 128. In this same sense, cfr. U.N., Human Rights Commission, Subcommission for the Prevention of Discriminations and Protection for Minorities, 37<sup>o</sup> meeting, Provisional report of Mr. Louis Joinet, Special Rapporteur, *Estudio sobre las leyes de amnistía y el papel que desempeñen en la salvaguardia y la promoción de los derechos humanos*. E/CN.4/Sub.2/1984/15, June 22, 1984, para. 56; Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, Article II*, Allied Control Council of December 20, 1945, Nuremberg Trials. Final Report to the Secretary of the Army on the Nuernberg War Crimes Trials Under Control Council law No. 10, Washington, D.C.: U.S. Government Printing Office, 1949; *ICTY, Case of Prosecutor v. Kunarac*. IT-96-23-T and IT-96-23/1-T. Trial Court Decision, Judgment of February 22, 2001, paras. 21 and 883; U.N., Rome Statute of the International Criminal Court, approved by the Diplomatic Conference Plenipotenciarios of the United Nations of the establishment of an international criminal court, U.N. Doc. A/CONF.183/9, July 17, 1998, Article 7.

prohibition to commit crimes against humanity is a norm of the *ius cogens*, and the punishment of those crimes is obligatory pursuant to general international law.<sup>207</sup>

403. Regarding the occurrence of the facts under a systematic or generalized attack against a civil population, it has already been established that the facts of the present case occurred within an internal conflict of gross violations to human rights in Peru (*supra* paras. 201 to 209), that the attack on the inmates located in pavilions 1A and 4B of the Miguel Castro Castro Prison constituted a massacre, and that said "operative" and the subsequent treatment given to inmates had the objective of threatening the life and integrity of said inmates, who were people accused or convicted for the crimes of terrorism or treason (*supra* paras. 215, 216, and 234). Likewise, the Tribunal points out that these people were imprisoned in a criminal center under the State's control, being the latter the direct guarantor of their rights.

404. Therefore, the Court concludes that there is evidence to state that the deaths and tortures committed against the victims of this case by state agents, for the reasons mentioned in the previous paragraphs constitute crimes against humanity. The prohibition to commit these crimes is a norm of the *ius cogens*, and, therefore, the State has the obligation to not leave these crimes unpunished and therefore it must use the national and international means, instruments, and mechanisms for the effective prosecution of said behaviors and the punishment of their perpetrators, in order to prevent them and avoid that they remain unpunished.<sup>208</sup>

405. This Tribunal has invariably stated that the State has the duty to avoid and fight impunity, characterized as "an offense within the obligation to investigation, persecute, capture, prosecute, and sentence those responsible for the violations of the rights protected by the American Convention."<sup>209</sup> Impunity must be fought through all means available, taking into account the need to make justice in a specific case and that promotes the chronicle repetition of violations to human rights and the total defenselessness of the victims.<sup>210</sup> This Tribunal has also pointed out that the nature and seriousness of the facts within contexts of systematic violations of human rights generates a greater need to eradicate the impunity of the facts.<sup>211</sup>

406. The Tribunal also takes into account the importance of opening a criminal proceeding against the former Peruvian President Alberto Fujimori Fujimori, who is accused of having planned and executed the "Operativo Mudanza 1" (*supra* paras. 197(75) and 209). In this regard, the common intervener stated during the public hearing that "on the day on which [they] see that the State [...] has the political will to start a trial [against] Alberto Fujimori Fujimori for this case [...] that [will help] start their healing process[...]." Likewise, the Commission in its observations regarding the initiation of the preliminary proceeding by the criminal judge considered that it "received and included as evidence the adoption of positive steps

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<sup>207</sup> Cfr. *Case of Almonacid Arellano et al.*, *supra* note 15, para. 99.

<sup>208</sup> Cfr. *Case of Goiburú et al.*, *supra* note 5, para. 128.

<sup>209</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 153; *Case of Almonacid Arellano et al.*, *supra* note 15, para. 111; and *Case of Servellón García et al.*, *supra* note 3, para. 192.

<sup>210</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 153; *Case of Almonacid Arellano et al.*, *supra* note 15, para. 111; and *Case of Servellón García et al.*, *supra* note 3, para. 192.

<sup>211</sup> Cfr. *Case of Goiburú et al.*, *supra* note 5, para. 131.

towards the complete elucidation of the facts, the prosecution and punishment of those responsible.”

407. Taking into consideration the seriousness of the facts of the present case, according to the general obligation of guarantee established in Article 1(1) of the American Convention, the State must adopt all measures necessary, of both a judicial and diplomatic nature, in order to prosecute and punish all those responsible for the violations committed.

408. Due to all the aforementioned, this Tribunal considers that the domestic proceedings initiated in the present case have not constituted effective recourses to guarantee a true access to justice by the victims, within a reasonable period of time, that includes the elucidation of the facts, the investigation and, in its case, punishment of those responsible and the reparation of the violations to the right to life and humane treatment. Therefore, the State is responsible for the violation of Articles 8(1) and 25 of the American Convention, in relation with the obligation included in Article 1(1) of the same, in connection to Articles 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, in detriment of the next of kin of the 41 dead inmates, of the surviving inmates, and of the next of kin of the inmates determined in paragraphs 336, 337, 340, and 341 of the Chapter on the violation to personal integrity and identified in Appendix 3 of victims of the present Judgment that for these effects is considered part of the same.

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409. This Tribunal will not issue a ruling regarding the alleged violation of “equal legal protection” in relation to the presentation of the habeas corpus (*supra* para. 370(e)), made by the common intervener, because it refers to a fact that is not part of the object of the *litis* of the present case, which has been defined based on the application presented by the Commission.

**XVI**  
**REPARATIONS**  
**APPLICATION OF ARTICLE 63(1)**  
**OBLIGATION TO REPAIR**

*Arguments of the Commission*

410. It requested that the Court:

a) in attention to the nature of the present case, declare that the beneficiaries of the reparations ordered by the Court as a consequence of the violations to human rights perpetrated by the Peruvian State be the people listed in Appendix A of the present application and their next of kin that prove during the proceedings before the Tribunal a close emotional tie to the victims and that they were deeply affected by the facts;

b) with regard to the pecuniary damage, that it set in equity the amount of the compensation corresponding to emerging damages and lost earnings, taking into account the nature of the case and the number of victims,

“without detriment to the claims presented by the representatives of the victims and their next of kin in the corresponding procedural moments;”

c) regarding non-pecuniary damages, that it set in equity the amount of the compensation for the physical and psychological suffering undergone by the victims, attending to the nature of the case and the number of victims. It is necessary to take into consideration the lack of a diligent investigation of the facts and of the subsequent punishments of those responsible, the lack of identification and delivery of the remains of at least one of the victims, among other infringements. The acts to which the victims were submitted have produced in them different forms, and different degrees, of fear, suffering, anxiety, humiliation, degradation, and feelings of inferiority, insecurity, frustration, and helplessness. At least 321 survivors resulted physically uninjured shared with their dead and injured prison mates the horror of the attack and the mistreatment after its conclusion, with the majority of them suffering from its psychological consequences up to this date;

d) set in equity the amount of the compensation for non-pecuniary damages inflicted upon the next of kin of the direct victims. From the evidence it can be concluded that the victims experienced moral suffering as a consequence of the gross violations of human rights to which they were submitted, who in some cases up to this point are not aware of what happened to their next of kin. Added to the above is the feeling of helplessness and frustration due to the lack of results in the investigative process;

e) regarding compensatory damages, it considers that in what refers to the amounts of the compensation to which the victims and their next of kin, who are duly represented before the Court, are entitled, the obligation of compensation of damages, detailed by its representation, is applicable. On the other hand, it is necessary to take into account the compensatory claims of the other group of victims, represented by the original petitioner, Mrs. Astete, since the common intervener presented her claims in this sense, only on behalf of the people that granted her a power to represent them. In what refers to the victims that have not appointed a representation, the Commission defends their interests and requests that compensatory damages be set in equity for said victims and their next of kin, stating as the form of compliance the search, identification, accreditation, and claim processes that lead to the possibility to make the corresponding payments. In the case of victims that have not been located, it is necessary and convenient to adopt the adequate measures in order to ensure that said victims and their next of kin are not deprived of the fair reparation that is due to them as a result of the events that have been acknowledged by the State;

f) in reference to the measures of cessation of the violations, the State must comply with its obligation to duly investigate, prosecute and punish the violations to human rights in the present case, since on the contrary it will be incurring in a continuous violation of the right established in Article 25 and of the obligation enshrined in Article 1 of the American Convention.” In this same sense, it is necessary that the remains of the victim or victims that were not fully identified by their next of kin be recovered and handed over to them, in order to allow them to complete their mourning for not knowing the luck their loved ones faced, and that the damage caused be partially repaired.



Furthermore, the State must adopt all measures necessary to avoid that military justice be in charge of investigating and prosecuting violations to human rights committed by members of the police force;

g) regarding rehabilitation measures, it order the State to assume the medical and psychological rehabilitation of the victims and the members of their family groups that have suffered damages as a result of the facts of the present case, taking into consideration that based on this several of the victims in this case have decided to live in other countries. Both the victims and their next of kin have suffered stigmatization due to the search for justice. It is of special importance for the rehabilitation that the acknowledgment of responsibility and the request for pardon made by the State during the public hearing be publicly diffused;

h) regarding measures of satisfaction and guarantees of non-repetition, it order the State to:

i. adopt al judicial and administrative measures necessary in order to "reopen" the investigation of the facts of the present case and locate, prosecute, and punish the planner or planners and other responsible parties of: the lack of safety to prevent the entrance of weapons to the Criminal Center "Miguel Castro Castro" the excessive use of force to recover control of the prison center in question; the extra-legal execution of at least 16 inmates; the torture of at least one female inmate; the cruel, inhuman, and degrading treatment in detriment of all the victims; the lack of a diligent, timely, and complete investigation; the destruction of essential evidence for the elucidation of the facts; and the denial of justice in detriment of the affected parties. The victims and their next of kin must have full access and capacity to act in all the stages and instances of said investigations, pursuant to domestic legislation and the norms of the American Convention. The State must ensure an effective compliance of the decision adopted by domestic courts. The result of the process must be publicly divulgated, in order for Peruvian society to know the truth;

ii. publish the Judgment issued by the Tribunal in a means of communication of national circulation;

iii. perform in Peru a public acknowledgment of its responsibility for the violations committed and the obstacles maintained for years in the exercise of justice, which must include a worthy and significant apology, in consultation with the surviving victims and the next of kin of the fatal victims;

iv. erect a monument or destine a place, in the area of Canto Grande, where the Criminal Center "Miguel Castro Castro" is located, in memory of all the victims of that massacre, in consultation with the surviving victims and the next of kin of the fatal victims;

v. modify legal dispositions as well as any other that in a similar manner, establishes an obstacle of fact for the procedures of judicial investigation. From the information provided by the State it can be concluded that under the protection of a regulatory norm, that does

not establish a specific time period for the conservation of the documents related to police investigations, the destruction of essential evidence for the complete elucidation of the facts was carried out;

vi. professionally train Peruvian police and armed forces personnel in matters of riot control, human rights, and the treatment of prisoners, through the formal inclusion of obligatory classes on the previously described subjects in the study programs of military and police academies, as well as those for penitentiary personnel;

vii. develop educational policies and plans destined to training police, military, and penitentiary personnel on negotiation strategies and the peaceful solution of conflicts;

viii. adopt a General Prison Manual pursuant to international standards on the humane treatment of people deprived of their freedom included in the Body of Principles for the Protection of All Persons Submitted to Any Type of Detention or Imprisonment and the Inter-American jurisprudence, as well as a general protocol for the use of force in prisons, under the European Penitentiary rules; and

ix. prepare emergency plans that include provisions on lines of command and responsibilities; appointment of officials who will provide public information during and after the events; evacuation models, among other provisions, ensuring that it be distributed within the penitentiaries and among the other state members involved in these phases of action: and

i) regarding costs and expenses, after having heard the representatives of the victims, order the State to pay the costs and expenses duly proven by the first, taking into consideration the present case's special characteristics.

#### *Arguments of the common intervener*

411. The common intervener requested the following:

a) along with the presentation of its brief of pleadings and motions, it presented a list of identified beneficiaries, represented by her;

b) public acknowledgment by the State of the facts "as proven in the present case." The State must make a public televised apology to the victims and their next of kin for the moral damage caused;

c) that the persecution against the survivor who presented the claim and represented this case cease in what refers to her honor and name, since she has been identified with the term "terrorist" in different communications and statements made by State agents. That her persecution also cease in what refers to the arrest warrants and orders to reopen a "res judicata by the Attorney General's Office [...] without any real grounds to do so," and that she be publicly compensated;

- d) that the "corresponding parts of the judgment of the Court" be published in the official newspaper and in another two private newspapers, of a national circulation;
- e) that the State request a pronouncement of the Journalist's association or any institution of journalistic ethics on behalf of all the media that distributed "false information" in which they correct the "lies published regarding what really happened." That it request that these means of communication promise to not use criminal appellatives when a person's responsibility has not been proven in an independent court;
- f) "that every day spent in prison [...] from May 6, 1992 and for the rest of the period covered by the present day [...] be considered equal to two days in prison." The aforementioned in order for the inmates Eva Chalco, Juan Castro Vizcarra, Ramiro Porras, and Daniel Grande Ascue, who have been released on conditional freedom, "may stop signing", as well as for the 11 prisoners, who she represents, that have not been prosecuted, so they may be benefited by this equivalence in the compliance of their sentences;
- g) the creation of a park in the area of Canto Grande, where the victims and the next of kin of the deceased she represents may plant a tree "as a symbolic gesture of life on behalf of a dead loved one," as well as the erection of a monument at the park in honor of the Mothers of the victims she represents. The latter must be built pursuant to the desires of the victims. They do not want "museums or monuments of a different nature to be placed in said park;"
- h) that the individual consequences of the damages cause be repaired pursuant to the table of damages presented along with its brief of final arguments;
- i) that the State reimburse, as soon as possible and no later than 6 months after the corresponding Judgment, the expenses incurred in during the "international litigation of the present case;"
- j) that the State "sign and ratify the Facultative Protocol of the Convention against torture and other Cruel, inhuman, or Degrading treatments or punishments" as a non-repetition guarantee;
- k) that the Court establish "that the violations of this petition constitute crimes against humanity." It requests the prosecution of the State agents that participated, in any way, in the execution of the facts subject of the present case and indicated their names;
- l) that when establishing *quantum* regarding reparations, when setting the amounts of the reparations, it take into account:
- i) the period of time that has gone by since the violation and the decision, that is a "delayed justice";
  - ii) the destruction of the life project of the victims and their next of kin who were not able to fulfill their personal development;

- iii) the children affected by the prolonged solitary confinement of their fathers and mothers;
- iv) both the injuries caused to the inmates victims of the "massacre" at the Criminal Center Castro Castro, as well as those caused with the subsequent torture, and it consider both the physical and psychological damage;
- v) the inmates that were uninjured during the events between May 6 and 9, 2002 in the criminal center Castro Castro but were victims of torture after being transferred to other prisons, and that therefore have permanent injuries of serious illnesses, (such as TBC);
- vi) the women who were pregnant, and who were victims of the attack on the criminal center Castro Castro;
- vii) the consequences of the damages caused, their long-term impact, and, if it applies, the decrease in the "victim's capacity to function;"
- viii) the moral sufferings and afflictions such as loss of family bonds with children, parents, and spouses, as a result of isolation;
- ix) the consequences of a pecuniary nature that have a direct link to the facts, and future expenses that may be incurred in, such as rehabilitation, medications, prosthesis, etc.;
- x) the monies and personal effects lost to destruction by state agents during the operation "Transfer I";
- xi) the moral damages due to "psychological torture" suffered by the victims' next of kin, and for the health damages to which they were submitted, as moral damage. Also, as pecuniary damages, all the expenses incurred in by the next of kin during the 4-day attack on the criminal center and the subsequent one during their search for their next of kin;
- xii) the responsibilities of the fatal victims, in relation to their next of kin, their ages, occupations at the time of death, and in the case of students, an estimate of what they would have perceived if they had finished their studies;
- xiii) that the people who died and were imprisoned in the criminal center Castro Castro under preventive detention, must be treated as if they would have obtained their freedom pursuant to the principle of innocence when estimating the pecuniary damage;
- xiv) for the effects of moral damages, the honorable way in which each of the victims died as well as their previous suffering; and

xv) the principle of "life's intrinsic value" used by the Court in the case of Villagrán Morales and in the case of Bámaca, in the sense that life may not be simply treated with the notion of "homo economicus", but instead life is *per se* a value that deserves protection, regardless of the fact that the person is handicapped or does not produce an economic income.

m) that it order that the State hand over the remains of Mario Aguilar Vega and Santos Genaro Zavaleta to the next of kin of the deceased, as a measure of reparation;

n) that it order that the State cover the costs of the transfer of the remains of Luis Llamas Menodoza to the cemetery closest to the home of his next of kin;

o) that it order the reincorporation of Mr. Luis Torres Maldonado into his job, since he was separated from the same due to the prison conviction "illegally" issued against him;

p) that it order a compensation in favor of Mr. Víctor Trejo Pérez, victim of the attack on the criminal center Castro Castro, who was acquitted through judgment of November 6, 1994 and was "illegally" imprisoned until October 2002, for his years of service at his previous job;

q) consider in equity a compensation for moral damage in favor of Patricia Zorrilla, for having been accused of "stirring a riot and murdering her prison mates who were surrendering" for which she was "illegally" imprisoned for approximately 3 months;

r) consider within the lost wages of the representative and victim, Mónica Feria Tinta all the time she dedicated to the representation of the present case. As of the year 1997, when she presented the petition, and until 2000, when the case was admitted she worked part-time, but she later had to work exclusively on the representation of the case full time. She requests that her professional studies, as well as her physical and moral suffering due to money problems be taken into consideration, as well as some parameters of international wages. She requested that she be reimbursed the amount of US\$ 655,000.00 United States dollars for this concept; and

s) regarding the costs and expenses, she stated that:

i) she requested the reimbursement of the expenses incurred in during the 10 years of litigation of the present case before the Inter-American System; and

ii) she requested "the reimbursement of \$448,761,412 United States dollars, spent" up to the present; that \$2,000 dollars be added to said value for monthly interests due to loans requested; and that she be assigned \$50,000 United State dollars as part of the future expenses she will incur in for the follow-up of the Judgment.

### *Arguments of the State*

412. The State indicated that:

- a) up to now it has paid US\$ 6,941,673.35, imposed by the Inter-American Court, and US\$ 336,923.87 in agreements of amicable solutions before the Inter-American Commission, both as reparations to victims of violations to human rights produced during the internal armed conflict. The present case would be a state obligation difficult to handle, in which the State is being accused for 42 dead inmates, 175 injured inmates, and 322 people who suffered cruel, inhuman, or degrading treatments. If the Court's standards were to be applied, a compensation of approximately US\$ 17,052,000 would be set between the deceased and the injured, without taking into account those submitted to cruel treatments which would be 322 people;
- b) the urgency to approve a law that determines individual reparations in standards that can be met by the State with criteria of equality and universality, without discrimination is evident;
- c) the right to truth "is materialized in the elucidation of the facts that results from the judicial proceedings, to which he requests that the Court refer, due to the advances made in said proceedings;"
- d) accepts the reparation referred to the publication of the Judgment, since this is a normal practice in Peru;
- e) it does not agree with the measure that refers to placing a commemorative plaque at the place of the events, since a monument has already been erected in a public place of the capital in favor of all the victims of the conflict. Besides, the Miguel Castro Castro Prison, currently in operation, "still holds inmates for the crime of terrorism linked to the political group that initiated the conflict and an action such as the one requested would support their political position and would put in risk the criminal center's order;"
- f) the State created the Comprehensive Plan of Reparations, through Law N° 28592, regulated by Supreme Decree N° 015-2006-JUS. Therefore "the State's intention to implement reparatory policies that contribute to benefit all the victims of the conflict that affected the country between the years of 1980 and 2000 [...] is proven," reason for which the victims may enjoy their right to promote the reparations that correspond to them. Likewise, the State requests that the Court acknowledge its intent to promote these policies and it order that the reparations be set through the same; and
- g) regarding the symbolic reparations, "the Peruvian State can only reaffirm its intention to implement them," without allowing them to be politicized.

### *Considerations of the Court*

413. Pursuant to the analysis carried out in the previous chapters, the Court has declared, based on the State's partial acknowledgment of responsibility, and on the facts of the case and the evidence presented before this Tribunal, that the State is responsible for the violation of the rights enshrined in Article 4 of the American Convention, in relation to Article 1(1) of the same,; Article 5 of the American Convention, in relation to Article 1(1) of the same, in connection to Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture; and of Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) of the same, in connection to Articles 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture. The Court has established, on several occasions, that all violation of an international obligation that has produced damage involves the duty to adequately repair it.<sup>212</sup> To these effects, Article 63(1) of the American Convention states that:

[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.

414. As previously stated by the Court, Article 63(1) of the American Convention constitutes a rule of customary law that enshrines one of the fundamental principles in contemporary international law on state responsibility. Thus, when an illicit act is imputed to the State, its international responsibility arises for the violation of the corresponding international norm, together with the subsequent duty of reparation and to put an end to the consequences of said violation.<sup>213</sup> Said international responsibility is different to the responsibility in domestic legislation.<sup>214</sup>

415. The reparation of the damage caused by a violation of an international obligation requires, whenever possible, full restitution (*restitutio in integrum*), which consists in restoring the situation that existed before the violation occurred. When this is not possible, the international court will determine a series of measures to guarantee the rights violated, repair the consequences caused by the infractions, and establish payment of an indemnity as compensation for the harm caused<sup>215</sup> or other means of satisfaction. The obligation to repair, regulated in all its aspects (scope, nature, modalities, and determination of the beneficiaries) by International Law, may not be modified or ignored by the State obliged, by invoking stipulations of its domestic law.<sup>216</sup>

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<sup>212</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 139; *Case of Almonacid Arellano et al.*, *supra* note 15, para. 134; and *Case of Goiburú et al.*, *supra* note 5, para. 140.

<sup>213</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 64 and 140; *Case of Almonacid Arellano et al.*, *supra* note 15, para. 135; and *Case of Goiburú et al.*, *supra* note 5, para. 141.

<sup>214</sup> Cfr. *Case of Servellón García et al.*, *supra* note 3, para. 161; *Case of Ximenes Lopes*, *supra* note 3, para. 208; and *Case of the Ituango Massacres*, *supra* note 7, para. 365.

<sup>215</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 141; *Case of Almonacid Arellano et al.*, *supra* note 15, para. 136; and *Case of Servellón García et al.*, *supra* note 3, para. 162.

<sup>216</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 141; *Case of Almonacid Arellano et al.*, *supra* note 15, para. 136; and *Case of Servellón García et al.*, *supra* note 3, para. 162.

416. Reparations, as indicated by the term itself, 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 successors.<sup>217</sup>

417. Pursuant to the evidentiary elements collected during the process and in the light of the aforementioned criteria, the Court proceeds to analyze the demands presented by the Commission and by the common intervener of the representatives of the alleged victims and their next of kin, and the State's considerations regarding the reparations in order to determine, first of all, who the beneficiaries of the reparations are, in order to later order the measures of reparation of the material and moral damages, the measures of satisfaction and non-repetition and, finally, that regarding costs and expenses.

#### A) *BENEFICIARIES*

418. The Court has determined that the facts of the present case constituted a violation of Article 4 of the American Convention, in relation to Article 1(1) of the same, in detriment of the 41 deceased inmates identified in Appendix 1 of victims of this Judgment; of Article 5 of the American Convention, in relation to Article 1(1) of the same, and in connection to Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, in detriment of the 41 deceased inmates identified and of the inmates who survived; of Article 5 of the American Convention, in relation to Article 1(1) of the same, in detriment of the next of kin of the inmates determined in paragraphs 336, 337, 340, and 341 of the chapter on the violation to the right to humane treatment and identified in Appendix 2 of victims of this Judgment; and of Articles 8(1) and 25 of the American Convention, in relation to Article 1(1) of the same, in connection to Articles 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, in detriment of the next of kin of the 41 dead inmates, of the surviving inmates, and of the next of kin of the inmates determined in paragraphs 336, 337, 340, and 341 of the chapter on the violation to the right to humane treatment and identified in Appendix 2 of victims of this Judgment. These people are entitled to the reparations set by the Tribunal, as victims of the mentioned violations.

419. Likewise, the next of kin of the 41 deceased victims identified will also be entitled to the reparations set by the Court, in their nature of successors of said victims.

420. According to the evidence presented, the Court has identified some of the mentioned next of kin, whose names are listed in Appendix 3 of the victims of the present Judgment that for these effects form part of the same. In that appendix only those people with regard to who there is evidence that allows the Court to determine that they were alive at the time of the facts. In relation to the other next of kin of the 41 deceased victims identified that have not been individualized in these proceedings, the Court states that the compensation that corresponds to them be delivered to them directly, in the same way provided regarding those who have been

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<sup>217</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 142; *Case of Servellón García et al.*, *supra* note 3, para. 163; and *Case of Almonacid Arellano et al.*, *supra* note 15, para. 137.



individualized, after they present themselves before the competent State authorities within the 8 months following the notification of this Judgment, and they prove, through a sufficient means of identification,<sup>218</sup> their relationship or kinship with the victim and that they were alive at the time of the facts.

421. The distribution of the compensations among the next of kin of the deceased victims, for the pecuniary and non-pecuniary damages that correspond to them, will be done as follows:<sup>219</sup>

- a) fifty per cent (50%) of the compensation will be divided in equal parts between the sons and daughters of the victims;
- b) fifty per cent (50%) of the compensation must be delivered to the spouse or permanent partner of the victim, at the time of death of the latter;
- c) if the victim does not have sons or daughters, or spouse or permanent partner, fifty per cent (50%) of the compensation will be handed over to its parents in equal parts. If one of them has died, the part that corresponds to him will be added to that of the other. The other fifty per cent (50%) will be distributed in equal parts among the brothers of said victim; and
- d) if there are no next of kin from any of the categories defined in the previous subparagraphs, what would have corresponded to the next of kin from those categories, will increase proportionally the part that corresponds to the others.

422. If the victims' next of kin, entitled to the compensations established in the present Judgment, have died or die before the corresponding compensation is delivered to them, the same distribution criteria of the compensation indicated in the previous paragraph will be applied.

#### *B) PECUNIARY DAMAGE*

423. The pecuniary damage entails the loss or detriment of the income of the victims and, in its case, of their next of kin, and the expenses incurred in as a consequence of the facts in the case *sub judice*. The Tribunal will set a compensatory amount in this sense for the violations declared in the present Judgment,<sup>220</sup> taking into account the State's partial acknowledgment of responsibility, the circumstances of the case, the evidence offered, the arguments presented by the parties, and the criteria established in the jurisprudence of the Tribunal itself.<sup>221</sup>

#### *Deceased Inmates*

<sup>218</sup> Cfr. *Case of the Ituango Massacres*, supra note 7, para. 94; *Case of the Moiwana Community*, supra note 190, para. 178; and *Case of the Plan de Sánchez Massacre*. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of November 19, 2004. Series C No. 116, para. 67.

<sup>219</sup> Cfr. *Case of Goiburú et al.*, supra note 5, para. 148; *Case of Montero Aranguren et al.* (Detention Center of Catia), supra note 128, para. 122; and *Case of Blanco Romero et al.*, supra note 147, para. 72.

<sup>220</sup> Cfr. *Case of Vargas Areco*, supra note 3, para. 146; *Case of Almonacid Arellano et al.*, supra note 15, para. 158; and *Case of Goiburú et al.*, supra note 5, para. 150.

<sup>221</sup> Cfr. *Case of Vargas Areco*, supra note 3, para. 146; *Case of Goiburú et al.*, supra note 5, para. 150; and *Case of Montero Aranguren et al.* (Detention Center of Catia), supra note 128, para. 126.

424. The Court considers it appropriate to set, in equity, the amount of US\$ 10,000.00 (ten thousand dollars of the United States of America) in favor of the 41 deceased inmates identified as compensation for pecuniary damages for the income they could have perceived for the work they could have carried out in the future. Said amounts must be distributed among their next of kin, pursuant to paragraph 421 of the present judgment. The State must make said payments within and 18-month term, as of the notification of the present Judgment.

#### *Surviving inmates*

425. It has been proven that as a consequence of the facts of the present case there are victims that suffer from physical and psychological damages that in many cases imply a permanent reduction in their ability to work due to a complete permanent handicap. Therefore, the Court sets, in equity, the amount of US\$ 25,000.00 (twenty five thousand dollars of the United States of America, or its equivalent in Peruvian currency), in benefit of the victims that due to the facts of the present case resulted with a complete and permanent handicap which made it impossible to work; and the amount of US\$ 10,000.00 (ten thousand dollars of the United States of America, or its equivalent in Peruvian currency) for those that resulted with a partial permanent handicap that affects their ability o work. Since the Tribunal does not have sufficient evidence to determine the individual handicap of each of the surviving victims, said determination must be made by the domestic bodies specialized in deciding on handicaps upon request of the interested parties, who must present their request within an 8-month term, as of the notification of the present Judgment. The State must make said payments within an 18-month period, as of the notification of the present Judgment.

426. The discrepancies regarding the determination indicated in the previous paragraph must be solved within the domestic realm, following the corresponding national proceedings before the competent authorities, among them the domestic courts. The previous without detriment to this Tribunal's competence to supervise compliance of the Judgment.

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#### *Next of kin of the victims*

427. As indicated (*supra* para. 337), it has been established that 36 of the inmates' next of kin looked for the victims, visiting hospitals and morgues during several days, for which the Court presumes they incurred in expenses. Therefore the Tribunal sets, in equity, the amount of US \$200 (two hundred dollars of the United States of America or its equivalent in Peruvian currency) for each of those next of kin, whose names have been included in Appendix 2 of victims of the present Judgment that for these effects is considered part of the same.

428. Besides, the Court assumes that the next of kin of the 40 deceased victims identified, whose remains were handed over to them, assumed the burial expenses, reason for which the Court sets, in equity, a compensation of US \$300.00 (three hundred dollars of the United States of America or its equivalent in Peruvian currency) for each family of said victims. Said amount must be delivered to the next of kin of the 40 deceased inmates in the following excluding order: the parents, in

their absence it will be delivered to the spouse or partner, and in its absence to their children, and if there are not any it will be delivered to the victim's siblings. For these effects, the mentioned next of kin must present their request within an 8-month term, as of the notification of the present Judgment, and the State must make said payments within an 18-month period, as of the notification of the present Judgment.

429. Regarding the expenses generated in relation to the delivery of the remains of the victim Mario Francisco Aguilar Vega to his next of kin, the State must observe that stated in paragraph 443.

### C) *NON-PECUNIARY DAMAGE*

430. Non-pecuniary damages may include the suffering and affliction caused by the violations as well as the detriment to very significant personal values, as well as non-pecuniary alterations in the conditions of existence of a victim. Since it is not possible to assign a precise monetary equivalent to non-pecuniary damages, it is necessary to provide the comprehensive reparation of the damage caused in other forms. First, through payment of an amount of money, 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, such as the transmission of a message of official disapproval of the corresponding violations to human rights and of commitment with the efforts tending to avoid the repetition of the violations. These acts seek to recover the victim's memory, the acknowledgment of their dignity, and the consolation of their next of kin.<sup>222</sup> The first aspect of the reparation of the non-pecuniary damages will be analyzed in this section and the second in the section corresponding to other forms of reparation.

431. International jurisprudence has repeatedly established that the judgment constitutes, *per se*, a form of reparation.<sup>223</sup> However, considering the circumstances in the case *sub judice*, the suffering caused by the violations committed on the victims and their next of kin, the change in the conditions of existence of the surviving inmates, and other consequences of a non-pecuniary nature suffered, the Court considers it convenient to determine payment of a compensation, set with equity, for non-pecuniary damages.<sup>224</sup>

432. Taking into account the different violations declared by the Tribunal in the present Judgment, the Court sets, in equity, the compensations for non-pecuniary damage, taking into consideration:

- a) regarding the deceased inmates, the non-pecuniary damages suffered due to the manner in which they died within the context of the violent events of "Operative Transfer 1", which implied the illegitimate use of force, an

<sup>222</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 149; *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 130; and *Case of Ximenes Lopes*, *supra* note 3, para. 227.

<sup>223</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 150; *Case of Servellón García et al.* *supra* note 3, para. 180; and *Case of Goiburú et al.*, *supra* note 5, para. 160.

<sup>224</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 150; *Case of Servellón García et al.* *supra* note 3, para. 180; and *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 131

attack of great magnitude employing weapons normally used at war and the lack of a timely medical attention;

b) that the deceased victim Julia Marlene Olivos Peña was tortured (*supra* para. 293);

c) regarding the surviving inmates, the non-pecuniary damages suffered due to the violations to the right to a humane treatment within the context of the violent events of "Operative Transfer 1", which implied the illegitimate use of force, an attack of great magnitude employing weapons normally used at war, the lack of a timely medical attention to those injured, the treatments received after May 9, 1992, and during their transfers to other criminal center and to hospitals, the treatments received in the health centers where they were transferred during the attack and once it had concluded; and the general detention conditions to which they were submitted after "Operative Transfer 1";

d) that the Court determined that the totality of the aggressive acts and the conditions in which the State deliberately placed all inmates (those who died and those who survived) for the duration of the attack, caused in them a serious psychological and emotional suffering for and constituted a psychological torture for all of them (*supra* para. 293);

e) that the Court determined that the totality of the detention conditions and the treatment to which the inmates were submitted in the criminal centers to which they were transferred or relocated after the so-called "Operative Transfer 1", constituted physical and psychological torture inflicted on all of them (*supra* para. 333);

f) that the female inmates Eva Sofía Challco, Sabina Quispe Rojas y Vicenta Genua López, at the time of the events, were 7, 8, and 5 months pregnant (*supra* paras. 197(57) and 298), and that the State left the basic prenatal health needs of the first two unattended, as well as the pre and postnatal health needs of Mrs. Quispe (*supra* para. 332);

g) that one female inmate was submitted to an alleged finger vaginal "examination", which constituted sexual rape (*supra* para. 312);

h) that six female inmates were forced to remain naked at the hospital, while watched over by armed men, which constituted sexual violence (*supra* para. 308);

i) that the next of kin of the deceased inmates were the victims of violations to Articles 8(1) and 25 of the Convention, in relation to Article 1(1) of said treaty, in connection to Articles 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture;

j) that the Court declared that the right to humane treatment of the next of kin of the inmates stated in paragraphs 336, 337, 340, and 341 was breached due to the treatment suffered: by the state agents while they were outside the criminal center between May 6 and 9, 1992 (*supra* para. 336); after that date when they went looking for their next of kin in hospitals and

morgues (*supra* para. 337); and due to the strict solitary confinement and visiting restrictions applied by the State on the inmates after the attack on the criminal center (*supra* para. 340). Likewise, when declaring said breach, the Tribunal considered that said solitary confinement caused a special infringement on the inmate's children under the age of 18 during said confinement (*supra* para. 341);

k) that the remains of Mr. Francisco Aguilar Vega have not been handed over to his next of kin; and

l) other factors that determine the seriousness of the facts indicated by the Court in Chapter IX on "the State's International Responsibility within the context of the present case."

433. Pursuant to the aforementioned the Court sets, in equity, the following compensations for non-pecuniary damages:

a) for each of the 41 deceased victims identified, the Court sets, in equity, the amount of US\$ 50,000.00 (fifty thousand dollars of the United States of America or its equivalent in Peruvian currency). The State must make these payments within an 18-month period, as of the notification of the present Judgment, taking into consideration that stated in paragraphs 420 and 421;

b) for the next of kin of the 41 deceased victims identified, the Court considers that the corresponding damages must be compensated through the payment of the amounts stated below:

i) US \$10,000.00 (ten thousand dollars of the United States of America, or its equivalent in Peruvian currency) in the case of the father, mother, spouse or permanent partner, and of each son or daughter of the victims. In the case of these next of kin of the victim Mario Francisco Aguilar Vega, the Court sets the compensation at US \$15,000.00 (fifteen thousand dollars of the United States of America or its equivalent in Peruvian currency);

ii) US \$1,000.00 (one thousand dollars of the United States of America or its equivalent in Peruvian currency) in the case of each brother or sister of the victims. In the case of these next of kin of the victim Mario Francisco Aguilar Vega the Court sets the compensation at US \$ 1,200.00 (one thousand two hundred dollars of the United States of America or its equivalent in Peruvian currency);

c) regarding the surviving victims:

i. for each of the victims with injuries of physical or mental illnesses that imply a complete permanent handicap to work the amount of US\$ 20,000.00 (twenty thousand dollars of the United States of America or its equivalent in Peruvian currency);

ii. for each of the victims with injuries of physical or mental illnesses that imply a permanent partial handicap to work the amount of US\$ 12,000.00 (twelve thousand dollars of the United States of America or its equivalent in Peruvian currency);

iii. for each of the victims with permanent consequences due to injuries suffered that did not result in a complete or partial handicap the amount of US\$ 8,000.00 (eight thousand dollars of the United States of America or its equivalent in Peruvian currency);

iv. for each of the other surviving victims not included in any of the previously mentioned categories, the amount of US\$ 4,000.00 (four thousand dollars of the United States of America or its equivalent in Peruvian currency);

v. since the Tribunal does not have sufficient evidence to individually determine in which of the previous categories each of the surviving victims must be included, said determination must be made by the domestic bodies specialized in the classification of injuries and handicaps upon request of the interested parties, who must present their request within an 8-month term, as of the notification of the present Judgment. Each of the victims may only be included in one of the four previous categories, which should be the one that represents the highest amount of compensation. The discrepancies regarding said determination must be solved within the domestic realm, following the corresponding national proceedings before the competent authorities, among them the domestic courts. The previous without detriment to this Tribunal's competence to supervise compliance of the Judgment. The State must make said payments within an 18-month period, as of the notification of the present Judgment;

vi. regarding the surviving victims that the Commission and the common intervener classified in their lists as "uninjured", the Court considers that it is necessary to point out that it could be that said people did not state that they had an injury since when offering their statement they only pointed out the violent events they had to face and they did not refer to their health condition. Taking into account the specific characteristics of this case, the Court states that these people may present themselves to prove their inclusion in any of the categories mentioned for the damages suffered as a consequence of the violations of the present case (*supra* subparagraphs i through v of this paragraph 433(c)). Said people must present their request within an 8-month period, as of the notification of the present Judgment. Each of the victims may be included in only one of the mentioned categories. The discrepancies regarding said determination must be solved within the domestic realm, following the corresponding national proceedings before the competent authorities, among them the domestic courts. The previous without detriment to this Tribunal's competence to supervise compliance of the Judgment. The State must make said payments within an 18-month period, as of the notification of the present Judgment;

vii. with relation to the victims that prove that they have their domicile abroad, the State must let them prove from their country of residence their physical and mental condition through objective and reliable means, such as medical certificates authenticated before a notary public or diagnosis issued by the Medical Associations of their

countries of residence. For this, that stated in subparagraph v of this paragraph 433(c) applies);

viii. the Court sets an additional compensation in favor of the victims Eva Chalco, Sabina Quispe Rojas, and Vicenta Genua López at US \$5,000.00 (five thousand dollars of the United States of America or its equivalent in Peruvian currency). The State must make said payments within an 18-month period, as of the notification of the present Judgment;

ix. the Court sets an additional compensation in favor of the victim of sexual rape, whose name is included in Appendix 2 of victims of this Judgment that for these effects is considered part of the same, at US \$30,000.00 (thirty thousand dollars of the United States of America or its equivalent in Peruvian currency). The State must make said payments within an 18-month period, as of the notification of the present Judgment;

x. the Court sets an additional compensation in favor of the six victims of sexual violence at US \$10,000.00 (ten thousand dollars of the United States of America or its equivalent in Peruvian currency). The names of these victims are found in Appendix 2 of victims of this Judgment that for these effects is considered part of the same. The State must make said payments within an 18-month period, as of the notification of the present Judgment;

d) for the next of kin of the victims of the violation to the right to humane treatment indicated in paragraphs 336, 337, 340, and 341, the Court sets a compensation of US \$1,500.00 (one thousand five hundred dollars of the United States of America or its equivalent in Peruvian currency). The names of these victims are found in Appendix 2 of victims of this Judgment that for these effects is considered part of the same. This compensation will be increased in US\$ 500.00 (five hundred dollars of the United States of America or its equivalent in Peruvian currency) for inmate's children under the age of 18 at the time of the solitary confinement (*supra* para. 341); that is, said children will receive a total compensation of \$2,000.00 (two thousand dollars of the United States of America or its equivalent in Peruvian currency). It has been proven that Yovanka Ruth Quispe Quispe, the daughter of the inmate Sabina Virgen Quispe Rojas, and Gabriel Said Chalco Hurtado, son of the inmate Eva Chalco were in said condition. Since the Court does not have the necessary evidence to determine the identity of all the children of the female inmates that at that time were under the age of 18, it is necessary that said people present themselves before the competent State authorities, within the 8-month period as of the notification of this Judgment to prove their relationship and their age, proving that they were within said supposition and, therefore, are victims of said violation. The State must make said payments within an 18-month period, as of the notification of the present Judgment.

434. The State must make the payments stated in paragraph 433 within an 18-month period, as of the notification of the present Judgment.

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

435. In this section the Tribunal will determine those measures of satisfaction that seek to repair non-pecuniary damages, that do not have a pecuniary scope, and it will establish measures of a public scope or repercussion.<sup>225</sup> In cases such as the present that are characterized by extreme seriousness these measures acquire a special relevance.

a) *Obligation to investigate the facts that caused the violations of the present case, and identify, prosecute, and punish those responsible*

436. The Court has established in this Judgment that the domestic proceedings opened in the present case have not constituted effective recourses to guarantee the victim's true access to justice, within a reasonable period of time, covering the elucidation of the facts, the investigation, and punishment of those responsible and the reparation of the violations to the right to life and humane treatment. Therefore, the Tribunal declared the State responsible for the violation of Articles 8(1) and 25 of the Convention, in relation to Article 1(1) of the same, in connection to Articles 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture.

437. The Court has considered as positive that the State is currently developing criminal proceedings within its ordinary jurisdiction. However, the Tribunal declared the violation of the right to access justice due to the fact that said proceedings do not cover the totality of the violations to human rights analyzed in the present Judgment. Both the criminal accusations made by the Prosecution as well as the orders to commence criminal preliminary proceedings issued by the Second Supraprovincial Criminal Court refer exclusively to the crimes of murder.

438. As previously indicated, even when the State has made recent efforts regarding the criminal investigation of a part of the facts, the violation committed in this case continues to be unpunished.

439. Besides, as indicated by the Court, the State must adopt all those measures necessary to comply with the obligation to investigate and, in its case, punish those responsible of gross violations to human rights.

440. The Court reiterates that the State is complied to fight this situation of impunity by all available means, since it promotes the chronic repetition of the violations of human rights and complete defenselessness of the victims and their next of kin, who have the right to know the truth of the facts.<sup>226</sup> The acknowledgment and exercise of the right to truth in a specific situation constitutes a means of

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<sup>225</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 152; *Case of Servellón García et al.*, *supra* note 3, para. 186; and *Case of Claude Reyes et al.*, *supra* note 19, para. 156.

<sup>226</sup> Cfr. *Case of Almonacid Arellano et al.*, *supra* note 15, para. 148; *Case of the Moiwana Community*, *supra* note 190, para. 204; and *Case of Carpio Nicolle et al.* Judgment of November 22, 2004. Series C No. 117, para. 128.



reparation. Therefore, in the present case the right to the truth gives place to an expectation of the victims, which the State must satisfy.<sup>227</sup>

441. In light of the above the State must, within a reasonable period of time, effectively carry out the ongoing criminal proceedings and the ones that may be opened, and it must adopt all measures necessary to elucidate all the facts of the present case and not only those that resulted in the death of the victims, in order to determine the intellectual and material responsibility of those who participated in the violations. The results of these proceedings must be publicly diffused by the State, so that the Peruvian society may know the truth regarding the facts of the present case.

442. Likewise, as a guarantee of non-repetition, the Court rules that the State must, within a reasonable period of time, establish the necessary means in order to ensure that the information and documentation related to police investigations regarding facts as serious as those of the present case be conserved in a manner such that they do not obstruct the corresponding investigations.

*b) Delivery of the body of Mario Francisco Aguilar Vega to his next of kin*

443. Since the next of kin of Mario Francisco Aguilar Vega have not received his remains (*supra* para. 251), this Tribunal declares that the State must carry out all the actions necessary and adequate to effectively guarantee the delivery, within a 6-month period, thus allowing them to bury it however they consider it appropriate. The State must cover all the expenses generated from the delivery of the victim's body to his next of kin, as well as the burial expenses in which they may incur.

444. Likewise, since there are doubts regarding if Peru complied with its duty to identify all the inmates who died and hand over the corresponding remains to their next of kin, pursuant to that stated in paragraphs 250 and 251 of the present Judgment, the State must adopt all the measures necessary to ensure that all the inmates that died as a result of the attack be identified and their remains be handed over to their next of kin, pursuant to domestic legislation. If other deceased inmates were to be identified, their next of kin may make the corresponding claims within domestic legislation.

*c) Public act of acknowledgment of responsibility in amends to the victims and for the satisfaction of their next of kin*

445. As has been stated in other cases,<sup>228</sup> the Court considers that it is necessary, in order to repair the damage caused to the victims and their next of kin, and to avoid that facts like those of the present case repeat themselves, that the State carry out a public act of acknowledgment of its international responsibility in relation to the violations declared in this Judgments in amends to the victims and for the satisfaction of their next of kin. This act must be carried out in a public ceremony, with the presence of high State authorities and of the victims and their next of kin.

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<sup>227</sup> Cfr. *Case of Blanco Romero et al.*, *supra* note 147, para. 95; *Case of the Moiwana Community*, *supra* note 190, para. 204; and *Case of Carpio Nicolle et al.*, *supra* note 226, para. 128.

<sup>228</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 152; *Case of Goiburú et al.*, *supra* note 5, para. 173; and *Case of Servellón García et al.*, *supra* note 3, para. 198.

The State must transmit said act through the media,<sup>229</sup> including the transmission on radio and television. For this, the State has one year, as of the notification of the present Judgment.

*d) Publishing of the judgment*

446. As has been ordered in other cases, as a satisfaction measure,<sup>230</sup> and taking into account that Peru expressed that "it accepts the reparation that refers to the publishing of the Judgment," the Court orders that the State must publish the Chapter on facts proven of this Judgment, without the corresponding footnotes, and the operative part of the same, once, in the Official Newspaper and in another newspaper of national circulation. For these publications the Court establishes a six-month period, as of the notification of the present Judgment.

447. Similarly, the Tribunal declares that the State must broadcast the mentioned parts of the present Judgment, through a radio station and a television channel, both of ample national coverage, at least on two occasions with an interval of two weeks between each of them. For this, the State has a six-month period, as of the notification of the present Judgment.

*e) Medical and psychological assistance*

448. Some of the surviving victims, as well as some of the next of kin of the deceased and surviving victims that have offered a statement before the Tribunal or have provided a sworn statement, have expressed they are suffering from physical consequences and/ or psychological problems as a result of the facts of this case. Likewise, the expert witness Ana Deutsch stated in her expert opinion that it is necessary that the victims and the next of kin receive an adequate medical and psychological treatment.

449. In order to contribute to the reparation of the physical and psychological damages, the Tribunal rules the State's obligation to offer, without cost and through its specialized health institutions, the medical and psychological treatment required by the victims and their next of kin, including any medication required by them, taking into consideration the sufferings of each of them after an individual evaluation.

450. Regarding the victims that prove they reside abroad and, before the competent domestic bodies, in the form and term established in paragraph 433(c) v and vii of this Judgment, that due to the facts of the present case they need to receive an adequate medical or psychological treatment, the State must deposit them in a bank account indicated by each of the victims, the amount of US\$ 5,000.00 (five thousand dollars of the United States of America), so that said money may help them with that treatment.

*f) Educational measures*

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<sup>229</sup> Cfr. *Case of the Girls Jean and Bosico*. Judgment of September 8, 2005. Series C No. 130, para. 235; *Case of the Yakye Axa Indigenous Community*, *supra* note 127, para. 226; and *Case of the Moiwana Community*, *supra* note 190, para. 216.

<sup>230</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 162; *Case of Claude Reyes et al.*, *supra* note 19, para. 160; and *Case of Almonacid Arellano et al.*, *supra* note 15, para. 162.

451. The violations attributable to the State in the present case were perpetrated by police, and army personnel, as well as special security forces, in violation of imperative norms of International Law. Likewise, the Court has indicated<sup>231</sup> that in order to adequately guarantee the right to life and integrity, the members of the security forces must receive adequate training.

452. Therefore, the State must design and implement, within a reasonable period of time, human rights education programs, addressed to agents of the Peruvian police force, on the international standards applicable to matters regarding treatment of inmates in situations of alterations of public order in penitentiary centers.

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453. Regarding the measures requested by the Commission and the intervener, on the construction of monuments and the creation of a park in "the area of Canto Grande", the State argued that "a monument (called the Eye that Cries) has already been erected in a public place of the capital of the Republic in favor of all the victims of the conflict, and that it is the subject of continuous memorial and commemoration acts."

454. In this sense, the Court values the existence of the monument and public area called "The Eye that Cries", created upon the request of civil society and with the collaboration of state authorities, which constitutes an important public acknowledgment to the victims of violence in Peru. However, the Tribunal considers that, within a one-year period, the State must ensure that all the people declared as deceased victims in the present Judgment be represented in said monument. For this, it must coordinate with the next of kin of the deceased victims an act, in which they may include an inscription with the name of the victim as corresponds according to the monument's characteristics.

#### E) COSTS AND EXPENSES

455. As has been stated on previous opportunities,<sup>232</sup> the costs and expenses are included within the concept of reparation enshrined in Article 63(1) of the American Convention, since the activity shown by the victims in order to obtain justice, both at a national and international level, implies erogations that must be compensated upon the declaration of the existence of the State's international responsibility. In what refers to the quantification of this concept, the Tribunal must prudently and based on equity appraise their scope, considering the expenses generated before the domestic and Inter-American jurisdictions, and taking into account their verification, the circumstances of the specific case, and the nature of the international jurisdiction for the protection of human rights. This appreciation may be based on equity.

456. The Court takes into consideration that the victims and their representatives incurred in expenses before the Commission and before this Tribunal. The Court has

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<sup>231</sup> Cfr. *Case of Montero Aranguren et al. (Detention Center of Catia)*, *supra* note 128, para. 147.

<sup>232</sup> Cfr. *Case of Vargas Areco*, *supra* note 3, para. 165; *Case of Almonacid Arellano et al.*, *supra* note 15, para. 16; and *Case of Goiburú et al.*, *supra* note 5, para. 180.

verified that the common intervener, Mrs. Mónica Feria Tinta, assumed the majority of the expenses. Likewise, it has verified that the representatives of another group of victims and their next of kin, made up by Sabina Astete, Douglas Cassel, Peter Erlinder, and Berta Flores, also incurred in expenses. This Tribunal establishes, in equity, that the State must reimburse in the concept of costs and expenses the amount of US\$ 75,000.00 (seventy five thousand dollars of the United States of America, or its equivalent in Peruvian currency) to Mrs. Mónica Feria Tinta (common intervener), and the amount of US\$ 15,000.00 (fifteen thousand dollars of the United States of America or its equivalent in Peruvian currency) to the mentioned group of representatives that are not the common intervener. Said group of representatives must appoint a person in their representation to receive the mentioned amount. The State must pay said amounts within a one-year term.

F) MEANS OF COMPLIANCE

457. In order to comply with the present Judgment, Peru must pay the compensations for pecuniary damages in favor of the victims and their next of kin (*supra* paras. 424 through 428) in the 18-month period as of the notification of the present Judgment. The next of kin of the deceased victims identified that have not been individualized in this process have an 8-month term as of the notification of the present Judgment to appear before the competent State authorities to prove their kinship (*supra* para. 420).

458. The State must comply, within an 18-month period as of the notification of the present Judgment, with the payment of the compensations for non-pecuniary damages (*supra* para. 433) in favor of the victims and their next of kin, taking into consideration that specialized domestic bodies must make some determinations upon request of the interested parties, who have an 8-month term as of the notification of this Judgment to present the request (*supra* para. 433(c)) v, vi, vii and (d).

459. The State must publish the corresponding parts of this Judgment and broadcast them through radio and television (*supra* paras. 446 and 447) within a 6-month period, as of the notification of the same.

460. The State must comply with the measures indicated in paragraphs 436 through 442 and 452 within a reasonable period of time and with the measure indicated in paragraph 443 within a 6-month term.

461. Regarding the medical and psychological treatment required by the victims and their next of kin (*supra* paras. 448 to 450), it must be offered immediately to those who have been identified, and as of the moment in which the State identifies them in those cases in which they have not been currently identified, and for the necessary period of time. Regarding the victims that, within the 8-month term as of the notification of this Judgment, prove that they reside abroad and that they need to receive a medical or psychological treatment, Peru must deposit them the amount of US\$ 5,000.00 (five thousand dollars of the United States of America), in the 18-month period as of the notification of the present Judgment.

462. The State must adopt the reparation measure that refers to the realization of a public act of acknowledgment of its responsibility in relation to the violations declared in this Judgment and of apology to the victims and for the satisfaction of their next of kin (*supra* para. 445), within a one-year term, as of the notification of the same.

463. The State must guarantee, within a one-year period, that all the persons declared as deceased victims in the present Judgment are represented in the monument called "The Eye that Cries", in such a way that the next of kin of the deceased victims may include an inscription with the name of the victim as corresponds pursuant to the monument's characteristics.

464. The State must reimburse the costs and expenses within a one-year period, as of the notification of this Judgment, according to that stated in paragraph 456 of the same.

465. The State must comply with its economic obligations through payment in dollars of the United States of America or its equivalent in the Peruvian currency, using for the corresponding calculations the exchange rate in force at the New York Plaza, United States of America, on the day prior to payment, with the exception of the payment established in paragraph 450, which must be made in dollars of the United States of America.

466. If due to causes attributable to the beneficiaries of the compensation and of the reimbursement of costs and expenses it were not possible for them to receive it within the mentioned terms, the State will deposit said amounts in favor of those in an account or certificate of deposit in a solvent Peruvian bank institution, in United States Dollars, and in the most favorable financial conditions permitted by the legislation and bank practices of Peru. If the compensation has not been claimed after ten years, the corresponding amount will be returned to the State, along with the interests earned.

467. The amounts assigned in the present Judgment under the concepts of compensations and reimbursement of expenses, and costs may not be affected or conditioned by current or future fiscal reasons. Therefore, they must be delivered in their totality pursuant to that established in the Judgment.

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

469. In accordance with its consistent practice, the Court reserves the power, inherent to its attributions and derived, at the same time, from Article 65 of the Convention to monitor compliance of the present Judgment in all its aspects. The case will be closed once the State has fully implemented all of the provisions of this Judgment. Within 18 months of the notification of this Judgment, Peru must present a report of the measures taken in compliance of this Judgment to the Court.

## **XVII OPERATIVE PARAGRAPHS**

470. Therefore,

**THE COURT**

**DECLARES,**

Unanimously, that:

1. It admits the partial acknowledgment of international responsibility made by the State for the events of May 6 to 9, 1992.
2. The present Judgment covers and issues a ruling both regarding the facts of May 6 to 9, 1992, as regarding those that occurred after that last date.
3. The State violated the right to life enshrined in Article 4 of the American Convention on Human Rights, in relation to Article 1(1) of the same, in detriment of the 41 deceased inmates identified, whose names have been included in Appendix 1 of victims of the present Judgment that for these effects forms part of the same, in the terms of paragraphs 231 to 258 of the same.
4. The State violated the right to humane treatment enshrined in Article 5(1) and 5(2) of the American Convention on Human Rights, in relation to Article 1(1) of said treaty, and in connection with Articles 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, in detriment of the 41 deceased inmates identified and of the surviving inmates, whose names have been included in Appendix 1 of victims of the present Judgment that for these effects forms part of the same, in the terms of paragraphs 262 to 350 of the same.
5. The State violated the right to humane treatment enshrined in Article 5(1) of the American Convention on Human Rights, in relation to Article 1(1) of the same, in detriment of the next of kin of the inmates determined in paragraphs 336, 337, 340, and 341 and identified in Appendix 2 of victims of the present Judgment that for these effects forms part of the same, in the terms of paragraphs 334 to 350 of the same.
6. The State violated the right to a fair trial and judicial protection enshrined in Articles 8(1) and 25 of the American Convention on Human Rights, in relation with Article 1(1) of the same, in connection to Articles 7(b) of the Inter-American Convention to Prevent, Punish, and Eradicate Violence Against Women, and 1, 6, and 8 of the Inter-American Convention to Prevent and Punish Torture, in detriment of the next of kin of the 41 deceased inmates identified, of the surviving inmates, and of the next of kin of the inmates determined in paragraphs 336, 337, 340, and 341 , and identified in Appendix 3 of victims of the present Judgment that for these effects is considered part of the same, in the terms of paragraphs 372 to 408 of the same.
7. This Judgment is, *per se*, a form of reparation.

**AND DECIDES,**

Unanimously, that:

8. The State must, within a reasonable period of time, effectively investigate the facts denounced in the present case, identify, and, in its case, punish those responsible, for which it must open the corresponding proceedings and effectively carry out the ongoing criminal proceedings as well as any new ones, adopt all the measures necessary to elucidate all the facts of the present case, in order to determine the intellectual and material responsibility of those who participated in said violation and publicly diffuse the results of these criminal proceedings, in the terms of paragraphs 436 to 460 of the present Judgment.

9. The State must establish, within a reasonable period of time, the necessary means in order to ensure that the information and documentation related to police investigations regarding very serious facts be conserved in a manner such that the corresponding investigations may be carried out, in the terms of paragraphs 442 and 460 of the present Judgment.

10. The State must carry out all the actions necessary and adequate to effectively guarantee the delivery of the remains of the victim Mario Francisco Aguilar Vega to his next of kin, within a 6-month period, and it must cover all the expenses generated from the delivery of the victim's body to his next of kin, as well as the burial expenses in which they may incur in the terms of paragraphs 443 and 460 of the present Judgment.

11. The State must adopt, within a reasonable period of time, all the measures necessary to guarantee that all the inmates that died as a result of the attack be identified and their remains be handed over to their next of kin, pursuant to domestic legislation. In the event that other deceased inmates are identified, their next of kin may present the corresponding claims pursuant to domestic law.

12. The State must carry out, within a one-year period, a public act of acknowledgment of its responsibility in relation to the violations declared in this Judgment and as any apology to the victims and for the satisfaction of their next of kin, in a public ceremony with the presence of high State authorities and of the victims and their next of kin, and it must transmit said act through the media, including the transmission on radio and television, in the terms of paragraphs 445 and 462 of the present Judgment.

13. The State must offer, without cost and through its specialized health institutions, the medical and psychological treatment required by the victims and their next of kin, including any medication required by them, taking into consideration the sufferings of each of them after an individual evaluation, in the terms of paragraphs 449 and 461 of the present Judgment.

14. The State must pay, within an 18-month period, the amount set in Article 450 of the present Judgment to the victims that prove they reside abroad and, before the competent domestic bodies, that due to the facts of the present case they need to receive an adequate medical or psychological treatment, in the terms of paragraphs 450 and 461 of the present Judgment.

15. The State must design and implement, within a reasonable period of time, human rights education programs, addressed to agents of the Peruvian police force, on the international standards applicable to matters regarding treatment of inmates, in the terms of paragraphs 452 and 460 of the present Judgment.

16. The State must guarantee that, within a one-year period, all the persons declared as deceased victims in the present Judgment are represented in the monument called "The Eye that Cries", for which it must coordinate, with the next of kin of the mentioned victims the realization of an act in which they may include an inscription with the name of the victim as corresponds pursuant to the monument's characteristics, in the terms of paragraphs 454 and 463 of the present Judgment.

17. the State must, within a six-month period, publish the Chapter on facts proven of this Judgment, without the corresponding footnotes, and the operative part of the same, once, in the Official Newspaper and in another newspaper of national circulation, as well as broadcast the mentioned parts of the present Judgment, through a radio station and a television channel, both of ample national coverage, at least on two occasions with an interval of two weeks between each of them, in the terms of paragraphs 446, 447, and 459 of the present Judgment.

18. The State must pay, within an 18-month period, the amount set in paragraph 424 of the present Judgment, for the pecuniary damages caused to the 41 deceased inmates identified, in the terms of paragraphs 424, 457, 465, 466, 467, and 468.

19. The State must pay, within an 18-month period, the amounts set in paragraph 425 of the present Judgment, for pecuniary damages to the surviving inmates, in the terms of paragraphs 425, 426, 457, 465, 466, 467, and 468 of the same.

20. The State must pay, within an 18-month period, the amounts set in paragraphs 427 and 428 of the present Judgment, for the pecuniary damages caused to the next of kin of the inmates for the expenses incurred in during the search as well as burial expenses, in the terms of paragraphs 427, 428, 457, 465, 466, 467, and 468.

21. The State must pay, within an 18-month period, the amounts set in paragraph 433 of the present Judgment, for the non-pecuniary damages caused to the 41 deceased inmates identified and of the surviving victims, in the terms of paragraphs 433, 434, 458, 465, 466, 467, and 468 of the same.

22. The State must pay, within an 18-month period, the amounts set in paragraph 433 of the present Judgment, for the non-pecuniary damages caused to the next of kin of the 41 deceased inmates identified, in the terms of paragraphs 433, 434, 458, 465, 466, 467, and 468 of the same.

23. The State must pay, within an 18-month period, the amounts set in paragraph 433 of the present Judgment, for the non-pecuniary damages corresponding the next of kin declared victims of the violation to Article 5 of the American Convention determined paragraphs 336, 337, 340, and 341 and identified in Appendix 2 of victims of the present Judgment that for these effects is considered part of the same, in the terms of paragraphs 433, 434, 458, 465, 466, 467, and 468 of the same.

24. It will monitor the compliance of the present Judgment in all its aspects, and it will close the present case once the State has fully implemented all of the provisions of this Judgment. Within an 18-month period as of notification of this Judgment, the State must present a report of the measures taken in compliance of this Judgment to the Court, in the terms of paragraph 469 of the present Judgment.

The Judges García Ramírez and Cançado Trindade advised the Court of their Concurring Votes regarding the sixth operative paragraph. Said votes accompany this Judgment.



Drawn up in Spanish and English, being the Spanish text the authentic one, in San José, Costa Rica, on November 25, 2006.

Sergio García-Ramírez  
President

Alirio Abreu-Burelli

Antônio A. Cançado Trindade

Cecilia Medina-Quiroga

Manuel E. Ventura-Robles

Pablo Saavedra-Alessandri  
Secretary

So ordered,

Sergio García-Ramírez  
President

Pablo Saavedra-Alessandri  
Secretary

**CONCURRING OPINION OF THE JUDGE SERGIO GARCÍA RAMÍREZ  
REGARDING THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN  
RIGHTS IN THE CASE OF THE MIGUEL CASTRO – CASTRO PRISON,  
OF NOVEMBER 25, 2006**

1. In this *Opinion* I will refer to two matters analyzed by the Inter-American Court in the Judgment issued in the *Case of Castro Castro* (Peru), on November 25, 2006, which is, by the way, a symbolic date in the general commitment to fight any type of violence against women. One of these matters, which I will deal with first and in a more ample manner, corresponds to the application, by the Tribunal of the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women, of June 9, 1994, commonly known by the name of the community where it was signed: *Convention of Belém do Pará*. The other regarding the frequent, intense, and painful subject of life within a prison and the relationship that exists, as a result of a criminal persecution --in ample terms--, between public power and individuals, criminally responsible or not, over which the first is exercised.

**APPLICATION OF THE CONVENTION OF BELÉM DO PARÁ**

2. The protection of human rights requires instruments of a general and specific scope that, jointly, conform the “shield of protection” required by large sectors of the population. Evidently, the declarations and pacts in which the rights and liberties of human beings in general are stated and guaranteed, sometimes referred to as “man’s rights” –the oldest denomination—and currently, with greater frequency as “human or fundamental rights”, are not enough. If they were enough, in the sense that they refer to rights that we all share under the condition of human beings, and if the proclamation of equality and non-discrimination, which possess a universal nature was sufficient, it would not be necessary to have certain instruments of a more specific scope, referring to the rights and liberties of those large sectors of the population.

3. It has been necessary –even more so, indispensable— to have specific declarations and treaties, which deal with hypothesis of great qualitative and quantitative importance. The protection of women’s rights stands out, since they are vulnerable for different reasons, hounded by risks, restrictions, and breaches that have a characteristic identity and refer not only to conditions derived from biology, but also, and probably most important, from cultural circumstances that have not been opposed, suppressed, dissipated –and on occasions, not even moderated--, despite the effort made in this sense by successive generations. The requirement of specific measures of protection is observed and attended to both in the international realm and national orders.

4. This current has prevailed in America. When the establishment of a regimen for the protection of human rights, that included a specialized jurisdiction was presented at the Conference on the Problems of War and Peace (Conference of Chapultepec, Mexico, 1945), a proposal –which was not unusual—was presented so that the corresponding declarative –and perceptive—instrument include, explicitly, men and women. Thus, the president of the Uruguayan delegation in said meeting

requested, in a speech given on February 22, 1945, the issuing of a “new Declaration on the Rights of Men and Women.” In synthesis, the relevance, and even the urgency, to protect that half of humanity that would normally remain – and normally remains—in the penumbra when transferring to reality the general declarations for the protection of human beings, with special references and figures was reiterated – as before, during, and after.

5. It is not my intention to state in this *Opinion* the list of the works seeking to consolidate that purpose, in the different realms in which they have been present: worldwide and regional. I focus on the American Convention on Human Rights. As of 1969 a hemispheric *corpus juris* on human rights has been gradually built, and today it includes several protocols and treaties, one of which is the mentioned Convention of Belém do Pará, a type of “specific Magna Carta” on woman’s rights –or better yet: women’s—that constitutes a separate and substantial chapter in the complete *corpus juris* that make up the statute of the contemporary human being, based on the double foundation offered by the worldwide human right’s order and the continental version in the order of the same specialty.

6. Up to today, the Inter-American Court had not received consultations or litigations whose main actor – or, at least one of its main actors, specifically--, was a woman. Obviously, the Court has dealt with matters in which the subject of equality of gender has been projected (such as *Advisory Opinion OC-4/84, “Proposed Amendments of the Naturalization Provisions of the Constitution of Costa Rica,”* decided upon on January 19, 1984), and it has had before it cases regarding women as victims of violations to human rights or people in risk, whose situation required provisional measures of a precautionary and protective nature. However, in these cases the violation or risk did not, necessarily, put in evidence considerations linked directly and immediately with the victim’s female condition.

7. It does not correspond to the Court –which lacks the power to attract and reject adjudicatory matters, nor may it formally suggest subjects for consultation—to request the forwarding of petitions or requests for opinions on specific matters, regardless of the greater or lesser relevance they may have regarding the formulation of Inter-American jurisprudence. The selection of the cases is incumbent to only those who have been invested of procedural legal standing to propose them to the consideration of the Court, subject to their own ordinances and endowed with autonomy –which the Court may not question—to present its arguments, thus initiating the jurisdictional actions. That is the reason why the Court has not dealt with certain matters regarding women’s rights, even when it has done so regarding other groups of the population, which are also relevant and vulnerable, of very different characteristics: minors, members of indigenous communities, migrant workers, detainees, foster children, etcetera.

8. In the case that corresponds to the Judgment with which I accompany this *Opinion* the applicability of the Convention of Belém do Pará has been presented for the first time, since there is no previous ruling of the Court in this sense. There were some, however, in other cases regarding the applicability and application of the instruments of the American *corpus juris* of human rights different to the ACHR: Protocol of San Salvador, Inter-American Convention to Prevent and Punish Torture, and Inter-American Convention on the Forced Disappearance of Persons. Thus, this road had been sufficiently traveled; however, the first was still awaiting its presentation, analysis, and solution. It had been, up to today, an “unexplored subject”, without definition. This is no longer true, in virtue of the judgment issued

by the Inter-American Court of Human Rights in the *Case of Castro Castro*.

9. The matter suggests at least two considerations. First of all, it is clear—in the light of the developments of national and international Law on human rights, but especially in the shade of a tenacious and wounding reality—that there is a need to affirm the specific protection required by women's rights and freedoms, statement which constitutes an essential piece for the comprehensive construction of the system for the protection of human rights and its effective validity. To plead in this direction means advancing in an established—although always full of obstacles, limitations, and contradictions—direction, consistent with the best tendencies in this stage of the ample and difficult history of equality between men and women in the eyes of the law (and, even more so, before the application of the law to a strict reality).

10. Of course, when I refer to women's rights and liberties I am alluding to two sectors in this universe of juridical protection: a) on one hand, those shared, without exception or distinction, with men: general rights; and b) on the other hand, those related directly and exclusively—or almost exclusively—with the condition of women of their holders. In this last sector what should reign is the adoption of special measures that acknowledge specific characteristics of women—an evident example is the protection before and after giving birth—and that reestablish, introduce, or favor equality between men and women in realms in which they have found themselves in an unfavorable situation with regard to the first due to cultural, economic, political, religious, or other considerations.

11. In rulings regarding equality before the law and other related matters, the Court has clearly stated that the principle of equality and non-discrimination does not suffer damages or a reduction when people are treated differently in situations that justify it, precisely in order to place them in a position that lets them truly exercise their rights and authentically take advantage of the guarantees acknowledged by law to all human beings. Real inequality, marginalization, vulnerability, and weakness must be compensated with reasonable and sufficient measures that generate or favor, as much as possible, conditions of equality and dismiss all forms of discrimination. The principle of lawfulness—whose origin is in an equal treatment for all—not only does not exclude, but demands, the admission—even better: the need—of a specificity that feeds on such an equal treatment and avoids the failure to which it is frequently exposed.

12. Due to all of the aforementioned, it is perfectly justifiable, and even desirable, that the defense of women's rights that has been deposited in specific declarations and conventions on this matter occupy front stage in the consideration of international protection organizations. That relevant admission contributes to clarify, strengthen, and enlarge the protective system in its totality. It is consistent with its objectives and it is pertinent and opportune if one takes into account the situation that normally prevails in this matter. Thus, there are legal substantive grounds that back the interest shown in the Convention of Belém do Pará.

13. Having solved this first matter, along comes the one regarding the applicability and, therefore, the application of that instrument by the Inter-American Court in a specific case, within the fulfillment of its adjudicatory jurisdiction, in such a way that the judgment analyzes and decides on the infringement that could have been suffered by the alleged victim pursuant to the Convention of Belém do Pará. Does the Inter-American Court have the power to issue a ruling regarding that

infringement, which would form part of the operative part of a judgment, and to order, based on that, certain consequences derived from the illegal act declared, which would be part of the condemnatory part of the judgment?

14. This question, with its corresponding effects, was solved with regard to the ACHR --support for the jurisdiction itself of the Court, in its different aspects--, as well as to the Protocol of San Salvador, the Convention regarding Torture and the Convention referring to Forced Disappearances. Now it arises in reference to the Convention of Belém do Pará, surrounding which there have been different points of view. I would not allow myself to disregard them and much less censor them in what they do not coincide with my point of view, but I must express --with regard to them--the opinion I have finally held when voting the Judgment.

15. The powers of a jurisdictional body derive, necessarily, of the norm that creates, organizes, and governs it. This link between a juridical norm, on one part, and jurisdiction, on the other --expression, in the jurisdictional order, of the principle of legality--, constitutes a precious guarantee for the defendants and a natural and necessary element of the State of Law. It would be inadmissible and extraordinarily dangerous for people that jurisdictional bodies intend to "construct", as of its will, the competence it considers convenient. This "voluntarism creator of jurisdiction" would put the body of rights and liberties of human beings in risk and would constitute a form of tyranny not less damaging than the one exercised by other bodies of the public power. It is possible that it be advisable to, pursuant to the evolution of the facts or the law, extend the jurisdictional realm of a body of this nature, so that it may better serve the satisfaction of social needs. But this extension must operate as of the normative reform and not simply from the voluntary --and essentially arbitrary--decision of the jurisdictional body.

16. Consequently, a tribunal --and specifically, the Inter-American Court-- must explore the normative universe according to which it must discipline its performance, the provisions that grant or deny it attributions to know of certain disputes. This is the first matter analyzed and solved by the jurisdictional body that receives a claim of justice. The matter does not present greater complications when there is a clear and emphatic norm that directly and explicitly grants these attributions. Obviously, there also aren't any when the norm denies this possibility or grants it to a body different to the one that is analyzing and deciding on its own competence.

17. There is a third situation, that presents itself when the stipulations of the legal code on human rights contains a regimen on the control of a subject by the international bodies of protection, but the formula they use is not in itself, *prima facie*, sufficiently explicit or univocal or differs from that used in other cases. In this hypothesis, the tribunal must interpret the provision and find its meaning; I am not saying, of course, that it must "complete" the legal code and create, based on its will or imagination, a competence that is not included, at all, in the norm on the control of conventionality of State acts. Its power does not go so far: it must only untangle the sense of the obscure or elusive provision and establish, through that logical-juridical process, its sense and scope. This is what the Inter-American Court does with regard to the Convention of Belém do Pará and its application to the present case.

18. It is desirable that the instruments of the American *corpus juris* include unequivocal orders, as clear as possible, whose interpretation does not require greater effort by the applicator of the norm, and even for any common reader. It is,

in the end, the transparency of the meaning of the norm, in favor of all those obliged or favored by it, a transparency convenient at all levels of juridical regulation. However, in our specific *corpus juris* there is a diversity of formulas to refer to the international responsibility of the States and the corresponding control when there is a failure to comply with the duties assumed. Each treaty employs its own twist; each one requires, therefore, an autonomous effort of interpretation, which may not simply apply the reasoning and conclusions that supported, in this matter, the understanding of other texts deposited in previous instruments.

19. It is convenient to revise the form in which the treaties that include provisions on international control refer to the matter in question, in the understanding that there are others that do not refer to it. From this revision, one can conclude the existence of a great diversity of expressions used to refer to the same matter and regulate it in an essentially coincident manner. In this subject it is also important to mention the existence of an additional distinction, that will be detailed hereinafter: while certain legal systems –for example, the ACHR—do not include restrictions to the knowledge of the Court, *ratione materiae*, others limit it to certain provisions – like, for example the Protocol of San Salvador.

20. I do not ignore the diversity of circumstances that could have surrounded the preparation of each international instrument, nor do I lose sight of the vicissitudes that normally underlie each selection of texts, which involves a complex juridical and political decision, after a process of reflection and negotiation. Beyond the evident variety of expressions, what is important is the progress each instrument has meant for the protection of human rights –which is far away from its port of arrival—and the need to consider both the totality as well as each of its components in such a way that leads to that protection and expresses, from a certain perspective consistent with its specialty, new steps toward a shared destination.

21. As is natural, the main orders regarding the matter that now interests me is found in the ACHR and in the Statutes of the Inter-American Court, which acknowledges competence to the Court --in the adjudicatory order, besides doing it in the consulting aspect-- to solve any matter regarding the interpretation and application of the central treaty of the American *corpus juris* (Articles 62 of the ACHR and 1 of the Statute). There is no doubt in this regard, although matters have been presented and solved in a timely manner by the Court, with regard to the competence of the latter due to conflicts regarding a State that decides to back out from the adjudicatory competence through a unilateral act –that does not constitute a claim against the Convention—and regarding the power of the Court to supervise compliance of its binding determinations.

22. The Protocol of San Salvador refers to this matter in different terms. It could have done it in the same form as the ACHR. With all, those terms do not require a greater effort by the interpreter. In effect, Article 19(6) states that the violation of Articles 8(a) (right to trade-unions), and 13 (right to an education) could give place, through the participation of the Inter-American Commission of Human Rights, and when it proceeds from the Inter-American Court of Human Rights, to the application of the system of individual petitions regulated by Articles 44 through 51 and 61 through 69 of the American Convention on Human Rights.”

23. The use of the expression “could give place” is not pure luck, and neither is the restriction of control of the suppositions considered in those two precepts of the Protocol. It is advisable to expand the scope of the matters that may be heard by the

Court, even when it is precise to observe that the number of cases of violations of norms of the Protocol that can be analyzed through the mere and simple application of the ACHR are not few, matter which I will not go into now. Whichever the case, the conviction that, despite the course of "could give place to", the Court is competent to know of these violations when that claimed by the Commission pursuant to the regimen of ordinary legal standing included in the American Convention prevails.

24. The Inter-American Convention to Prevent and Punish Torture does not employ, when referring to this matter, the expressions used by the ACHR or those used by the Protocol of San Salvador. It chooses another formula –thus, a third formula--, less explicit than those, that calls for a certain effort of interpretation. It states, referring to the acts of torture, that "after all the domestic legal procedures of the respective State and the corresponding appeals have been exhausted, the case may be submitted to the international for a whose competence has been recognized by that State." (Article 8) Even when it does not specifically mention the Commission or the Court, nor does it invoke any norm – material or procedural – of the ACHR, the general interpretation accepts that they may intervene in said suppositions and that the Court has the corresponding powers to apply the Convention on torture, assess the violations committed, and issue the corresponding statements and convictions. Thus has been done by the Tribunal in several cases, without objection.

25. On a later date than that of the instrument mentioned in the previous paragraph, the Convention of the Forced Disappearance of Persons gave its own formula in this field; the fourth formula within the totality. It states that the processing of the petitions or communication on forced disappearances "shall be subject to the procedures established in the American Convention on Human Rights, and to the Statute and Regulations of the Inter-American Commission on Human Rights and to the Statute and Rules of Procedure of the Inter-American Court of Human Rights, including the provisions on precautionary measures." (Article XIII). It has been understood that the Inter-American Tribunal has attributions to decide on the violations in this realm, without detriment of what it already did in the exercise of the general competence granted to it by the ACHR and in the terms of its substantive stipulations, as proven by the germinal judgments of the Court in adjudicatory matters, specifically the famous judgment issued in the *Case of Velásquez Rodríguez*, of June 26, 1987.

26. Coinciding in date and place of subscription with that legal code on forced disappearance, the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women chose an expression different to all those mentioned up to now –at the same time, different among themselves—to refer to the matter of international control over the behavior that transgressed the duties assumed by the State and therefore generates on its behalf, international responsibility demandable before instances of the same nature. Thus, we are facing a fifth formula.

27. Under the section "International mechanisms of protection", the Convention of Belém do Pará refers to the power of the States parties to it and of the Inter-American Commission to request to the Court an advisory opinion on the interpretation of the Convention itself (Article 11). This norm is not indispensable, since the provisions of the ACHR on advisory matters (Article 64) are enough to justify the Court's competence in this sense. And in what refers to matters that may have an adjudicatory nature, as of the violation of the Convention of Belém do Pará – specifically the breach of Article 7--, it opens the door to the presentation of

complaints or claims before the Inter-American Commission, which “shall consider such claims in accordance with the norms and procedures established by the American Convention on Human Rights and the Statutes and Regulations of the Inter-American Commission on Human Rights for lodging and considering petitions.” (Article 12)

28. As can be seen, the Convention of Belém puts emphasis on international control to which it dedicates a specific chapter, which covers both informative collaboration and its analysis (Article 10), and the advisory attention (Article 11), and litigious considerations (Article 12). In other terms, the international normative on the matter of acknowledgment of the rights and determination of public duties has not wanted to stop, instead it has sought to ensure that such acknowledgment and determination become real, and for that it has employed the means used, for those purposes, by the international regulations: supervision and control under bodies given the attributions to do so. In other terms: the Convention seeks to ensure the effectiveness of its norms and the scope of its purposes.

29. Article 7 of the Convention of Belém do Pará, mentioned in Article 12 of the same and invoked in the Judgment of the *Case of Castro Castro*, includes an emphatic conviction of all forms of violence against women, and gives the States Parties to this Convention the responsibility of the assumption of “policies” oriented to preventing, punishing, and eradicating such violence. Within this framework, certain actions and abstentions that attend to those objectives are obligatory. These actions and abstentions have an evident correspondence with duties inherent to the acknowledgment, respect, and guarantee of the rights and liberties enshrined in the ACHR –for example, the provisions in Articles 5 and 8 of the same, and others--, with the adoption of norms that serve those purposes, and the suppression of measures and practices, of a diverse nature, that mean violence against women –provision related to Article 2 of the ACHR, among other precepts.

30. Therefore, the joint reading of the ACHR, with its catalogue of general rights and guarantees, and of the Convention of Belém do Pará, with its declaration of specific state duties, to which women’s rights correspond, results both natural and obligatory for the application of both. The second determines, illustrates or complements the content of the first in what refers to women’s rights that derive from the ACHR. That joint reading allows the integration of the panorama of the rights, and therefore, the profile of the violations to which the Inter-American Court has made reference in the Judgment of the *Case of Castro Castro* and assess their entity in the light of both instruments, the general one and the special one, as did the Court in this ruling, first in its gender issued by the Inter-American Tribunal in the exercise of its adjudicatory function. Said reading is consistent with the *pro personae* criteria that governs the interpretation in subjects of human rights –as has acknowledged the Court at all times—and it agrees with to the stipulation of Article 29 of the ACHR, especially subparagraph (b), which excludes any interpretation that may limit the rights and liberties acknowledged in conventions different than the ACHR and therefore promotes their inclusion within the framework of protection that must be provided by the bodies of the American Convention.

31. Article 12 of the Convention of Belém do Pará attributes to the Commission the knowledge of denunciations or complaints for violations to Article 7 of the same instrument. With this it opens the door for the presentation of individual petitions due to this concept, pursuant to the provisions of the ACHR and the Statute and Rules of Procedure of the Commission. It is reasonable –and consistent with the



general protection system of human rights—to understand that the application of this legal codes governs all the extremes of the procedure followed before the Commission, which may be exhausted in this same instance or advance toward a second stage in the international protection, developed before the Court, when the Commission so determines it, it threatens the provisions of the ACHR (Articles 51 and 61(1), of its Statute (Article 23) and its Rules of Procedure (Articles 26 and following, especially 44).

32. In synthesis: the applicability and application of the Convention of Belém do Pará, with regard to its Article 7 and in the manner in which it has been done by the Inter-American Court in the Judgment of the *Case of Castro Castro*, is based on several considerations:

a) the Inter-American System for the Protection of Human Rights operates based on a *corpus juris* in expansion, which seeks to cover the most ample protection of people, both through norms of an ordinary and general scope, as well as through provisions whose subjective validity includes specific human groups to which declarations or measures of protection indispensables for the effective enjoyment and exercise of their rights and liberties are destined;

b) the attribution of powers to international bodies of protection –as well as to any deciding instances, of which the definition of rights and obligations depends—is not based on the simple will of the bodies called to exercise them, but on a normative framework sufficient that acts as the grounds of the public function, a guarantee of security for the participants and a limit to the arbitrariness of authorities;

c) to attribute powers to hear a case to international bodies of control and supervision, that *corpus juris* has not made use of a single formula, that unites all suppositions that may be practiced, but instead it has used different texts –five, up to now, as indicated *supra*--, that must be analyzed in light of the body within which they are included and the legal code in which they appear, taking into account the object and purpose of the first and the latter;

d) that interpretation is made within the limits determined by the ACHR, as governing legal code of the body, and the specific instruments that are trying to be applied; one and the other may limit the knowledge of a body of specific extremes or allow an ample analysis of possible violations. In order to establish the complete panorama in this matter, under specific suppositions, we would have to consider, in its case, the reserves or limitations to competence formulated by the States;

e) the interpretation must fulfill the previsions of Article 29 of the ACHR, embrace the criterion *pro personae* of International Law on Human Rights, favor the complete effectiveness of the treaty in attention to its object and purpose and contribute to the affirmation and strengthening of the Inter-American System in this subject.

#### **USE OF FORCE ON PERSONS DEPRIVED OF FREEDOM**

33. Now, the Court focuses its attention once more on a recurring matter, one on which it has made emphasis throughout numerous rulings, and even in some observations before political bodies of the Organization of American States. It is

violations that have occurred in a criminal institution, whose occupants are subject, almost completely, to the control of the State –*de jure* and *de facto*--, guarantor of the observance of the rights of who are in that situation of special dependency. This is associated to, in order to make up the panorama of the facts contemplated in the Judgment, the use of force by State agents, as an instrument to carry out certain determinations and exercise the control of a group of people in the exceptions and conditions that have been indicated in the Judgment itself. Therefore, the circumstances of this case have two components: on one hand, reclusion and on the other the use of force. The violations are projected in these two dimensions.

34. As has been said –and it is convenient to insist on this--, what characterizes a State of Law within the framework of a democratic society and in attention of the values and principles that characterize it, is the acknowledgment or assignment of functions and roles, duly characterized, to the State, society, and individuals, and the specific relationship, with all its expressions and consequences, that exists between those three subjects. The nature of those functions and the nature of that relationship –and its decisive test, if we may use the expression— are especially visible in critical circumstances, such as those that are set forth when the State authority intervenes, with all its power, in the custody of the accused, the execution of convictions, and the control of collective, spontaneous, or provoked movements.

35. The Court has examined these matters in several judgments, both declarative and convicting, which set the scope of the individual's rights and the duties and activities of the State, and the corresponding reparations based on the violations. The State's duty – with its consisting powers — to provide the compliance of the provisions legally issued and ensure public order has never been denied. But never has it admitted that said duty be exercised in an unlimited or overflowing manner, which may reach the extreme we now have before us and that the State itself has substantially acknowledged. In this scenario the different principles that take root in a governing concept result applicable: legitimacy and rationality of public measures, as a source for their admission, that to the contrary result excessive, disproportionate, unnecessary, and definitely violate human rights.

36. In order to grab attention regarding these matters, which deserve a deep reflection and immediate corrective measures –and I am not referring only, of course, to the State where the facts object of the conviction that correspond to the present *Opinion* occurred--, it is worth while remembering the cases in which the Court has examined situations of mistreatment –from serious to extremely serious: including crimes against humanity—in detriment of inmates, either individually or collectively. In this group we have, for example, totally or partially the cases of *Loayza Tamayo* (1997), *Suárez Rosero* (1997), *Castillo Petruzzi* (1999), *Cantoral Benavides* (2000), *Hilaire, Constantine, and Benjamín* (2002), *Maritza Urrutia* (2003), *Bulacio* (2003), *Tibi* (2004), *Lori Berenson* (2004), *Caesar* (2005), *Fermín Ramírez* (2005), *Raxcacó Reyes* (2005), *García Asto and Ramírez Rojas* (2005), and *López Alvarez* (2006). The disproportionate use of force in circumstances of aggression on groups of detainees or control of collective movements has been examined in the cases of *Neira Alegría* (1995), *Durand Ugarte* (2000), *Juvenile Reeducation Institute* (2004) and *Montero Aranguren* (2006). We must also take note of the very serious excesses in actions carried out to control freedom, as was warned in the *Case of the Caracazo* (1999).

37. There has been, in an increasing number and when facing extremely worrying situations, provisional measures adopted by the Court in situations of that same

nature: cases of *Peruvian Prisons* (1992, 1993), *Urso Blanco Prison* (2004), *Children Deprived of Liberty in the "Complexo do Tatuapé" of FEBEM* (2005, 2006), *Persons imprisoned in the "Dr. Sebastião Martins Silveira" Penitentiary in Araraquare, São Paulo* (2006), *Monagas Judicial Confinement Center ("La Pica")*, *Mendoza Prisons* (2006) and *Yare I and Yare II Capital Region Penitentiary Center* (2006).

38. The Judgment in the *Case of Castro Castro* –as well as others adopted in the course of two years, or less—must grab the attention of our countries, and even of the organization that reunites the American States, with regard to the situation of prisons, the state in which persons deprived of their freedom are found, the deficiencies in the means available for the custody and treatment of the detainees and the generally insufficient preparation of the agents in charge of these tasks or others linked to the control of collective movements, either in reclusion or in liberty. The Judgment of this case refers once more to the need to provide the personnel in charge of them –which should be carefully selected—the preparation they require in order to comply with their duties, which has led –as observed in this Judgment—to a source of massive violations, committed with extraordinary violence. This provision is integrated into the ample concept of the reparations or, better yet, the guarantees of non-repetition, concept that has been developed by the jurisprudence of the Court.

Sergio García-Ramírez  
Judge

Pablo Saavedra-Alessandri  
Secretary

## CONCURRING OPINION OF THE JUDGE A.A. CANÇADO TRINDADE

1. I have voted in favor of the adoption, by the Inter-American Court of Human Rights, of the present Judgment in the case of the *Castro Castro Prison*. Given the importance I attribute to some of the matters presented throughout the law proceedings before the Court in the present case, I find myself obliged to add to the present Judgment this Concurring Opinion, with my personal reflections as the grounds for my position regarding the deliberations carried out by the Tribunal. I will focus my reflections on eight basic items, specifically: a) Time and Law, now and forever; b) new reflections on time and Law; c) time and the vindication of the rights; d) the legal persons and facts; e) the emerging of the State's international responsibility and the principle of proportionality; f) the recurrence of the crime of State: the forgotten juridical thought; g) the need and importance of the gender analysis; and h) oppressed and oppressor: the unsustainable domination and the primacy of Law.

### I. Time and Law, Now and Forever.

2. The relationship between time and Law has always been the object of my reflections, even way before becoming a Judge of this Court. In the bosom of the latter, the matter has been present in my Concurring Opinion (paras. 4-6) in the case of *Blake versus Guatemala* (merits, Judgment of 01.24.1998), my Concurring Opinion (paras. 15 and 23) in the case of *Bámaca Velásquez versus Guatemala* (merits, Judgment of 11.25.2000), my Concurring Opinion (paras. 24-33) in the case of the *Moiwana Community versus Suriname* (Judgment of 06.15.2005), in my Concurring Opinion (paras. 2-15) in the pioneering and historical Advisory n. 16 (of 10.01.1999) on *The Right to Information on Consular Assistance. In the Framework of the Guarantees of the Due Process of Law*, among others. More recently, in *General Course on Public International Law*, which I offered in 2005 at the Academy of International Law of La Haya,<sup>1</sup> I allowed myself to dedicate a full chapter<sup>2</sup> to this subject that I consider of a fundamental relevance.

3. I took to writing this chapter and including it at the beginning of my mentioned *General Course*, not only to highlight the importance I give the matter, but also to spread upon the record my position, frankly contrary both to the positivist pretension of visualizing and interpreting the legal system regardless of time, as well as the "realistic" pretension of taking into consideration the facts of the present regardless of their temporary dimension, attributing to them an alleged inevitableness and an improvable perpetuity. Therefore, positivism and realism, when they abstract the ineluctable relationship between time and Law, they become ineluctable and pathetically subservient to power – which I consider unacceptable, when maintaining the primacy of Law in any and all situation.

4. It is not my objective to reiterate in this Concurring Vote to the present Case of the *Castro Castro Prison*, my considerations presented on other occasions,

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<sup>1</sup>. A.A. Cançado Trindade, "International Law for Humankind: Towards a New *Jus Gentium* - General Course on Public International Law", 316 *Recueil des Cours de l'Académie de Droit International de la Haya* (2005) (en prensa).

<sup>2</sup>. Chapter II. And *cf.* also, on time and Law, A.A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Edit. Renovar, 2002, pp. 3-8 and 1039-1109.

including numerous of my Opinions in this Court, on time and Law, to which I will limit myself to referring to (*supra*). I proceed in the present Concurring Opinion, to add new personal reflections on time and Law, since the matter was effectively presented throughout the course of the legal proceedings before this Court in the present case of the *Castro Castro Prison*.

## II. New Reflections on Time and Law.

5. We all live in time, the greatest mystery of human existence; but the implacable time of the cosmos, which reduces power and glory to nothing, is not the time of humans, that later fills us with hope and then memory. Time grants everybody, first innocence, to later impose experience. And this covers it all, good and evil, proper of human condition, corresponding to each individual the extraction of its lessons in search of their own nirvana.

6. Time covers everything, the *chiaroscuro* of day and night, of the seasons of the year, and covers everybody – those that dispense justice and those that disintegrate with their violence and deceits. Time impregnates the existence of every person with memories that let them search for the sense of each instant of their history. The time of humans demystifies the unfair and astute, and gradually sediments absolute values. Chronological time is different to the biological one<sup>3</sup>, and the latter is different from the psychological one. Human time requires truth, memory, and justice, since omission and impunity will deprive life of sense and it will fill it up with malice.

7. Time is inherent to Law, its interpretation and application, the Law that seeks to govern human relationships and all type of situations. Law, when governing the conflicts that arise is, in time, the transmitter of solidarity between the generations that succeed each other. If time is what finally allows the overcoming of obstacles and the obtainment of justice, it is human conscience what moves Law towards this purpose, overcoming all evil.

8. Time and Law disunited lead to the despair, paralyzing the course of life surrounded by sense and realization. Time and law united put an end to impunity, turning life into a privilege nurtured by spiritual peace and tranquility. Time with justice is a time worth while remembering, it is the time of the lightness of the being. Time with impunity is a time that must be endured, it is that of the being's nightmare. The first paves the way to the realizations of the being in life; the second, is the time of despair. Justice cannot be denied to each fellow man; this would turn life, for each of them, into Dante's hell.

9. The difference between seriousness and grace becomes evident here, immortalized by a superior woman (Simone Weil) who I greatly admire for her purity of spirit and audacious mystic. She faced evil, sought out restoration, and (at 34 years of age) she no longer fed herself and turned herself over to death;<sup>4</sup> she turned

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<sup>3</sup>. The time of youngsters, who live their days, is not the time of boys and girls, who live their minutes, or that of adults and the elderly, who live their history.

<sup>4</sup>. In a sanatorium in Ashford, Kent, on 08.24.1943; only eight people went to her funeral, but the meditations of this superior woman (whom I have admired since my youth), today almost forgotten by the general public, are still inspiring those who fight for life and justice. Cf. S. Weil, *Oeuvres* [org. F. de Lussy]

herself over to the other life, leaving her successors with the indelible testimony of an illuminated and strong spirit. The same as Stefan Zweig, another illuminated writer of the XX century, which preferred the other life<sup>5</sup> when he did not find in this one the restorative justice; they were both so different from, v.g. dictators and criminals such as Stalin and General Franco, who, on their deathbeds, close to all types of attentions, had the natural death they denied all their victims of secret operations.

10. The intentions of the Providence are inscrutable, when they do not prevent the victims of radical evil from being brutalized, while the victimizers – when there is no justice – keep on enjoying a safe and normal life. The intentions of the Providence are inscrutable, when it concedes a natural death to the impious and impure, and when it does not avoid the self-inflicted death of those that cultivated so much the life of the spirit with their luminous thinking, and they continue to inspire and orient those that insist on turning this brutal and ephemeral world into at least a harmonious one. The intentions of the Providence are inscrutable when it allows the death of so many in the humiliation of abandonment, even those that were so sensible to human suffering in such a tyrant world.

### III. Time and Vindication of Rights.

11. In the second half of the XX century, time (which, the same as the threat and use of force, and armed conflicts, so much pressures humanity) has tried to be explained not as an objective piece of information (as was intended by I. Newton at the end of the XVII century and beginning of the XVIII century), or as structure *a priori* of the spirit (as stated by I. Kant in the XVIII century), but instead as a social symbol conformed at the end of a long process of human learning.<sup>6</sup> On my part, I do not feel persuaded or sure in this sense. The attempts to explain time have, each one of them, their own merits, and some of them are especially penetrating.

12. That is the case, v.g., of those who have sought to link time to the precariousness of human condition, and – more subjectively – to each person's conscience (v.g. R. Descartes, in the XVII century, and E. Husserl, at the beginning of the XX century). I am afraid that, despite all the efforts made in the search for an explanation, time will continue to surround human existence, as has always happened, now and forever. The human being is not the creator of time, but conditioned by it, by their time, - as well known by those who have lived in times of dictatorships and tyrannies. Time plays an essential role in the existential situation of the human being (totally different from the intemporal vision intended by classic physics.<sup>7</sup> Time precedes the existence of every human being,<sup>8</sup> and survives it.

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, Paris, Quarto Gallimard, 1999 [reed.], pp. 11-1267; S. Weil, *Gravity and Grace*, London, RKP, 1972 [reed.], pp. 1-160.

<sup>5</sup>. Was found dead with his wife on 02.23.1942, victimized by a fatal overdose, in his home, his exile, in Petrópolis (Brazil). His vast works reveal a strange sensibility to human suffering and the history of ideas; *cf.*, *inter alia*, S. Zweig, *O Mundo que Eu Vi*, Rio de Janeiro, Ed. Record, 1999 [reed.], pp. 7-519.

<sup>6</sup>. *Cf.* N. Elias, *Sobre o Tempo* [trad. de *Über die Zeit*, 1984], Rio de Janeiro, J. Zahar Ed., 1998, pp. 7-163.

<sup>7</sup>. I. Prigogine, *El Nacimiento del Tiempo*, 2a. ed., Buenos Aires, Metatemas, 2006, pp. 37, 22, 24 y 26.

13. In the public hearing held before this Court in the present case of the *Castro Castro Prison*, carried out in the exterior meeting in San Salvador, El Salvador, on the 16<sup>th</sup> and 27<sup>th</sup> days of June 2006, the common intervener of the representatives of the victims and their next of kin, and also a victim of the present case (Mrs. Mónica Feria Tinta), stated that “14 years change and do not change things.” In a certain sense, “time has stopped”, since for nine years her life has been consumed in the investigation of this case; among the victimized mothers, one (Mrs. Auqui) died last year, and another told her about the death of her son. The ones who died have not left, but instead they are present in the reflections and dreams of the survivors of the massacre of the Prison of Castro Castro. She added that everything is at a halt until “justice may be served”. But, in the meantime, time goes by, “we get older and justice does not come and the clock keeps ticking. Many of us have not been able to become mothers yet;” there is a right to memory that “is part of the right to truth”, and in the present case, “we made an over human effort to present evidence that will allow us a judgment “that will protect” this group of victims.”<sup>9</sup>

14. In reality, we can extract some reflections and lessons from this dramatic argument. We formed here a cruel *décalage* between, on one hand, chronological and biological time, and, on the other, psychological time. Chronological and biological time continue to flow, increasing the victim’s despair, who grow older in the darkness of impunity. Psychological time immobilizes the natural course of life, since the realization of justice must be sought, which takes time.

15. Similarly, given the extreme cruelty of the suffering inflicted on the victims of the Prison of Castro Castro (*infra*), many of them were deprived of their existential time (41 deceased victims identified up to this date). Others saw their biological time significantly reduced, in reason, v.g. of the handicaps, of damage to the lungs and skin, of blindness in one eye, of the destruction in tissues, of greater vulnerability to cancer.<sup>10</sup> The victims were arbitrarily deprived of time of life, and, in many cases (41 already identified), of life itself.

16. In my personal image, I cannot escape the impression that many of the victims bombed in the brutal armed attack of the *Castro Castro Prison* (pavilion 1A) seem Joans of Arc of the end of the XX century (without any intention of canonizing). But the same as the historical character (born in Domrémy, Vosgos, on 01.06.1412, and who died on 05.30.1431), they had their ideas to free the social environment, for which they were imprisoned, some submitted to a trial without means of defense, and some were not even given this opportunity; in the mentioned armed attack, many died little after the bombing; at the same time, Joan of Arc, as is known, was convicted to be burnt at the stake. Unfortunately, the victimization and savagery continue after the centuries, in different continents.

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<sup>8</sup>. *Ibid.*, p. 77.

<sup>9</sup>. Inter-American Court of Human Rights (IACHR), *Transcription of the Public Hearing in the case of the Prison of Castro Castro, the 26th and 27th days of June 2006, at San Salvador, El Salvador*, pp. 116 (internal circulation).

<sup>10</sup>. Paragraphs 186, 187, 216, and 433 (c) of the present Judgment.

#### IV. The Legal Facts and Persons.

17. In what refers to the millennial human brutality, the facts by long surpass human imagination. When you think you have imagined the worst, along comes a fact that proves that human beings are capable of more in the brutal treatment given to their piers:

"Within the building, the roar of the gun shots, with a deafening echo in the limited space of the hall had caused panic. During the first moments they thought that the soldiers were going to break into the rooms shooting everything they found in their way, that the Government had changed its mind, choosing the massive physical liquidation (...). They saw the bodies piled up, the winding blood slowly moving through the tile as if it were alive, and the boxes of food. (...) Danger lurks the careless, in those lifeless bodies, especially in the blood; who could know what vapors, what emanations, what poisonous miasmas could already have been released from the destroyed meat of the blind. They are dead, they cannot do anything to us, someone said [; ...] they do not even move or breathe, but who can tell us that this white blindness is not precisely a misfortune of the spirit, and, if it is, lets assume from this hypothesis, that the spirits of those blind persons have never been as free as they are now, outside their bodies and therefore free to do whatever they want, especially evil, which, as if of general knowledge, has always been easier for it to do."<sup>11</sup>

18. Is this is a description of the consequences of the armed attack against the Prison of Castro Castro? Even though, *prima facie*, it would seem so, it is not; it is instead of the allegory of the "epidemic outbreak of white blindness " of José Saramago,<sup>12</sup> who adds:

"The moral conscience, offended by so many fools and to which so many others have renounced, is something that exists and that has already existed, it is not just an invention of the philosophers of the Quaternary, when the soul was merely a confusing project. With the passing of time, (...) we end up putting the conscience in the color of blood and the salt of tears, and as if this were not enough, we turned the eyes into a species of mirrors turned inside out, with the result that, they end up showing, many times without reserve, what we were trying to deny with the mouth."<sup>13</sup>

19. To the penetrating messages of the allegories of A. Camus on *the plague*, and of J. Saramago on blindness, I would allow myself to add a very brief deliberation, brought about by the facts of the present case. From the debris of the bombing on the Prison of Castro Castro, from the devastation of the armed attack perpetrated against its defenseless inmates between the days of May 06 and 09, 1992, from the blood of its victims piled up one on top of the other, from the brutalities prolonged in time, from the damages caused to the inmates' eyes by the splinters (fragmentation weapons) and the gases, - of this entire massacre without pity, arises the human conscience declared and symbolized today in the monument "*The Eye that Cries*",<sup>14</sup> in acknowledgment of the suffering of the victims and as an expression of solidarity to them.

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<sup>11</sup>. J. Saramago, *Ensayo sobre la Ceguera*, México, Punto de Lectura, 2005 [reimpr.], pp. 121-122, and cf. pp. 160-161 for other "descriptions".

<sup>12</sup>. Cf. *ibid.*, pp. 64 and 266.

<sup>13</sup>. *Ibid.*, pp. 30-31, and cf. p. 112.

<sup>14</sup>. Referred to by the Court in the present Judgment (paras. 452- 453 and 463, and operative paragraph n. 16).



20. Solidarity and, through the present Judgment of this Court, justice, finally triumphed over criminal victimization. Today "*The Eye that Cries*" defies the passing of time, or intends to do so, as a sign of regret for the eyes that burned or were perforated in the Prison of Castro Castro, and as a lesson that everyone must persevere in the search of their own redemption. Given the finite nature of existential time, there are those that seek their improvement through the expressions of the spirit. In the present case, "*The Eye that Cries*" proves it. As stated by Stefan Zweig in an essay of 1938, with his characteristic sensibility, the "mystery of artistic creation" offers the "indescribable moment" in which "the worldly limitation of the perishable ends in us humans and the perennial starts."<sup>15</sup>

21. In this case of the *Prison of Castro Castro*, the cruelty of the facts caused by the State agents effectively goes beyond the wings of imagination. As summarized by one of the testimonies offered before this Court, to be under that bombing was "like hell".<sup>16</sup> It should not go by without being noticed that, who presented the facts of the *cas d'espèce* to this Court with greater precision and detail were precisely the representatives of the victims themselves and their next of kin (through their common intervener), *as subjects of International Law that they are*, and not the Inter-American Commission on Human Rights. The application presented by the latter includes some imprecisions pointed out throughout the present Judgment of the Court, and several of the facts only appear in the Annexes to the application presented by the Commission. But the Annexes are part of the main document, the mentioned application.

22. In my judgment, the present case buries, once and for all, the anachronistic and paternalistic view of the past of the alleged need of an "intermediation" by the Commission between the victims and the Court. In the present case, the victims – the real substantive plaintiff before the Court, as I have always stated – know how to present the facts in a much more complete and ordered form than the Commission. The present case puts in evidence the emancipation of the human being *vis-à-vis* their own State, as well as *vis-à-vis* the Commission, within the framework of the Inter-American System of protection.

23. Once more the *cas d'espèce* highlights the true central position that victims occupy in the legal proceedings before the Court. In the public hearing of 06.26-27.2006 before this Court in the present case of the *Castro Castro Prison*, in response to questions I allowed myself to direct to her (reminding her that the victims themselves has vindicated "reparation measures of a collective impact"), the Commission admitted correctly that the victims are the real plaintiff before the Court (thesis I have backed for years in the bosom of this Tribunal) and that the measures of reparation of "collective impact" were necessary and important in the circumstances of the present case, in which the next of kin of the male and female prisoners were also *direct* victims of "psychological infringement" of the tortures inflicted upon their loved ones deprived of freedom.<sup>17</sup>

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<sup>15</sup>. S. Zweig, *Tiempo y Mundo*, Barcelona, Edit. Juventud, 1998 [reed.], p. 220.

<sup>16</sup>. Paragraph 187(b)(3) of the present Judgment.

<sup>17</sup>. Cf. IACHR, *Transcription of the Public Hearing...*, *op. cit. supra* n. (9), pp. 143-144 (internal circulation).

24. In its Brief of Pleadings, Motions, and Evidence of 12.10.2005, presented to the Inter-American Court in the *cas d'espèce*, the legal representation of the victims and their next of kin stated that pavilion 1A of the Prison of Castro Castro "held approximately 131 female prisoners among which there were women who were far along in their pregnancies and elderly women." They were attacked at dawn of May 06, 1992 by 500 police officers and around 1000 officers of the armed forces, with the use of heavy weapons; at noon they used "white phosphorous gas against the female prisoners locked up in pavilion 1A," which caused "violent asphyxia" and "a excruciating suffering: the feeling that their windpipe would split in half and that the respiratory tract was chemically burning; the skin and internal organs were burning as if they would have caught fire. (...) The explosives caused expansive waves that damaged the kettledrums which felt like they were on fire." (para. 20)

25. According to the mentioned account, "the massive nature of said infliction of suffering undergone by the victims during the attack, turned said suffering more extreme and horrific in nature." (para. 23) Likewise,

"several women who were seriously injured but who were able to resist and arrive alive at the hospital, where they were taken in trucks, one on top of the other, were raped at the hospital by hooded individuals who were supposedly going to examine them upon their arrival. They were not offered any medical attention and some of them died as a consequence of that.

The male survivors were forced to remain almost 15 days without medical attention submitted to forced positions, of ventral cubitus with their hands on their nape (...). On May 10<sup>th</sup> Fujimori inspected the Castro Castro Prison personally, walking among the tortured prisoners in the forced position of ventral cubitus, and approving the result of the operation. (...)

The female prisoners were divided into two groups. One group was taken to the prison of Cachiche in Ica, and the other to the prison of Santa Mónica in Lima. The women of Santa Mónica were subject to similar conditions to that of the men: they were forced to remain with the same clothes that had been using since the massacre and they were not allowed to shower for more than 15 days. They remained completely *incomunicado* from the outside world for almost 5 months after the massacre and their whereabouts were unknown for that entire time by their next of kin. Access was not permitted to attorneys or their next of kin until the end of September 1992. (...) Only a woman can now what it is like to be bleeding every month, without having how to take care of her hygiene. These deprivations were intentional: to inflict severe psychological suffering." (paras. 25-27 and 29).

26. The same account tells us that two of the female inmates, as a consequence of the brutalities inflicted, lost use of reason, they lost their mental sanity (Mrs. Benedicta Yuyali, of almost 70 years of age, and Mrs. Lucy Huatuco - para. 29). The mentioned presence of the element of *intent* seems to me of the greatest importance for the constitution of the State's international responsibility in the present case of the massacre of the *Prison of Castro Castro*: the incidence of said *mens rea*, of the *animus aggressionis* of the State's power, constitutes, in my opinion, the *aggravated* international responsibility of the respondent government.

27. In the aforementioned public hearing before this Court in the present case, carried out in the city of San Salvador, I allowed myself to ask one of the victims and witness (Mrs. Gaby Balcazar Medina) in the case, which were "her current reflections regarding this experience of contact with human evil."<sup>18</sup> She responded:

"(...) With all they have done to me, I felt that they had left marks not only on my body but on my soul as well (...). During the first years I had nightmares, I dreamt I

<sup>18</sup>. IACHR, *Transcription of the Public Hearing...*, *op. cit. supra* n. (9), p. 24 (internal circulation).

was killed, I dreamt of the dead bodies (...). (...) I know there is so much evil in human beings, even in police officers, but there was one who offered me water and not boiled water, I asked for a bottle of water [and] he felt sorry for me and calmed my thirst.

(...) As of today, when I have been heard, when you have given me this opportunity, many youngsters that have died will be able to rest as of this day in peace, because there has been somebody who has really said what happened during those four days in the Castro Castro Prison, - that it is a big lie that they went there to transfer us, because they went there to kill us, - and those youngsters and mothers who died are going to rest in peace as of today."<sup>19</sup>

28. The facts of the present case, as presented especially by the legal persons, speak for themselves. Based on the body of evidence found in the dossier, the Court concluded in the present Judgment that there was no riot that justified the so-called "Operative Transfer 1" from May 06 to 09, 1992 in the Prison of Castro Castro (para. 197(21)). What happened was an armed attack executed by security forces of the State to "endanger the life and integrity of the inmates who were located in pavilions 1A and 4B" of the Prison of Castro Castro (paras. 215 and 216). It was a premeditated attack (para. 197(23) and 26-33). The Court, when it pointed out the "seriousness of the facts" of the present case, stated that what happened at the Prison of Castro Castro "was a massacre" (para. 234). The aforementioned *aggravated* international responsibility arises, in my judgment, in the circumstances of the present case, from the perpetration of a *State crime*.

#### **V. The Emerging of the State's International Responsibility and the Principle of Proportionality.**

29. In the proceedings of the present case (written and oral phases), there is a detail in the arguments presented before the Court that cannot go unnoticed. With the best of the intentions – to seek justice, - the Inter-American Commission of Human Rights made emphasis of the lack of proportionality in the use of force by the state agents in the incursion of the Prison of Castro Castro, while the representation of the victims and their next of kin highlighted as the central matter the illegality of the original act (aggravated by the intent). This leads me to a brief recapitulation of the origin or emergence of the State's international responsibility.

30. Actually, I had already examined the matter of the origin of the State's international responsibility in my Concurring Opinion (paras. 1-40) in the case of "*The Last Temptation of Christ*" (*Olmedo Bustos et al. versus Chile*, Judgment of 02.05.2001); it is not my intention to repeat here the vast considerations developed by me in this sense in that Concurring Vote, but leave in this Concurring Vote this very brief reference to them. There I stated an understanding in the sense that the international responsibility of a State Party in a human rights treaty arises exactly at the time on which an international illegal fact – act or omission- imputable to said State occurs (*tempus commisi delicti*), in violation of its obligations under the treaty in question.

31. After referring again to the matter in my Concurring Opinion (para. 4) in the case of *Myrna Mack Chang versus Guatemala* (Judgment of 11.25.2003), I allowed myself to reiterate, in my Concurring Opinion (para. 14, and *cf.* paras. 11-18), in the

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<sup>19</sup>. IACHR, *Transcription of the Public Hearing...*, *op. cit. supra* n. (9), pp. 24-25 (internal circulation).

case of the *Gómez Paquiyauri Brothers versus Peru* (Judgment of 07.08. 2004), my understanding in the sense that

"(...) In International Law on Human Rights, *the State's international responsibility arises exactly when the violation of the rights of a human being occurs*, that is, at the time when the international illegal act attributable to the State occurs. Within the framework of the American Convention on Human Rights, the State's international responsibility may arise due to acts or omissions of any power or body or agent of the State, regardless of their hierarchy, that violates the rights protected by the Convention.<sup>20</sup>"

32. In synthesis, in my opinion, there cannot be any doubt, according to the most lucid doctrine on International Law; that the State's international responsibility (as a subject of International Law) arises when the illegal act (act or omission), which violates an international obligation, attributable to the State occurs.<sup>21</sup> In the *cas d'espèce*, the State's international responsibility arose at the time of the armed incursion (with *animus aggressionis*) of armed state agents to the Prison of Castro Castro.

33. The lack of proportionality in the use (completely unnecessary) of force constitutes an *aggravating* circumstance of the *already existing* State responsibility. I do not free myself from going further: in the present case of the *Castro Castro Prison*, the *animus aggressionis* (the *mens rea*) – that characterizes the *gross* violations of human rights arises as of the moment when the decision is made and the armed attack on the inmates of the mentioned prison, perpetrated by many officers of the national police, the Peruvian army, and by special forces units (v.g., DINOES, UDEX, SUAT, USE), who, as stated by the Court in the present Judgment, "even placed themselves as snipers on the roofs of the Criminal Center and fired gunshots against the inmates" (para. 216) is planned.

34. The so-called "Operative Transfer 1", carried out with great brutality by these different State security forces, could not have been, in my point of view, perpetrated with that magnitude (even with war weapons) without being previously planned, decided on, and authorized by the highest State authorities. *License to kill*, - was an authentic State crime. We can, thus, in said circumstances, go back in the *tempus commisi delicti*, to take into consideration, as aggravating elements, the planning of the state to commit an international illicit act of special seriousness.

35. At the same time, the principle of proportionality is normally invoked within the framework of International Humanitarian Law; its invocation and observance contribute to the clarification of behavior in a situation of armed conflict, imposing

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<sup>20</sup>. Cf. Inter-American Court of Human Rights (IACHR), case of "*The Last Temptation of Christ*" versus Chile, Judgment of 02.05.2001, Series C, n. 73, p. 47, para. 72; and cf. Concurring Opinion of the Judge A.A. Cançado Trindade, p. 76, para. 16, and cf. pp. 85-87, paras. 31-33.

<sup>21</sup>. F.V. García Amador, *Principios de Derecho Internacional que Rigen la Responsabilidad - Análisis Crítico de la Concepción Internacional*, Madrid, Escuela de Funcionarios Internacionales, 1963, p. 33; Roberto Ago, "Second Report on State Responsibility", *Yearbook of the [U.N.] International Law Commission* (1970)-II, pp. 179-197; A.A. Cançado Trindade, "The Birth of State Responsibility and the Nature of the Local Remedies Rule", 56 *Revue de Droit international de sciences diplomatiques et politiques* - Ginebra (1978) pp. 165-166 and 176; P.-M. Dupuy, "Le fait générateur de la responsabilité internationale des États", 188 *Recueil des Cours de l'Académie de Droit International de La Haye* (1984) pp. 25 y 50; J. Crawford, *The International Law Commission's Articles on State Responsibility - Introduction, Text and Commentaries*, Cambridge, University Press, 2002, pp. 77-78.

restrictions on belligerent behavior in the middle of hostilities;<sup>22</sup> the principle of proportionality is relevant in this context. What happens though, is that in the present case of the *Castro Castro Prison versus Peru*, the victims were not a belligerent part in an armed conflict, but instead people already deprived of their freedom and in a state of defenselessness, and that they were not rebellious. The *temperamenta belli*<sup>23</sup> are not in question here; the fundamental principles that may be invoked here are, of a different order, that of the dignity of human beings, and that of the inalienability of the rights inherent to it. Said principles inform and conform the human rights enshrined in the American Convention, and violated in the *cas d'espèce*.<sup>24</sup>

36. The armed attack on the *Castro Castro Prison* did not form part of an armed conflict: it was a real massacre. The flagrant illegality of the acts of brutality imputable to the State, that make up *ab initio* its international responsibility under the American Convention, assumes a truly central position in the judicial reasoning of an international human rights tribunal such as this Court; the principle of proportionality appears as an additional element, in a tangential position, before a *previously established* international responsibility of the case. In its substantial study on *Customary International Humanitarian Law*, diffused by the International Committee of the Red Cross,<sup>25</sup> the principle of proportionality marks presence as a *prohibition* to attack causing death and injuries in the civil population in an excessive manner with foreseeable military advantages.

37. Therefore, the present case does not deal with determining the lack of proportionality of the attack and the weapons (of war) used, since these (one and the other) were already conclusively forbidden. There was no armed conflict, there was no riot in the prison, there was no rebellion among the inmates; they were in a complete state of defenselessness. The attack brutally perpetrated, with heavy war artillery, was a cold-blooded massacre, which sought to exterminate people deprived of their liberty and in a complete state of defenselessness.

38. The international *aggravated* illicit had already been perpetrated and immediately constituted the State's aggravated international responsibility. Within the context of the present case of the *Prison of Castro Castro*, the representation of the victims and their next of kin, through their common intervener (Mrs. Mónica Feria Tinta), also a victim of this specific case, captured, besides the facts (*cf. supra*), the legal grounds applicable, with greater precision and success than the Commission, with regard to this specific matter.

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<sup>22</sup>. C.P./J.P., "Article 57 - Precautions in Attack", in *Commentary on the Additional Protocols of 08 June 1977 to the Geneva Conventions of 12 August 1949* (eds. Y. Sandoz, C. Swinarski, B. Zimmermann), Geneva, ICRC/Nijhoff, 1987, pp. 683-685. And *cf.* J. Pictet, *Development and Principles of International Humanitarian Law*, Dordrecht/Geneva, Nijhoff/Inst. H. Dunant, 1985, p. 76.

<sup>23</sup>. Cf. C. Swinarski, *A Norma e a Guerra*, Porto Alegre/Brasil, S.A. Fabris Ed., 1991, p. 17.

<sup>24</sup>. Operative paragraphs 3-6 of the present Judgment.

<sup>25</sup>. International Committee of the Red Cross, *Customary International Humanitarian Law* (eds. J.-M. Henckaerts, L. Doswald-Beck *et alii*), vols. I-III, Cambridge, University Press, 2005.

39. This may not go unnoticed and it constituted for me a encouraging fact, since, - as I have been insisting for years in the bosom of this Court and in my books,<sup>26</sup> - the true plaintiff before the Court are the petitioners (and not the Commission), who, as indicated in the present case, have reached a level of maturity considered sufficient to present their arguments and evidence in an autonomous manner, not only in factual matters, but also in juridical subjects (*cf. supra*), and in some cases – as is the present case – with greater precision and success than the Commission. Therefore, the paternalistic and anachronistic vision that in the past stated that the petitioners always needed a body such as the Commission to “represent them” has been completely overcome. Not always. The present case proves it beyond doubt.

#### **VI. The Recurrence of the State’s Crime: the Forgotten Juridical Thought.**

40. The bombing of the Castro Castro Prison was a premeditated massacre, planned and executed by State agents, from the highest hierarchy of the State’s power up to the members of the police force. It was, as was previously stated, a *crime of State*. Once more this Court decided, through the present Judgment, on a crime of State, whose occurrence is much more frequent than what one can imagine. The crimes of State that have reached international justice are a micro-cosmos of everyday atrocities in different continents, which have not yet been able to be brought before the contemporary international courts.

41. The existence and frequent occurrence of crimes of State are, in my opinion, unquestionable. That is what I have been warning about, in the bosom of this Court, - and before the apparent mental lethargy of an ample and insensitive current of contemporary legal international doctrine, - in, v.g., my successive Concurring Opinions in the cases of *Myrna Mack versus Guatemala* (Judgment of 11.25.2003), *Plan de Sánchez Massacre versus Guatemala* (Judgments of 04.29.2004 and 11.19.2004), of the *Mapiripán Massacre versus Colombia* (Judgment of 03.07.2004), of the massacre of the *Moiwana Community versus Suriname* (Judgment of 06.15.2005), of *Almonacid Arellano et al. versus Chile* (Judgment of 09.26.2006), of *Goiburú et al. versus Paraguay* (Judgment of 09.22.2006), and of the *Ituango Massacres versus Colombia* (Judgment of 07.01.2006).<sup>27</sup>

42. In this last one, - my Concurring Opinion in the case of the *Ituango Massacres*, - upon developing my reflections with regard to the planning and execution of massacres as crimes of State, I allowed myself to deliberate:

"How is it possible to deny the existence of a State crime? The international legal experts that have done it (in their majority) have simply closed their eyes to the facts, and given signs of their lack of conscience by denying to extract the juridical consequences of said facts. Their blind dogmatism has stopped the evolution and humanization of International Law. Crimes of State – there is no way to deny it – have been planned and perpetrated by its agents and collaborators, in a recurring manner,

<sup>26</sup>. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, vol. III, Porto Alegre/Brasil, S.A. Fabris Ed., pp. 27-117 y 447-497; A.A. Cançado Trindade, *El Derecho Internacional de los Derechos Humanos en el Siglo XXI*, Santiago, Editorial Jurídica de Chile, 2001, pp. 317-374; A.A. Cançado Trindade, *El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos*, Bilbao, Universidad de Deusto, 2001, pp. 9-104.

<sup>27</sup>. I also referred to the aggravating circumstances of massacres presented before this Court in my Concurring Opinion in the case of *Baldeón García versus Peru* (Judgment of 04.06.2006).

and on different continents. The experts on international law have the duty to save the concept of crime of State, even to sustain the credibility of their profession. (...)

Successive crimes of State – those already determined and proven, added to those there is no news about – continue happening, before the obliging and indifferent eyes of the greater part of the contemporary experts in international law. The crimes of State have not stopped existing because they affirm that they do not exist and cannot exist. All the contrary: State crimes do exist, and they should not exist, and the experts in international law should make an effort to fight it and punish it as such. The greater part of the contemporary international law doctrine has been neglectful, when it avoids the subject.<sup>28</sup> They cannot keep on doing it, since, fortunately, to ensure its non-repetition, the atrocities have been reconstructed in recent accounts,<sup>29</sup> and the memory has been preserved by the ever growing publications of the survivors of massacres as State crimes." (paras. 30 and 41).

43. The *aggravated* international state responsibility corresponds to these massacres as crimes of State, with their juridical consequences, - as I have reiterated in my reflections developed in my Concurring Opinion (paras. 24-36) in the case of the *Plan de Sánchez Massacre*, and in my Concurring Opinion (paras. 30-40) in the case of the *Mapiripán Massacre*. Previously, in my Concurring Opinion in the case of *Myrna Mack Chang* I rescued a doctrinal current that, for decades, has admitted the existence of crimes of State (paras. 22-26), and that seems to be forgotten – deliberately or not – in our days. It is not my intention here to repeat my reflections developed in my previous Concurring Opinions in this sense, but to add some new considerations on this forgotten juridical form of thought.

44. It is not mere coincidence that, in the middle of the second decade of the twentieth century, in an inspired and visionary book published in Bucharest in 1925, titled "*Criminalité collective des États et le Droit pénal de l'avenir*", the Romanian lawyer Vespasien V. Pella warned not only that the capacity of a State of committing international crimes is unquestionable, but that the most dangerous criminality and the one that is most difficult to fight, is the *crime organized* by the State.<sup>30</sup> Thus, the organization of an international justice was urgent, even to prevent and fight the States' criminal policy.<sup>31</sup> An V.V. Pella added with clarity:

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<sup>28</sup>. The best thing that the e.g. Commission on International Law (CIL) of the United Nations could do, in my opinion, would be to reopen, in 2007-2008, its reconsideration in the framework of its Articles on the State's International Responsibility, abandon the strictly statistic and anachronistic Cosmo vision that permeates them, take the concept of crime of State out of the box, rescue it, and include it once again in its mentioned Articles, with their juridical consequences (punitive damages). With this, the mentioned work of the CIL, in my opinion, would gain credibility and would offer the international community, and in final instance, humanity as a whole, a service.

<sup>29</sup>. Cf. compilaciones *Masacres - Trazos de la Historia Salvadoreña Narrados por las Víctimas*, 1a. ed., San Salvador, Ed. Centro para la Promoción de Derechos Humanos "M. Lagadec", 2006, pp. 17-390; *Los Escuadrones de la Muerte en El Salvador*, 2a. ed., San Salvador, Edit. Jaraguá, 2004, pp. 11-300.

<sup>30</sup>. V.V. Pella, *Criminalité collective des États et le Droit pénal de l'avenir*, Bucarest, Imprimerie de l'État, 1925, pp. 20 y 22.

<sup>31</sup>. *Ibid.*, p. 113. For him, war (of aggression) was "a typical case of collective criminality": - "La guerre, jusqu'ici, a été regardée comme un *acte licite* dans les rapports internationaux. Très peu nombreux ont été ceux qui ont pensé à l'étudier au point de vue de l'idée de criminalité collective. (...) Tous les crimes internationaux ne sont que le résultat de l'inspiration directe des classes dirigeantes, qui, par leur action, tendent à provoquer l'apparition, au sein des grandes masses populaires, de cette volonté inconsciente, génératrice de toutes les actions violentes qui ont troublé au cours des siècles l'ordre international". *Ibid.*, pp. 21 and 25.

"Les théoriciens du Droit international public admettront eux-mêmes que, du jour où sera reconnu le caractère criminel de la guerre d'agression, et en dehors de la disparition du droit de la guerre comme objet de leur discipline juridique, ils seront obligés de modifier les méthodes mêmes d'investigation scientifique qu'ils employaient jusqu'à l'heure actuelle.

Au lieu de cet empirisme diplomatique consistant quelquefois à étudier la guerre au seul point de vue de la matérialité des faits historiques, il sera nécessaire de procéder à des recherches approfondies dans le domaine de la criminalité internationale"<sup>32</sup>.

45. Even at the end of the twenties, H. Donnedieu de Vabres was also promoting (in 1928) a "répartition de la compétence criminelle entre les États" in search of a universal right,<sup>33</sup> capable of inhibiting the especially gross violations of the rights enshrined. A decade later, H. Lauterpacht stated (in 1937) that crimes and responsibility could not be limited only to the interior of the State, since this would allow the individuals, "associés sous la forme d'État", to commit criminal acts and invoke immunity, thus stopping – with the State's power - "a virtually unlimited power of destruction": and he immediately warned, with great clarity, that

"(...) Il ne peut guère y avoir d'espoir pour le droit international et la morale si l'individu, agissant comme l'organe de l'État peut, en violant le droit international, s'abriter effectivement derrière l'État impersonnel et métaphysique; et si l'État, en cette capacité, peut éviter le châtement en invoquant l'injustice de la punition collective."<sup>34</sup>

46. Two years later (in 1939), Roberto Ago observed that the subjects of International Law, endowed with international legal personality, are capable of committing an international crime; he remembered that Hans Kelsen also admitted that a fact thus incriminated, ordered, and committed by a State body (or agent), may be imputed to the State as a subject of International Law,<sup>35</sup> within the framework of the international legal system. After some years, in the middle of the XX century, S. Glaser, focusing on the State as a "sujet d'une infraction internationale", in his book of 1954 identified the war of aggression as a crime of State within the international legal system;<sup>36</sup> for him, "il y a des infractions internationales dont le sujet ne peut être qu'un État."<sup>37</sup>

47. Even in the fifties (in 1959), Pieter N. Drost published his works *The Crime of State*, in two volumes, the first one dedicated to what he called "humanicide", and the second to genocide. When referring to the first category, he remembered the existence of universal standards of reason and justice, and defined *humanicide* as a Crime of State, perpetrated by State agents abusing public power, in detriment of

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<sup>32</sup>. *Ibid.*, p. 13.

<sup>33</sup>. H. Donnedieu de Vabres, *Les principes modernes du Droit pénal international*, Paris, Rec. Sirey, 1928, p. 451.

<sup>34</sup>. H. Lauterpacht, "Règles générales du droit de la paix", 62 *Recueil des Cours de l'Académie de Droit International de La Haye* (1937) pp. 350-352.

<sup>35</sup>. R. Ago, "Le délit international", 68 *Recueil des Cours de l'Académie de Droit International* (1939) pp. 451-452 y 461, y cf. pp. 455, 435, and 472.

<sup>36</sup>. S. Glaser, *Introduction à l'étude du Droit international pénal*, Bruxelles/Paris, Bruylant/Rec. Sirey, 1954, pp. 38-55 and 63-70.

<sup>37</sup>. *Ibid.*, p. 63.



individuals, and in violation of human rights (such as those enshrined in Articles 3-21 of the Universal Declaration of Human Rights), defying the Constitutional State.<sup>38</sup>

48. In his judgment, both acts and omissions can constitute crimes of State, compromising the State's aggravated international responsibility – in reason of its criminality – as a legal person, which must assume the juridical consequences of said crimes.<sup>39</sup> P.N. Drost concluded that it should protect individuals from "humanicide" as a crime of State, and, since the latter could even "destroy the international legal system", it should be punished and inhibited.<sup>40</sup>

49. At the end of the XX century, the International Criminal Tribunal *ad hoc* for the former Yugoslavia, in its Judgments of the case of *Tadic*, of 05.07.1997 (*Trial Chamber*) and of 07.15.1999 (*Appeals Chamber*), stated – in its first Judgment – that "the obligations of individuals under International Humanitarian Law are independent and apply without prejudice to any questions of the responsibility of States under International Law" (para. 573); the Tribunal added – in its second Judgment – that the acts of the individuals in question "are attributed to the State, as far as State responsibility is concerned, and may also generate individual criminal responsibility." (para. 144) *The determination of an individual's international criminal responsibility does not, therefore, free the State of its international responsibility.*

50. In my recent *General Course on Public International Law* given in the Academy of International Law of La Haya (2005), I allowed myself to present my position in the sense that the crime of State does exist, and it has juridical consequences. Likewise, I related its sanction and prevention with the fundamental or superior interests of the international community as a whole and of the international juridical legal system.<sup>41</sup> I did it based on my experience in this Court, reiterating the reflections I have developed in this sense in successive Opinions in Judgments regarding certain cases decided upon by this Court in the previous years.<sup>42</sup>

51. There have been occasions in which the crimes of State have been committed beyond national boundaries, on a truly inter-state scale. In this sense, in my recent Concurring Opinion in the case of *Goiburú et al. versus Paraguay* (Judgment of 09.22.2006), I allowed myself to state that

"(...) It has been proven that the present case of *Goiburú et al.* is inserted in a policy of *State terrorism* that victimized, in the cruelest and most brutal way possible, thousands of people and their next of kin in the countries that prepared the Condor Operation, in which gross violations of human rights were even committed 'extra-territorially', in other countries and other continents. How can we deny the existence of the *Crime of State* before a State policy of extermination?"

<sup>38</sup>. P.N. Drost, *The Crime of State - Book I: Humanicide*, Leyden, Sijthoff, 1959, pp. 262-263, 347-348, 218-219, and 318.

<sup>39</sup>. *Ibid.*, pp. 283-284, 290, 294, and 296.

<sup>40</sup>. *Ibid.*, pp. 36 and 325.

<sup>41</sup>. A.A. Cançado Trindade, "General Course on Public International Law - International Law for Humankind: Towards a New *Jus Gentium*", 317 *Recueil des Cours de l'Académie de Droit International de la Haye* (2005) cap. XV (in press).

<sup>42</sup>. *Cf. supra*, paragraph 39 of this Concurring Opinion.

The crime of State does not only exist in the head of the 'illuminated' experts on international law that dogmatically affirm that the State simply cannot commit a crime. They continue ignoring episodes such as those of the present case, historically proven, and other cases of massacres awarded by the Inter-American Court (cases, v.g. of the *Barrios Altos Massacre*, of the *Plan de Sánchez Massacre*, of the *19 Merchants*, of the *Mapiripán Massacre*, of the massacre of the *Moiwana Community*, of the *Pueblo Bello Massacre*, of the *Ituango Massacres*), and murders planned at the highest level of state power (cases, v.g. of *Barrios Altos*, and of *Myrna Mack Chang*), even having today the acknowledgment of international responsibility by the respondent governments for their occurrence.

Something does not stop existing simply because one states it does not exist. The experts in international law cannot remain indifferent to human suffering, which can be concluded from facts historically proven. While the contemporary doctrine on international law insists on denying what has been historically proven – the crimes of State – it will be eluding a matter of the greatest seriousness, with its juridical consequences, compromising its own credibility. (...)" (paras. 23-25)

52. In my opinion, those responsible for the exclusion in 2000 of the conception of "crime of State" from the Articles on the State's Responsibility of the Commission on International Law of the United Nations (adopted in 2001) failed International Law. They did not realize – or they did not worry about the fact – that said notion leads to the "progressive development" itself of International Law. It supposes the existence of rights both previous and superior to the State, whose violation, in detriment of human beings, is especially gross and damaging to the international legal system itself. It provides the latter with universal values, by inhibiting said gross and damaging violations, and seeking to ensure the international *ordre juridique*.

53. Similarly, it gives expression to the belief that certain behaviors – that make up, or are part of a state policy – are inadmissible, and suddenly generate aggravated international responsibility of the State, with its juridical consequences. It points out the road toward the construction of an organized international community, of the new *jus gentium* of the XXI century, of International Law for humanity.

54. Contrary to what the experts in international law seem to want to achieve by remaining attached to obscurantism (in its unconditional defense of what the State's do), the existence of the crime of State is empirically proven. Its occurrence is much more frequent than what one would hope. The XX century as a whole and the beginning of the XXI century have been tragically full of crimes of State. And the contemporary International Law cannot remain indifferent to this.

55. The crime of State effectively brings about juridical consequences – as should be, - with a direct incidence on the reparations due to the victims and their next of kin. A consequence consists in the "punitive damages" *lato sensu*, conceived these, beyond the merely pecuniary meaning inadequately attributed to them (in certain national jurisdictions), as specific obligations of reparation that must be assumed by the States responsible for criminal acts or practices, all of these obligations that may be considered an appropriate response or reaction of the legal system against the crime of State.<sup>43</sup>

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<sup>43</sup>. N.H.B. Jorgensen, *The Responsibility of States for International Crimes*, Oxford, University Press, 2003, pp. 231 and 280.

56. They are obligations to do. And, among them, is the obligation to identify, prosecute, and punish the perpetrators of the crimes of State, who, due to their actions (or omissions), incurred in international criminal responsibility, besides compromising the international responsibility of their State, on behalf of who they acted (or omitted), in the execution of a criminal policy of the State.<sup>44</sup> It is not about merely individual acts (or omissions), but of a criminality organized by the State itself.<sup>45</sup> Thus, it becomes necessary to take into account, *jointly*, the international criminal responsibility of the individuals involved as well as the State's international responsibility, essentially complementary; the *aggravated* international responsibility corresponds to the crime of State of the State in question.<sup>46</sup>

57. The present Judgment of the Court in the case of the *Castro Castro Prison* contemplates and effectively orders a series of obligations to do, in its chapter XVI, on reparations. These are particularly ample, from the compensations up to measures of satisfaction and non-repetition of the injurious acts. Among the latter (non-pecuniary reparations), I can mention the identification, prosecution, and punishment of those responsible; and educational measures, as well as of medical and psychological assistance. The Court, once more, has correctly considered Articles 8 and 25 of the American Convention in their inseparability.<sup>47</sup> And, likewise, correctly pointed out that gross violations, such as those of the present case, to human rights (made up, in my opinion, by crimes of State) violate the international *jus cogens*.<sup>48</sup>

## VII. The Need and Importance of the Gender Analysis.

58. The present case cannot be adequately examined without a gender analysis. Remember that, as a first step, the United Nations Convention of the Elimination of All Forms of Discrimination against Women (CEDAW, 1979) advanced on a holistic vision of the matter, tackling women's rights in all areas of life and in all situations (in fact, I would even add in the light of the *cas d'espèce*, in the deprivation of freedom); the Convention cries out for the modification of socio-cultural patterns of behavior (Article 5) and highlights the principle of equality and non-discrimination,<sup>49</sup> - a principle that the Inter-American Court has already determined, in its transcendental Advisory Opinion n. 18 (of 09.17.2003) on the *Juridical Condition and Rights of Undocumented Migrants*, that belongs to the domain of the *jus cogens* (paras. 97-111).<sup>50</sup>

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<sup>44.</sup> Cf., in this sense, R. Maison, *La responsabilité individuelle pour crime d'État en Droit international public*, Bruxelles, Bruylant, 2004, pp. 22, 30, 262-263, 286, 367, 378, 399, 409, 437, and 509-513.

<sup>45.</sup> *Ibid.*, pp. 24 and 251.

<sup>46.</sup> *Ibid.*, pp. 294, 298 and 412.

<sup>47.</sup> Operative paragraph n. 6, and corresponding whereas paragraphs.

<sup>48.</sup> Cf. paragraphs 203 and 271.

<sup>49.</sup> E.A. Grannes, *The United Nations Women's Convention*, Oslo, Institutt for offentlig Retts skriftserie (n. 13), 1994, pp. 3, 9, and 20-21.

<sup>50.</sup> And cf. Concurring Opinion of the Judge A.A. Cançado Trindade, paras. 58 and 65-85.

59. The present Judgment of the Court in the case of the *Castro Castro Prison* correctly warns of the need of the gender analysis, since, in that specific case,

"women were affected by the acts of violence in a different way than men; (...) some acts of violence were directed specifically toward them and other affected them in a greater proportion than they affected men." (para. 223)

Besides, the present case seems to reveal that the perception itself of the passing of time may not be the same for men and women.

60. The present case of the *Castro Castro Prison* reveals an approximation between psychological time and biological time, put in evidence by something sacred that has been violated in the present case: the project as well as the experience of *maternity*. Maternity, which must be surrounded by special cares, respect, and acknowledgment, throughout life and in the afterlife, was violated in the present case in a brutal form and on a truly inter-temporal scale.

61. First of all, there was the extreme *pre-natal* violence, put in evidence in the brutalities to which pregnant women were submitted in the Prison of Castro Castro, described in the present Judgment (paras. 197(57), 292, and 298). Which have been the consequences of this situation of extreme violence in the mind – or the subconscious – of the children born from the a mother's womb so disrespected and violated, even before their birth?

62. There was then the extreme violence in the experience itself of maternity, when facing the brutality perpetrated against their children. In the aforementioned public hearing before this Court in the present case of the *Castro Castro Prison*, a mother (Mrs. Julia Peña Castillo), a witness in the case, described it with eloquence:

"(...) On June 06, 1992, who speaks is the mother of many children (...), (...) my mother's instinct was more than for the house, for more than just cooking, I left everything behind (...). When I arrived there [at Castro Castro] there was more than just the press, (...) there were many soldiers, there were trucks going in and others coming out, (...) there I started screaming, (...) screaming and saying: - 'what are you doing, my children my children!' It was the first thing reflected in my words, my children. (...)

(...) There many of us mothers hugged, we hugged strongly because the roars of the cannon reached out hearts. Each roar represented a very strong pain because you could see the splinters flying from the pavilions. (...) There was a mother next to me, I hugged her and she told me 'my daughter is alive, my daughter is alive' (...). Hearing her got me very excited. Later that day the situation was worse, you could no longer hear voices, just shots fired from what sounded like a machine gun or a long weapon (...), you could hear it and then it would stop, and then on the other side again. (...) The gunshots continued. We stayed there all night, we did not know anything, who was dead, who was injured, how many had died, nothing because they did not give us any information. Even the police officers that came out (...). They did not give us any type of information (...). (...) They were not interested."<sup>51</sup>

63. In even another dimension, many of the women who survived the bombing of the Prison of Castro Castro – as has been stated in this Concurring Opinion (para. 13, *supra*) – have not been able to be mothers yet, since, as stated in the public hearing in the *cas d'espèce* before this Court, they have since then used all their existential time in searching for truth and justice. Thus, we are facing here a maternity that has been denied or postponed (a damage to a life project), forced

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<sup>51</sup>. IACHR, *Transcription of the Public Hearing...*, *op. cit. supra* n. (9), pp. 41-43 (internal circulation).

upon them by the cruel circumstances, as claimed with all pertinence by the common intervener of the representatives of the victims and their next of kin (*supra*).

64. And, in the dimension of the after-life, the experience of maternity has also been seriously affected. It has been well illustrated in the desperate search, in the morgues, by the victims' next of kin, of the remains of the inmates who died in the armed attack against the Prison of Castro Castro, and the indifference of the state authorities. As stated by the Court in the present Judgment,

"(...) The testimonies included in the body of evidence coincide when they state that an additional element of suffering was the fact of being [the mothers and next of kin] in that situation of uncertainty and despair on 'Mother's Day' (Sunday May 10, 1992)." (para. 338)

65. Beyond the circumstances of the *cas d'espèce*, the gender analysis has contributed, in general, to reveal the systematic nature of discrimination against women, and the affirmation of women's rights (*cf. infra*), and their insertion by consensus in the Vienna Declaration and Programme of Action of 1993,<sup>52</sup> - has finally acknowledged the omnipresent violations of women's rights both in the public and private realms.<sup>53</sup> Both the mentioned Vienna Declaration and Programme of Action as well as the Action Platform adopted by the IV World Conference of Women in Beijing 1995<sup>54</sup> contributed the barriers faced by women in cultural patterns of behavior in the most different situations and circumstances.<sup>55</sup>

66. The *travaux préparatoires* of the Facultative Protocol to the Convention of 1979 on the Elimination of All Forms of Discrimination against Women (CEDAW)<sup>56</sup> (adopted in 1999), followed by the entry into force, on 12.22.2000, of the mentioned Protocol, came to strengthen the right to individual international petition, considerably expanding, with a gender approach, the circle of people protected, when covering women's rights as legally demandable.<sup>57</sup> At the same time, the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women (Convention

<sup>52</sup>. For a personal testimony, *cf.* A.A. Cançado Trindade, "Memória da Conferência Mundial de Direitos Humanos (Viena, 1993)", 87/90 *Boletim da Sociedade Brasileira de Direito Internacional* (1993-1994) pp. 9-57; A.A. Cançado Trindade, "Balance de los Resultados de la Conferencia Mundial de Derechos Humanos (Viena, 1993)", 3 *Estudios Básicos de Derechos Humanos*, San José de Costa Rica, IIHR, 1995, pp. 17-45.

<sup>53</sup>. M. Suárez Toro y S. Dairiam, "Recognizing and Realizing Women's Human Rights", in *The Universal Declaration of Human Rights: Fifty Years and Beyond* (eds. Y. Danieli, E. Stamatopoulou y C.J. Dias), Amityville/N.Y., Baywood Publ. Co., 1999, pp. 117, 119, and 122-123.

<sup>54</sup>. For testimonies in this sense, *cf.*: Several Authors, *Estudios Básicos de Derechos Humanos*, tomo IV (present. A.A. Cançado Trindade), San José de Costa Rica, IIHR, 1996, pp. IX-XIV and 15-335.

<sup>55</sup>. A.A. Cançado Trindade, *Tratado de Direito Internacional dos Direitos Humanos*, tomo III, Belo Horizonte/Brasil, S.A. Fabris Ed., 2003, pp. 354-356.

<sup>56</sup>. *Cf.* for a detailed study, v.g., A. Byrnes y J. Connors, "Enforcing the Human Rights of Women: A Complaints Procedure for the Women's Convention", 21 *Brooklyn Journal of International Law* (1996) pp. 679-783; and *cf.* also, v.g., IIHR, *Convención CEDAW y Protocolo Facultativo*, 2a. ed., San José de Costa Rica, IIHR, 2004, pp. 15-40.

<sup>57</sup>. A.A. Cançado Trindade, "O Acesso Direto da Pessoa Humana à Justiça Internacional", in *Protocolo Facultativo à CEDAW*, Brasília, Cadernos Agende (Ações em Gênero, Cidadania e Desenvolvimento) n. 1, 2001, pp. 45-74.

of Belém do Pará, adopted in 1994), which came into force on 03.05.1995, expressed the conviction that

"the elimination of violence against women is a necessary condition for their individual and social development and their complete and equal participation in all the realms of life."<sup>58</sup>

67. It has always seemed surprising, if not enigmatic, to me that up to today, more than a decade as of the entry into force of the Convention of Belém do Pará, the Inter-American Commission has never, up to this date, sought the hermeneutics of this Court on said Convention, as permitted expressly by the latter (Articles 11-12). In the present case of the *Castro Castro Prison*, acts of extreme violence and cruelty have been committed against the inmates – men and women, - constant in the case file, which, however, require an analysis of gender in reason of the nature of certain breaches of rights suffered especially by the women. Remember, v.g., that stated, in this sense, in the aforementioned Brief of Pleadings, Motions, and Evidence (of 12.10.2005) of the victims' legal representation in the sense that several female prisoners, who were already "seriously injured" but made it to the hospital, "transported in trucks one on top of the other," were "raped at the hospital by hooded individuals."<sup>59</sup>

68. In the legal proceedings (in both the written and oral stages) before this Court, it was the representation of the victims and their next of kin, and not the Commission, who insisted on relating the protection norms of the Convention of Belém do Pará<sup>60</sup> (specifically its Articles 4 and 7) with the violations to the American Convention on Human Rights. This exercise comes to attend the necessary gender analysis in the present case. Article 4 of the Convention of Belém do Pará states that "every woman" has the right to "recognition, enjoyment, exercise, and protection" of all the human rights enshrined in international instruments on the matter, among which it expressly mentioned the rights to life, humane treatment, to not be submitted to tortures, to respect to "the inherent dignity of her person."<sup>61</sup>

69. And, through Article 7 of the Convention of 1994, the States Parties agree to pursue a series of measures to "prevent, investigate, punish, and eradicate" the different forms of violence against women. In the present case of the *Castro Castro Prison*, where, for the first time in the history of this Court, the gender analysis is set forth – to my satisfaction as a Judge – by the representatives of the victims themselves and their next of kin (and not by the Commission) as the true plaintiff before the Court and as subjects of International Law, the human rights of women have been violated with special cruelty, constituting the *aggravated* international responsibility of the Respondent government.

70. The operative paragraphs 4 and 6 (and the corresponding paragraphs that substantiate it) of the present Judgment are issued both over the American

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<sup>58</sup>. Preámbulo, 5o. *considerandum*. Said Convention, instead of enshrining new rights, adds the gender analysis.

<sup>59</sup>. IACHR, *Transcription of the Public Hearing in the case of the Castro Castro Prison...*, *op. cit. supra* n. (9), pp. 30-31, para. 25.

<sup>60</sup>. Ratified by the Peruvian State on 04.02.1996.

<sup>61</sup>. Article 4 (a), (b), (d), and (e).

Convention on Human rights and on another two Inter-American sectorial Conventions: operative paragraph 4 of the Inter-American Convention Against Torture, and operative paragraph 6 on the latter as well as the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women (Convention of Belém do Pará). The mentioned Inter-American sectorial Convention are not uniformed in their corresponding clauses that attribute jurisdiction, *which has prevented this Court from issuing judgment, up to this date, on both of them*: the Inter-American Convention against Torture<sup>62</sup> and the Inter-American Convention on the Forced Disappearance of Persons.<sup>63</sup>

71. The second correctly includes a clause that it expressly attributive of jurisdiction to the Inter-American Court (besides to the Commission – Article XIII), but not the first: being a prohibition of the *jus cogens* (the prohibition of torture), and having in mind non-revocable rights, its Articles 16 and 17, - in an emphatic example of bad wording, - for reasons that escape my comprehension only refer expressly to the Commission, and not the Court, in a world in which international jurisdiction is expanding through the creation of new international courts, precisely to punish and prevent, *inter alia*, torture! I do not free myself of leaving my firmly critical position in this sense recorded here.

72. Regarding the Convention of Belém do Pará (whose adoption I personally witnessed, in the General Assembly of the OAS in 1994, a few hours before my first election as Full Judge of this Court), regarding which this Court issues its first ruling in the present Judgment, at the end of 2006, - its Article 11 refers expressly to the consultative function of the Court, but, in what refers to its adjudicatory function, Article 12 of said Convention could be much more clear. Article 12 of the Convention of Belém do Pará is not at the height of the noble cause it sponsors – the defense of women's rights – and it could have chosen a much better wording, thus requiring interpretation.

73. Article 12 expressly only foresees the right of petition of the Inter-American Commission, but at least it adds that the Commission will consider the petitions “in accordance with the norms and the procedures established by the American Convention on Human Rights and the Statutes and Regulations” of the Commission. It so happens that, between said norms, for the *consideration* of petitions, is Article 51(1) of the American Convention, which expressly states the forwarding by the Commission of cases not settled by it to the Court for its decision. Therefore, the Court has jurisdiction over said cases, and may and must issue a ruling regarding the alleged violations of the human rights of women, - with the necessary gender analysis, as presented in the present case, - under the Convention of Belém do Pará in said circumstances, giving the latter the due *effet utile*.

74. But to disregard the need of this exercise of interpretation, and to strengthen its own mechanism of protection, the Convention of Belém do Pará should have included a clause of express attribution of jurisdiction to the Court in adjudicatory

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<sup>62.</sup> Cf. IACHR, cases of *Paniagua Morales, Villagrán Morales (Street Children), Cantoral Benavides, Tibi, Hermanos Gómez Paquiyaury, Maritza Urrutia, Gutiérrez Soler, Baldeón García, and Vargas Areco*.

<sup>63.</sup> Cases of *Molina Theissen, Blanco Romero, Gómez Palomino, and Goiburú et al.* – Besides, the Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities, which creates its own mechanism of supervision (Article VI), the Court refers to it in its Judgment of the case of *Ximenes Lopes*.

matters. But not because of this is the Court deprived of jurisdiction; to the contrary, in my judgment it has jurisdiction, in the understanding and the terms I summarized in the previous paragraph of this Concurring Opinion. The negotiators and those who draw up international human rights instruments should have been more precise in the exercise, taking into account the imperatives of protection of the human being, - in the present case, women's rights that are regrettably violated and unpunished in everyday life, in some parts of the world more than others.

### VIII. Oppressed and Oppressors: The Unsustainable Domination and the Primacy of the Law.

75. Finally, I proceed to my last line of reflections in the present Concurring Opinion. With her usual keenness, the great mystical thinker Simone Weil warned, in her penetrating essay *Reflections Concerning the Causes of Liberty and Social Oppression* (1934), which considered as her own "will", that

"extermination suppresses power when it suppresses the object. Therefore there is, in the essence itself of power, a fundamental contradiction that, properly speaking, prevents its existence; those who are called lords, always obliged to reinforce their power, (...) are not but the persecution of a domain impossible to possess, persecution with infernal torments, of which the Greek mythology offers beautiful images.

(...) This is how Agamenon, who sacrificed his daughter, relives in the capitalists who, in order to maintain their privileges, quickly accept wars that can take away their own children. (...)

(...) The true subject of *The Iliad* is the influence of war on the warriors and, through them, on all humans: nobody knows why he sacrifices himself and he sacrifices his own in a mortal war without a purpose (...). In this old and wonderful poem we can already see the essential evil of humanity: the substitution of the purposes for the means."<sup>64</sup>

76. In the same brilliant essay, Simone Weil insisted on her warning in the sense that

"Nothing easier than diffusing any myth through a population. Thus, there is no need to be surprised of the appearance without precedents in history of 'totalitarian' regimens. (...) There where the irrational opinions substitute ideas, strength can do anything. (...) As long as the oppressed have wanted to create groups capable of exercising a real influence, these groups (...) have reproduced in their bosom the tasks of the regimen they sought to reform or fight, that is, the bureaucratic organization, the inversion of the relationship between the means and the purposes, the disregard for individuals, the separation between thought and action, the mechanical nature of thought itself, the use of the brutishness and lies as means of propaganda, (...) a civilization that rests on rivalry, on fights, on war."<sup>65</sup>

77. The reflections of 1934 of this admirably lucid woman, Simone Weil, are relevant in relation to successive examples of oppression throughout the following decades.<sup>66</sup> The truth is that brutality has always been present in human relationships, as can be concluded from the *Genesis* (IV.4). It has been present before and after the creation of the State, and, with the latter, it has been magnified

<sup>64</sup>. S. Weil, *Reflexiones sobre las Causas de la Libertad y de la Oposición Social*, Barcelona, Ed. Paidós/Ed. Universidad de Barcelona, 1995 [reed.], pp. 79-81.

<sup>65</sup>. *Ibid.*, pp. 143 and 145.

<sup>66</sup>. Including the brutalities perpetrated in pavilion 1A of the Peruvian Prison of Castro Castro (which held around 131 female prisoners), during the so-called "Operative Transfer 1", of May 06 to 09, 1992.



with its recourses and its monopoly over the use of force (as some shortsighted publicists are proud to state). As stated correctly by the Preacher, in the briefest and most enigmatic of the writings of the Old Testament (the beautiful *Ecclesiastes*),

"Is there anything of which one can say,  
"Look! This is something new"?  
It was here already, long ago;  
it was here before our time.  
There is no remembrance of men of old,  
and even those who are yet to come  
will not be remembered  
by those who follow."<sup>67</sup>

78. And the Preacher continues, in an implacable manner: "If you see the poor oppressed in a district, and justice and rights denied, do not be surprised at such things; for one official is eyed by a higher one, and over them both are others higher still. The increase from the land is taken by all!"<sup>68</sup> These words, which have survived for centuries, are invested of great current importance in our days! We could have perfectly heard them (if we have not yet heard them, or at least the idea they enclose) in some of the thousands of seminars and discussions carried out in our days.

79. But the Preacher does not end there. He continues, with wisdom and knowledge of human nature:

"Again I looked and saw all the oppression that was taking place under the sun: I saw the tears of the oppressed— and they have no comforter; power was on the side of their oppressors— and they have no comforter. And I declared that the dead, who had already died, are happier than the living, who are still alive. But better than both is he who has not yet been, who has not seen the evil that is done under the sun."<sup>69</sup>

80. And the Preacher adds that everything has its time:

"There is a time for everything,  
and a season for every activity under heaven:  
a time to be born and a time to die,  
a time to plant and a time to uproot,  
a time to kill and a time to heal,  
a time to tear down and a time to build,  
a time to weep and a time to laugh,  
a time to mourn and a time to dance,  
a time to scatter stones and a time to gather them,  
a time to embrace and a time to refrain,  
a time to search and a time to give up,  
a time to keep and a time to throw away,  
a time to tear and a time to mend,  
a time to be silent and a time to speak"(...).<sup>70</sup>

81. My time as Full Judge of this Court is expiring. Everything has its time, a time to arrive and a time to leave. Regarding the surviving victims of the case of the *Castro Castro Prison*, they had their time of prolonged suffering, their time to suffer

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<sup>67</sup>. Chapter 1, verses 10-11.

<sup>68</sup>. Chapter 5, verses 8-9.

<sup>69</sup>. Chapter 4, verses 1-3.

<sup>70</sup>. Chapter 3, verses 1-8.

due to lack of punishment, but now they have their time for justice. After the darkness there is light, in the *chiaoscuro* of the fragile human existence. For me, the sad anticipated *saudade* of the departure from the Court is in part compensated by the light that goes on to illuminate the victims' paths, with the establishment of truth and justice.

Antônio Augusto Cançado Trindade  
Judge

Pablo Saavedra-Alessandri  
Secretary