INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF THE PEASANT COMMUNITY OF SANTA BÁRBARA *V. PERU*

JUDGMENT OF SEPTEMBER 1, 2015

(Preliminary Objections, Merits, Reparations and Costs)

In the case of the *Peasant Community of Santa Bárbara v. Peru,*

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

Humberto Antonio Sierra Porto, President
Roberto F. Caldas, Vice President
Manuel E. Ventura Robles, Judge
Alberto Pérez Pérez, Judge
Eduardo Vio Grossi, Judge
Eduardo Ferrer Mac-Gregor Poisot, Judge,

also present,

Pablo Saavedra Alessandri, Registrar
Emilia Segares Rodríguez, Deputy Registrar,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention" or "the Convention") and with Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this judgment, which is structured as follows:

[*] In accordance with Article 19(1) of the Rules of Procedure of the Inter-American Court applicable to the instant case, Judge Diego García-Sayán, a Peruvian national, did not take part in the deliberation of this judgment.

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I
INTRODUCTION OF THE CASE AND CAUSE OF THE ACTION

1. *The case submitted to the Court. On* July 8, 2013, the Inter-American Commission of Human Rights (hereinafter "the Inter-American Commission" or "the Commission") submitted a brief (hereinafter "submission brief") to the jurisdiction of the Inter-American Court in the case of the Peasant Community of Santa Bárbara against the Republic of Peru (hereinafter "the State" or "Peru"). According to the Commission, the case concerns the alleged responsibility of the State for the alleged forced disappearance of 15 persons, most of them belonging to two families, including seven children aged between eight months and seven years. These acts were allegedly committed by members of the Peruvian Army on July 4, 1991, in the community of Santa Bárbara, province of Huancavelica. The Commission noted that, despite the fact that the internal investigations had demonstrated the criminal responsibility of the military personnel accused, and that the military courts even found six members of the armed forces responsible for the alleged acts, on January 14, 1997, the Supreme Court of Justice applied Amnesty Law No. 26.479. Even after the reopening of the criminal proceedings in 2005, there has been no final conviction against of the perpetrators. Consequently, the facts remain in impunity.

2. *Procedure before the Commission.* The procedure before the Commission was as follows:

a) Petition. On July 26, 1991, the Inter-American Commission received the initial petition from the Center for Studies and Action for Peace (*Centro de Estudios y Acción para La Paz* - CEAPAZ). Subsequently, on July 7, 1992, the Center for Justice and the International Law (CEJIL) joined the case as co-petitioner. On August 31, 2010, the representatives reported that the CEAPAZ organization was not legally sponsoring the case in Peru, and that said representation had been assumed since 2006 by *Paz y Esperanza*, the same organization that represents the majority of the alleged victims of the case in the domestic judicial proceedings.

b) Report on Admissibility and Merits. On July 21, 2011, the Commission adopted Admissibility and Merits Report No. 77/11, pursuant to Article 50 of the Convention (hereinafter "Admissibility and Merits Report"), in which it reached a series of conclusions and made several recommendations to the State:

i. Conclusions. The Commission concluded that the State was responsible for breach of its obligations to prevent violations and ensure:

1. The rights to personal liberty, humane treatment, life and juridical personality in accordance with Articles 7, 5, 4, and 3 of the American Convention, in conjunction with Article 1(1) of said instrument, to the detriment of the adults Francisco Hilario Torres; his wife, Dionicia Quispe Malqui; their daughters, Antonia and Magdalena Hilario Quispe; and their daughter-in-law, Mercedes Carhuapoma de la Cruz; Ramón Hilario Morán and his wife Dionicia Guillén; and Elihoref Huamaní Vergara; as well as the children: Yessenia, Miriam and Edith Osnayo Hilario; Wilmer Hilario Carhuapoma; Alex Jorge Hilario; and the brothers Raúl and Héctor Hilario Guillén;

2. The rights of the child in accordance with Article 19 of the American Convention, in relation to Article 1(1) thereof, to the detriment of the children: Yessenia, Miriam and Edith Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Hilario and the brothers Raúl and Héctor Hilario Guillén;

3. The rights of the family recognized in Article 17 of the American Convention, in conjunction with Article 1(1) thereof, to the detriment of the disappeared persons: Dionicia Quispe Malqui, her daughters Antonia and Magdalena Hilario Quispe, and her daughter-in-law Mercedes Carhuapoma de la Cruz; Ramón Hilario Morán and his wife Dionicia Guillén; and Elihoref Huamaní Vergara, as well as the children Yessenia, Miriam and Edith Osnayo Hilario; Wilmer Hilario Carhuapoma, Alex Jorge Hilario and the brothers Raúl and Héctor Hilario Guillén and their next of kin: Zósimo Hilario Quispe, Marcelo Hilario Quispe, Gregorio Hilario Quispe, Zenón Cirilo Osnayo Tunque, Víctor Carhuapoma de la Cruz, Ana de la Cruz Carhuapoma, Viviano Hilario Mancha, Dolores Morán Paucar, Justiniano Guillen Canto, Victoria Riveros, Marino Huamaní Vergara and Alejandro Huamaní Robles;

4. The right to a fair trial and judicial protection recognized in Articles 8 and 25 of the American Convention, in conjunction with Article 1(1) thereof, and with Article 1 of the Inter-American Convention on Forced Disappearance of Persons, and Articles 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of the disappeared persons and their next of kin;

5. Articles 8(1) and 25 of the American Convention, in relation to the provisions of Articles 1(1) and 2 thereof and Article III of the Inter-American Convention on Forced Disappearance of Persons, to the detriment of the victims and their next of kin; and

6. The right to humane treatment of the victims' next of kin recognized in Article 5 of the American Convention, in connection with Article 1(1) of that instrument.

ii. Recommendations. Consequently, the Commission made the following recommendations to the State:

1. Provide adequate reparation for the human rights violations found in the [...] [Admissibility and Merits] report, in material and well as moral aspects, that take into account the special condition of the seven child victims in the case, including fair compensation, elucidation and dissemination of the historical truth of the events, the remembrance of the disappeared victims, and implementation of an adequate program of psychosocial care for the next of kin of the disappeared victims.

2. Establish a mechanism that, to the extent possible, enables the complete identification of the disappeared victims and the return of their mortal remains to their families.

3. Carry out and conclude, as appropriate, the domestic proceedings connected with the human rights violations found in the [...Admissibility and Merits] Report and pursue the investigations in an impartial and effective manner, and within a reasonable time in order to completely clarify the events, identify the intellectual and material authors, and impose the appropriate penalties.

4. Strengthen the capacity of the Judiciary to adequately and efficiently investigate the facts and punish those responsible, including through the provision of the necessary material and technical resources to ensure the correct conduct of the proceedings.

5. Adopt such measures as may be necessary to prevent such events from occurring in the future, in keeping with the duty to protect and ensure the human rights recognized in the American Convention. In particular, implement permanent education programs on human rights and international humanitarian law in the training schools of the armed forces.

6. Adopt administrative measures against those public officials found to have been involved in the commission of the violations found in the [Admissibility and Merits], report, including any judges or magistrates who failed to properly discharge their duty to protect fundamental rights.

3. *Notification to the State.* On August 8, 2011, the Commission notified the Admissibility and Merits Report to the State, granting it two months to provide information on its compliance with the recommendations. After seven extensions granted by the Commission to the State and a work meeting held by the Commission with the parties during its 147th regular session, the State presented information on its compliance with the recommendations.

4. *Submission to the Court.* On July 8, 2013, "given the need to obtain justice for the [alleged] victims," the Inter-American Commission submitted the instant case to the jurisdiction of the Court, attaching a copy of Admissibility and Merits Report No. 77/11. It also appointed Commissioner José de Jesús Orozco Henríquez and Executive Secretary Emilio Álvarez Icaza L. as its delegates before the Court. In addition, it appointed Assistant Executive Secretary Elizabeth Abi-Mershed, as well as Silvia Serrano Guzmán and Nerea Aparicio, as legal advisers.

5. *Requests of the Inter-American Commission.* Based on the foregoing, the Commission asked the Court to declare the international responsibility of the State for the same violations indicated in its Report on Admissibility and Merits (*supra* para. 2. b). Likewise, the Commission asked the Court to order the State to implement certain measures of reparation.

II
PROCEEDINGS BEFORE THE COURT

6. *Notification to the State and the representatives.* The Commission's submission of the case and its annexes was notified to the State and the representatives on October 1 and September 30, 2013, respectively.

7. *Brief with pleadings, motions and evidence.* On December 10, 2013, the representatives of the alleged victims, the *Paz y Esperanza* organization and the Center for Justice and International Law (CEJIL), submitted to the Court their brief with pleadings, motions and evidence (hereinafter "pleadings and motions brief"). The representatives substantially agreed with the Commission's arguments and asked the Court to declare the responsibility of the State for the violation of the same articles alleged by the Commission. However, they also alleged violations of Articles 11, 13 and 21 of the American Convention, to the detriment of the alleged disappeared victims and their next of kin, for the alleged violation of the rights to private and family life, to the truth and to private property. In addition, they presented as an alleged victim a person who did not appear in the Admissibility and Merits Report. Finally, the representatives requested that the State be ordered to adopt various measures of reparation, as well as the reimbursement of certain costs and expenses.

8. *Answering brief.* On April 16, 2014, the State submitted its brief with preliminary objections, its answer to the submission of the case and observations to the pleadings and motions brief (hereinafter "answering brief"). As to the merits of the case, it pointed out that the facts considered as proven in the domestic judicial rulings and set forth in the Report on Admissibility and Merits, are configured as extrajudicial executions to the detriment of 15 persons, and that during the processing of the case before the Commission it stated that said facts constituted "violations of the right to life, personal integrity and personal liberty, enshrined in Articles 4, 5 and 7 of the American Convention." Therefore, it maintained that the instant case is not a case of forced disappearance and that the State is not internationally responsible for any of the violations alleged in this regard. In relation to the agents appointed for the instant case, on October 29, 2013, Peru appointed Mr. Luis Alberto Huerta Guerrero, Supranational Public Prosecutor, as its Principal Agent; subsequently, via a communication dated January 12, 2015, the State appointed Doris Margarita Yalle Jorges and Sofía Janett Donaires Vega, attorneys at the Office of the Specialized Supranational Public Prosecutor, as alternate agents.

9. *Observations on the preliminary objections.* On June 19 and 20, 2014, the Commission and the representatives of the alleged victims presented, respectively, their observations on the preliminary objections raised by the State in its answering brief.

10. *Public hearing.* In an order of December 4, 2014,[1] the President of the Court called the Commission, the representatives and the State to a public hearing to receive their observations and final oral arguments, respectively, on the preliminary objections and possible merits, reparations and costs, and also to receive the statements of an alleged victim, two witnesses offered by the State and an expert witness offered by the representatives. In said order, the President also requested the statements rendered by affidavit of seven alleged victims, two expert witnesses offered by the Commission and four expert witnesses offered by the representatives. The public hearing was held on January 26 and 27, 2015, during the 107th regular session of the Court, which took place at its seat.[2] During the hearing, the parties presented various documents.

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[1] *Cf. Case of the Peasant Community of Santa Bárbara v. Peru.* Order of the President of December 4, 2014. Available at: http://www.corteidh.or.cr/docs/asuntos/comunidadcampesina_04_12_14.pdf

[2] The following persons appeared at the hearing: a) for the Inter-American Commission: Silvia Serrano Guzmán, lawyer of the Commissions' Executive Secretariat; b) on behalf of the alleged victims: Francisco Quintana and Charles Abbott, of the Center for Justice and International Law (CEJIL), and Milton Gens Campos Castillo, of the *Paz y Esperanza*

11. *Amicus curiae.* On January 30, 2015, The John Marshall Law School International Human Rights Clinic submitted an *amicus curiae*[3] brief.

12. *Final written arguments and observations.* On March 2, 2015, the State, the representatives and the Commission submitted their final written arguments and observations, respectively. In addition, the State and the representatives submitted various documents together with their briefs. On April 6, 2015, the State submitted its observations on the documents presented with the final written arguments of the representatives. The representatives did not submit observations. On April 13, 2015, and after an extension was granted, the Commission submitted its observations on the annexes to the final arguments.

13. *Helpful evidence.* On February 5, 2015, following the instructions of the President of the Court and pursuant to Article 58(b) of the Court's Rules of Procedure, the State was asked to submit documentation as helpful evidence. In a communication dated March 2, 2015, the State submitted the documentation requested. On April 13, 2015, and after an extension was granted, the Commission submitted its observations on the helpful evidence. The representatives did not submit observations.

14. *Deliberation of the instant case.* The Court began deliberation of this judgment on August 31, 2015.

III
JURISDICTION

15. The Court has jurisdiction to hear this case, pursuant to Article 62(3) of the American Convention, given that Peru ratified the American Convention on July 28, 1978, and accepted the contentious jurisdiction of the Court on January 21, 1981.

IV
"RECOGNITION OF THE VIOLATION OF RIGHTS BY THE PERUVIAN STATE" AND LEGAL CLASSIFICATION OF THE FACTS

A. Arguments of the parties and the Commission

16. The ***State*** indicated that before the Inter-American Commission it affirmed that "there was a violation of rights; specifically, of the right to life, the right to personal integrity and the right to personal liberty established in Articles 4, 5 and 7 of the American Convention," to the detriment of fifteen people, including seven children. It also held that, "insofar as there were minors among the persons who were executed and [...] that they were not provided with the necessary special protection [,] [...] the provisions of Article 19 of the Convention [...] on the rights of the child are consequently applicable." In this regard, it referred in detail to the facts considered proven in the judgment of the National Criminal Chamber of February 9, 2012, and in the final judgment (*ejecutoría suprema*) of the Supreme Court of Justice of May 29, 2013, which the judiciary characterized as aggravated homicide with ferocity and premeditation and as crimes against humanity for the purpose of substantiating their imprescriptible nature, and not as forced disappearance. Accordingly, the State asked the Court to consider the instant case under the legal classification of extrajudicial execution and not as forced disappearance. In addition, it argued that the representatives themselves had endorsed this classification in the aforementioned criminal proceedings. It also pointed out that the Final Report of the Truth and

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Association, and c) for the State: Luis Alberto Huerta Guerrero, Specialized Supranational Public Prosecutor and Principal Agent; Sofía Janett Donaires Vega and Doris Margarita Yalle Jorges, lawyers of the Office of the Specialized Supranational Public Prosecutor as Alternate Agents.

[3] This brief was submitted by Steven D. Schwinn, Co-director of said Clinic.

Reconciliation Commission (CVR) referred to this case as "Extrajudicial Executions in Santa Barbara," a fact that was taken into account in the decision of the National Criminal Chamber and should have been considered by the Commission and the representatives. Furthermore, it argued that the alleged theft of property and burning of houses would be outside the factual framework of the case.

17. Without prejudice to the foregoing, Peru indicated that "the allusion [in the acknowledgement of responsibility made before the Commission] to other international instruments that are not part of the inter-American system was only referential […], so that these instruments cannot be applied directly in the present case, noting […] that the Court […] does not have jurisdiction to declare the violation of provisions contained in those treaties"[4].

18. In addition, the State pointed out that the Commission's Admissibility and Merits Report did not allege the violation of Article 11 of the Convention, as argued by the representatives, so that this "would mean extending the group of rights that the [Commission] understands were affected by the Peruvian State."[5]

19. In view of the foregoing, Peru asked the Court to "consider the State's acknowledgement of responsibility in the terms mentioned above, and in relation to the violation of the right to life, the right to personal integrity, the right to personal liberty and the rights of the child, established in Articles 4, 5, 7 and 19 of the American Convention." According to the State, the foregoing "should be strictly differentiated from the enforceability of the attribution of international responsibility to the Peruvian State for the events that occurred and for which the aforementioned violations have been recognized [,] since [for the State] the competent authorities of the domestic administration of justice did not fail in their duty to investigate and prosecute the accused (beyond the shortcomings alleged by the [Commission] and the representatives of the alleged victims) related to the obligation to guarantee the aforementioned rights, and is aware of the duty to provide reparation arising from the violations." At the public hearing, Peru pointed out that "the acknowledgement, precisely linked to the points raised by the State before the Inter-American Commission, is in line with Articles 4, 5 and 7 of the Convention."

20. In its final written arguments, the State indicated that, despite its acknowledgement of the violation of rights made before the Commission and subsequently confirmed by the domestic courts, it is not appropriate for the Court to determine and declare the international responsibility of the State for the violation of the rights contained in Articles 4, 5, 7 and 19 of the Convention, based on the unrestricted respect for the principle of subsidiarity or complementarity in the inter-American system. According to Peru, at the time of the State's acknowledgement of responsibility before the Commission, a final judicial ruling on the facts had not been issued. However, all this had already been done through the judgment of the National Criminal Chamber of February 9, 2012 and the Final Judgment (*ejecutoria suprema*) of May 29, 2013. Based on this, it asked the Court not to rule on the violations of the aforementioned rights. It also stated that the judgments issued by the Peruvian Judiciary constitute a measure of reparation for the victims in the case.

21. In its Report on Admissibility and Merits, the ***Commission*** noted that in the processing of the case before it, the State initially denied the facts and, subsequently, in 2005, admitted that "[t]he acts perpetrated in the community of Santa Bárbara constitute a violation of the right

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[4] Peru noted that the considerations of rights in the Commission's Report on Admissibility and Merits, alludes to Article 13 of the Additional Protocol II to the Geneva Conventions on the principle of civil immunity, and that "it is not acceptable that the [Commission] seeks to apply this instrument immediately."

[5] It also indicated that the precedent cited by the representatives refers to a case of forced disappearance of minors, a situation that "is not applicable in this specific case." Regarding the "aggravated responsibility" alleged by the representatives, the State rejected such claim.

to liberty, life and physical integrity" recognized, *inter alia*, in the American Convention on Human Rights and the Inter-American Convention to Prevent and Punish Torture, international instruments that were in force at the time when the events occurred. In this regard, it understood that the State acknowledged its "responsibility for the violation of Articles 4, 5 and 7 of the American Convention, together with the other instruments invoked," appreciated the State's acceptance of its international responsibility in relation to these aspects of the case and granted full effects to this acknowledgement. Nevertheless, the Commission noted that Peru's acceptance of responsibility was expressed in general terms, in relation to 14 of the fifteen victims, without subsequently referring to said acceptance of responsibility. Nor did the State specify "to which specific facts [the acknowledgement] applied" and did not accept responsibility regarding the claims presented in relation to Articles 8 and 25 of the American Convention. Likewise, and in a different sense, it pointed out that in the context of the proceedings before it, in "September 1991, that is, two months after the events occurred, the State indicated that had been able to determine that 14 members of the Santa Bárbara peasant community had been detained on July 4, 1991, and that up to that moment they were missing, since it had not been proven that the remains found in the Rodeo Pampa [*sic*] sector belong to the missing persons". Subsequently, the State did not contradict the classification of the facts of this case as forced disappearance. At the public hearing, the Commission "consider[ed] that there is […] a State acknowledgement of the facts of the case," since Peru "assumes as the factual framework of the case the decisions of the National Criminal Chamber and, subsequently, of the Supreme Court of Justice," and that such acknowledgement should be effective under the Court's Rules of Procedure. It also pointed out that "it is for the […] Court to determine the legal classification of the facts under the American Convention without the articles invoked by the State limiting that classification."

22. In their pleadings and motions brief, the ***representatives*** requested that the Court, when assessing the State's international responsibility, take into account the latter's acknowledgement of responsibility before the Commission, and that even if the Court should consider that this acknowledgement puts an end to the dispute regarding this part of the proceeding, it should examine in detail the facts to which this case refers, as well as the rights that were violated as a result of their occurrence, since such analysis "constitutes a form of reparation for the victims and their next of kin and, in turn, contributes to the preservation of the historical memory, to prevent a repetition of similar facts and to satisfy the purposes of the inter-American jurisdiction on human rights." At the hearing, the representatives recalled that "in response to an acknowledgement of responsibility, such as that made by the State, it is still incumbent upon the Court to make a legal assessment" of the facts of the case. In their final written arguments, they pointed out that, in response to Judge Ferrer Mac-Gregor's question during the public hearing, the State recognized that Articles 4, 5 and 7 of the Convention had been violated. They also noted that the State did not dispute the central facts of the case and that it did not invoke the acknowledgement in order to limit the scope of the examination of the rights that were violated.

B. Considerations of the Court

23. In accordance with Articles 62 and 64 of the Rules of Procedure,[6] and in exercise of its powers of international judicial protection of human rights, a matter of international public order that transcends the will of the parties, it is incumbent on this Court to ensure that acts of acquiescence are acceptable for the purposes sought by the inter-American system. This task is

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[6] Articles 62 and 64 of the Court's Rules of Procedure establish: "Article 62. Acquiescence: if the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule on its juridical effects." "Article 64. Continuation of a Case: Bearing in mind its responsibility to protect human rights the Court may decide to continue the consideration of a case, notwithstanding the existence of the conditions indicated in the preceding Articles."

not limited merely to confirming, recording or taking note of the acknowledgements made by the State or to verifying the formal conditions of such acts; rather the Court must weigh them in light of the nature and severity of the alleged violations, the requirements and interests of justice, the particular circumstances of the specific case, and the attitude and position of the parties,[7] so that it is able to determine, insofar as possible and in exercise of its jurisdiction, the truth of what happened.[8] The Court advises that the acknowledgement of specific facts and violations may have effects and consequences in the analysis made by this Court on the other facts and violations alleged in the same case, insofar as they are all part of the same set of circumstances.

24. Regarding the facts of the instant case, the State acknowledged them in the terms established in the judgment of the National Criminal Chamber of February 9, 2012, and the Final Judgment (*ejecutoría suprema*) of May 29, 2013. In other words, it did not specifically admit all the facts described in the Commission's Admissibility and Merits Report or in the pleadings and motions brief of the representatives. Nevertheless, as it has done in other cases,[9] this Court understands that Peru admitted the following facts:

> i. the Plan known as Operation "Apolonia" was designed as part of the State's policy to combat subversion in the Province and Department of Huancavelica, and was devised by the Political and Military Command of Huancavelica, with the specific purpose of raiding the village of Rodeo Pampa, in the community of Santa Bárbara;
> ii. the mission of Operation "Apolonia" was to capture and/or destroy "terrorist criminals";
> iii. in the execution of Operation Apolonia, two military patrols were ordered to participate: one from the counterinsurgency base of Lircay and, the other from the counterinsurgency base of Huancavelica;
> iv. the only people found in Rodeo Pampa were unarmed villagers who belonged to two family groups, and most of them were women and children;
> v. the route taken by the "Escorpio" patrol with the 14 detainees is the one that leads to the "Misteriosa" or "Vallarón" mine, which is located on the road from Rodeo Pampa to the military base of Lircay;
> vi. "the commander of the 'Escorpio' patrol, Bendezú Vargas, upon receiving information of the discovery of dynamite, gave the order to take all the detainees without exception up to the mine shaft, including a 65 year-old man, women, and children";
> vii. "the treatment and elimination of the victims and the circumstances in which this took place, whereby they were tied up and previously forced into the mine shaft, constitutes a serious violation of their human condition, and therefore of their dignity";
> viii. "the detention and execution of the victims was indiscriminate, since no consideration was given to the fact that they were members of the civilian population, who were unarmed and defenseless in the face of the superiority of the armed military patrol. And […] seven of the victims were very young children, who enjoy special legal protection";
> ix. the names and ages of the 14 victims mentioned;
> x. "the former soldier Elihoref Huamaní Vergara was also killed with the other victims";
> xi. "the purpose of taking the detainees up to the mine, tied up, clearly evidenced that the intention was to kill them";
> xii. the detainees "were killed by shots from FAL rifles, a weapon used by the Army. […] Almost immediately, one or two dynamite charges were detonated in the mine where the victims had been killed in order to eliminate the evidence. Most of the victims' bodies were destroyed, and only human remains were found during the judicial inspection;" and

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7 *Cf. Case of Kimel v. Argentina. Merits, reparations and costs.* Judgment of May 2, 2008. Series C No. 177, para. 24, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of November 14, 2014. Series C No. 287, para. 27.

8 *Cf. Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of May 26, 2010. Series C No. 213, para. 17, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 27.

9 *Cf. Case of Kawas Fernández v. Honduras. Merits, reparations and costs.* Judgment of April 3, 2009. Series C No. 196, para. 25, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 27.

xiii. the detainees "were dynamited for the purpose of concealing all traces of the crime committed."

25. Therefore, the dispute with respect to these facts has ceased. However, the dispute continues with respect to: i) the alleged theft of property and burning of the victims' homes; ii) the complaints filed after the events and the response of the State authorities thereto; iii) the manner in which the investigations of the facts were conducted, the recovery and identification of the remains and the forensic procedures; iv) the alleged existence of a series of cover-up mechanisms that were clearly deliberate and included, at least, the denial of the detentions, the use of dynamite on several occasions and during the first ten days after the events in the abandoned "Misteriosa" or "Vallarón" mine as a means to destroy the evidence of what happened, as well as the harassment and detention of villagers who reported the facts, and threats to justice operators, and v) the alleged lack of due diligence and irregularities in the capture of the fugitive defendants.

26. In short, the State's acknowledgement constitutes a partial acceptance of the facts. Nevertheless, considering the seriousness of these events, the Court will proceed to establish those that generated the State's responsibility, as well as the context in which they took place, since this contributes to the reparation of the victims, to prevent the repetition of similar facts and, in sum, to satisfy the purposes of the inter-American human rights system.[10]

27. On the other hand, with regard to the legal arguments raised by the parties, the Court recalls that it has applied the principle of *estoppel* to grant full scope to the acknowledgements of responsibility made by States, which they then sought to disregard in subsequent stages of the inter-American proceedings, either before the Commission or the Court, including in cases against Peru.[11] In this regard, the Court recalls that according to international practice, when a party to a dispute adopts a certain attitude that is to its own detriment or to the benefit of the other party, by virtue of the principle of *estoppel*, it cannot then assume another conduct that is contradictory to the first.[12]

28. In the instant case, the Court notes that, in a brief of January 17, 2005, submitted to the Inter-American Commission, Peru indicated that "[t]he acts perpetrated in the community of Santa Bárbara constitute a violation of the right to liberty, life and physical integrity enshrined in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the American Convention on Human Rights, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Inter-American Convention to Prevent and Punish Torture. These international instruments were in force at the time of the commission of the facts."[13] In these terms, the Inter-American Commission issued its Report on Admissibility and Merits (*supra* para. 2. b).

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[10] *Cf. Case of Tiu Tojín v. Guatemala. Merits, reparations and costs*. Judgment of November 26, 2008. Series C No. 190, para. 26, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 33.

[11] *Cf. Case of Neira Alegría et al. v. Peru. Preliminary objections*. Judgment of December 11, 1991. Series C No. 13, para. 29, and Case of Cruz *Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of April 17, 2015. Series C No. 292, para. 53.

[12] *Cf. Case of Neira Alegría et al. v. Peru. Preliminary objections, supra,* para. 29, and Case of Cruz *Sánchez et al. v. Peru, supra,* para. 53.

[13] The State indicated, in the section on "Background", that "this case is related to the forced disappearance-extrajudicial execution of 15 persons […]"; however, neither the section on "Considerations – procedural Synthesis" nor the section of "Conclusions", where it makes the acknowledgment of responsibility, characterizes the facts of the case as forced disappearance. *Cf.* Brief of the State of January 17, 2005 (evidence file, folio 970). On the other hand, in a brief of September 23, 1991, the State merely referred to the "*alleged* detention-disappearance of the citizens" (emphasis added) and transcribed a Preliminary Report of the Public Prosecutor's Office, prepared by the Assistant Provincial Prosecutor of Huancavelica, which indicated that "it has been determined that the fourteen members of the Santa Bárbara Peasant Community, the subject of investigation by this Special Prosecutor's Office, were detained on July 4 of this year and to date are missing, among them seven minors. It has not been conclusively proven that the remains found in the mine in the Rodeo Pampa sector belong to the disappeared persons." Brief of September 23, 1991 (evidence file, folios 551 to 553). For the Court, the statements contained in said briefs of January 2005 and September

29. Subsequently, in its response, the State expressed an ambiguous position by requesting, on the one hand, that the Court "consider the State's acknowledgement" of the violation of the rights to life, personal integrity, personal liberty and the rights of the child and, on the other hand, by stating that this "should be strictly differentiated from the enforceability of the attribution of international responsibility of the Peruvian State." However, during the public hearing, it reiterated its acknowledgement of violations of the rights recognized in Articles 4, 5 and 7 of the Convention (*supra* para. 19), and based on these two submissions, both the Commission and the representatives formulated arguments.

30. However, in its final written arguments, the State declared that it is not appropriate for the Court to determine and declare the international responsibility of the State for the violation of the rights contained in Articles 4, 5, 7 and 19 of the Convention, based on the principle of subsidiarity or complementarity of the inter-American system (*supra* para. 20).

31. In this regard, the Court notes that ambiguous or ambivalent positions in the litigation of a case by the parties do not contribute to the realization of the purposes of the inter-American system for the protection of human rights, in particular, the purpose of finding just solutions to the particular problems of a case.[14] On the other hand, the Court considers that, in the proceedings before the Commission, Peru acknowledged some of the violations alleged by the Commission and the representatives and consequently generated legal effects on which they acted. Therefore, the contradictory conduct that the State intends to assume in the processing of the case before this Court is contrary to the principle of *estoppel*, which is why no legal effects will be given to the State's alleged disregard of the violation of the aforementioned rights.

32. Accordingly, the Court considers that the State recognized the violation of the rights to life, personal integrity and personal liberty, established in Articles 4, 5 and 7 of the Convention, to the detriment of Francisco Hilario Torres, Dionicia Quispe Mallqui, Antonia Hilario Quispe, Magdalena Hilario, Mercedes Carhuapoma de la Cruz, Ramón Hilario Morán, Dionicia Guillén Riveros and Elihoref Huamaní Vergara. It also recognized the violation of said articles, as well as of the right to special protection of the child enshrined in Article 19 of the Convention, to the detriment of Yessenia, Miriam and Edith Osnayo Hilario, Alex Jorge Hilario, Wilmer Hilario Carhuapoma, Raúl and Héctor Hilario Guillén. The Court decides to accept the partial acknowledgement of responsibility made by the State.

33. Without prejudice to the foregoing, the Court notes that the dispute remains as to the legal classification of the facts of this case as extrajudicial execution or forced disappearance and the scope of the violations of the Convention indicated in the preceding paragraph. The dispute also continues with respect to the alleged violations of Articles 2, 3, 11, 13, 17, 21 and 8 and 25 of the American Convention, as well as with respect to the violation of Article 5 to the detriment of the victims' next of kin and the claims of the parties regarding reparations. There is also a dispute regarding the alleged violations of Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture and Articles I and III of the Inter-American Convention on Forced Disappearance of Persons. These disputes will be analyzed in the corresponding chapters of this judgment.

1991 do not constitute a clear recognition by Peru that the facts of the case should be legally classified as forced disappearance.

[14] *Cf. Case of Pacheco Teruel et al. v. Honduras.* Merits, reparations and costs. Judgment of April 27, 2012. Series C No. 241, para. 19, and *Case of García and Family Members v. Guatemala. Merits, reparations and costs*. Judgment of November 29, 2012. Series C No. 258, para. 23.

V
PRELIMINARY OBJECTIONS

34. The State filed four "preliminary objections", namely: i) "failure to exhaust domestic remedies"; ii) "objection *ratione materiae* in relation to the Inter-American Convention on Forced Disappearance and on the classification of the facts in the Report on [Admissibility and] Merits of the [Commission]"; iii) "inadmissibility regarding the formulation of new arguments presented by the representatives and not raised by the Commission in its [Admissibility and] Merits Report: inclusion of Marcelina Guillén Riveros" as alleged victim; and iv) "inadmissibility regarding the formulation of new arguments presented by the representatives and not raised by the Commission in its [Admissibility and] Merits Report: alleged violation of the right to property and the prohibition of arbitrary interference in family life."

35. Given the nature of the arguments raised by the State, the Court will consider them in the pertinent parts of this judgment. Consequently, it will only consider as preliminary objections those that have - or could have - the status of preliminary objections, that is, objections that are preliminary in nature and tend to prevent the analysis of the merits of a contested matter, by objecting to the admissibility of a case or the competence of the Court to hear a particular case or any of its aspects, whether by reason of the person, subject matter, time or place, provided that such arguments are preliminary in nature.[15] If these matters cannot be considered without first analyzing the merits of a case, they cannot be analyzed by means of a preliminary objection.[16]

36. Therefore, this chapter will only consider the arguments indicated above under paragraphs i) and ii). The arguments indicated under paragraphs iii) and iv) will be analyzed in the next chapter on preliminary considerations.

A. Failure to exhaust domestic remedies

A.1. Arguments of the parties and the Commission

37. The ***State*** argued that, based on Article 34 of the Commission's Rules of Procedure adopted on April 8, 1980, and Article 46(2) of the Convention, the petition "should have been declared inadmissible by the Inter-American Commission [,] […] because it was filed 21 days after the facts occurred, when the petitioners had not exhausted the mechanisms available to them in the national jurisdiction […]." It also indicated that "from the outset, the petitioners did not respect the subsidiary nature of the supranational protection system," since they turned to the Commission without having any ruling or decision that would allow them to know whether any of the exceptions established for the non-exhaustion of domestic remedies had materialized. In this regard, it argued that on the date the complaint was filed before the Commission, the investigations were still underway and the Commission was aware of this. Consequently, it asked the Court to declare its preliminary objection well founded.

38. The ***Commission*** pointed out that the objection of failure to exhaust domestic remedies was presented in a timely manner by the State. However, it noted that Peru focused its objection before the Court on the situation prevailing at the time the petition was received. In this regard, the Commission explained that the reason for its decades-long consolidated criterion of analyzing

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[15] *Cf. Case of Las Palmeras v. Colombia. Preliminary objections.* Judgment of February 4, 2000. Series C No. 67, para. 34, and *Case of Human Rights Defender at al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 283, para. 15.

[16] *Cf. Case of Castañeda Gutman v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of August 6, 2008. Series C No. 184, para. 39, and *Case of Human Rights Defender at al. v. Guatemala, supra,* para. 15.

the requirement to exhaust domestic remedies in light of the situation at the time the admissibility report was issued, has to do with the fact that in a significant number of cases there are modifications and/or updates on the situation of compliance with the admissibility requirements. It noted that according to the Convention and the applicable rules, the admissibility stage is precisely for the purpose of allowing States to submit additional information on the adequacy and effectiveness of the domestic remedies, when petitions are based on arguments regarding the applicability of exceptions to the rule of prior exhaustion of domestic remedies. The assessment of all this information culminates at the moment of deciding on the admissibility of the petition. It emphasized that all the information received after the initial petition is strictly submitted to adversarial proceedings. It also argued that the State's position is at odds with the text of Article 46(2) (c) of the Convention, which necessarily presupposes the existence of parallel proceedings at the domestic and inter-American levels. Based on the foregoing, and taking into account that at the time of analyzing the requirement to exhaust domestic remedies in the instant case, 20 years had already elapsed since the facts without any judicial ruling having been issued, the Commission considered that the objection of unwarranted delay established in Article 46(2)(c) of the American Convention was applicable.

39. In addition, in a subsidiary manner, the Commission referred at the public hearing "to the situation in Peru at the time [the] petition was lodged [...] and recalled that in cases of forced disappearance, the appropriate remedy that States must offer is the immediate and diligent search for the person with the dual objective of clarifying the facts [and...] protecting and preventing a violation of the personal integrity and life of a person. When the petition was submitted to the Commission, at least five complaints had already been filed by individuals and community members who had reported the facts to the domestic authorities; however, none of these complaints merited either the immediate opening of an investigation, or the carrying out of immediate searches […]. A writ of habeas corpus had also been filed and this remedy was also unsuccessful and did not elicit an immediate and effective response. This lack of effectiveness of the remedies pursued, even at the time the petition was filed, [was] a true reflection of the generalized climate of ineffectiveness of the Public Prosecutor's Office and the Judiciary, which the Commission itself was able to verify during an on-site visit made to the State of Peru, […] three months after the events were perpetrated […] and which is clearly reflected in the 1993 Country Report […]." In view of the foregoing, the Commission requested that the preliminary objection filed be declared inadmissible.

40. The ***representatives*** stated that the Court should dismiss this preliminary objection for the following five reasons. First, they argued that the preliminary objection should not be heard because the State did not allege, nor was there a serious error in the proceedings before the Commission, that would have violated its right of defense. Secondly, they indicated that the objection filed by the State did not meet the formal and material requirements to be considered, since at the time of filing that objection before the Commission and the Court, it did not mention which remedies should have been exhausted or the reasons why they were adequate and effective. Third, the representatives pointed out that it has been the constant practice of the Commission to analyze the requirements set forth in Articles 46 and 47 of the Convention in light of the situation in force at the time when it rules on admissibility or inadmissibility.

41. Fourth, the representatives argued that the exception contained in Article 46(2)(b) of the Convention had been met, given that in the instant case Peru did not take adequate steps to remedy the violations denounced at the time of the initial complaint, nor subsequently, and that to date the victims' right to truth, justice and reparation has not been satisfied. Furthermore, they affirmed that the relatives of the alleged victims were already certain that the remedies filed would be ineffective before the Commission decided on admissibility.

42. Fifth, the representatives argued that the exception to the requirement of prior exhaustion of domestic remedies contained in Article 46(2) (c) of the Convention was met. They

pointed out that it is not disputed that in 1991 at least seven complaints were filed regarding the facts, in addition to two habeas corpus petitions which were dismissed. They also noted that two criminal proceedings had been initiated, one in the military jurisdiction in 1991 and the other in the ordinary jurisdiction in 1992, and that the latter was shelved due to the application of the Amnesty Law, and it was only in 2005 that the case was reopened. They also pointed out that at the time of the issuance of the Report on Admissibility and Merits there were two criminal proceedings in progress, and that this case was brought before the Court "due to the lack of progress in the implementation of the [Commission's] recommendations by the State." Thus, this procedural delay, closely linked to the merits of the case, had "drastically exceeded any reasonable time [...]." In their final written arguments, the representatives further argued that his preliminary objection is incompatible with the acknowledgement of responsibility made by the State, since such acknowledgement implies in principle the acceptance of the Court's jurisdiction.

A.2. Considerations of the Court

43. Article 46(1)(a) of the American Convention establishes that in order to determine the admissibility of a petition or communication submitted to the Inter-American Commission, in accordance with Articles 44 or 45 of the Convention, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.[17] In this regard, the Court has held that an objection to the exercise of its jurisdiction based on the supposed failure to exhaust domestic remedies must be presented at the appropriate procedural opportunity, that is, during the admissibility proceeding before the Commission.[18]

44. In this case, during the admissibility proceeding before the Commission, by means of communications received by the Commission on September 21, 1992 and January 25, March 21 and May 17, 2011, the State alleged that the requirement of exhaustion of domestic remedies had not been met.[19] Subsequently, the Commission's Report on Admissibility and Merits was issued on July 21, 2011. Therefore, the present preliminary objection was filed at the appropriate procedural moment.

45. Notwithstanding the foregoing, first of all, the Court recalls that preliminary objections cannot limit, contradict or render ineffective the content of a State's acknowledgement of responsibility.[20] In this regard, the Court notes that the preliminary objection of failure to exhaust domestic remedies filed by Peru is not compatible with the State's partial acknowledgement of responsibility in this case (*supra* paras. 23 to 33), since, if declared admissible, it would exclude all the facts and violations admitted by Peru from the jurisdiction of this Court.

46. In addition, the Court recalls that, in order for a preliminary objection of failure to exhaust domestic remedies to proceed, the State presenting this objection must specify the domestic remedies that have not yet been exhausted, and demonstrate that these remedies were

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17 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections.* Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Argüelles et al. v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2014. Series C No. 288, para. 42.

18 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra,* para. 85, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of June 22, 2015. Series C No. 293, para. 28.

19 *Cf.* Brief of the State of September 21, 1992, received by the Commission on September 23, 1992 (evidence file, folio 400); Brief of the State of December 7, 2010 received by the Commission on January 25, 2011 (evidence file, folios 673 to 681); Brief of the State of March 21, 2011 (evidence file, folios 737 to 746), and Brief of the State of May 17, 2011 (evidence file, folios 690 to 694).

20 *Cf. Case of Manuel Cepeda Vargas v. Colombia, supra,* para. 26*, and Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia*, *supra,* para. 37.

available, adequate, suitable and effective.[21] Thus, it is not the task of the Court, nor of the Commission, to identify *ex officio* which domestic remedies have not yet been exhausted. The Court emphasizes that it is not up to the international bodies to remedy the lack of precision in the State's arguments.[22] In this regard, the Court finds that Peru did not explain why the remedies or processes mentioned in its briefs of September 21, 1992[23] and January 25, March 21 and May 17, 2011[24] would, in its view, be adequate, suitable and effective. Therefore, the Court considers that the State did not comply with the material requirements for the presentation of this preliminary objection. In view of the foregoing, the Court dismisses the preliminary objection of failure to exhaust domestic remedies.

B. Objection *ratione materiae* with respect to the Inter-American Convention on Forced Disappearance of Persons

B.1. Arguments of the parties and the Commission

47. The ***State*** pointed out that the Inter-American Convention on Forced Disappearance of Persons is not applicable to the instant case, since the alleged facts have been the subject of a criminal proceeding in the domestic jurisdiction for the crime of aggravated homicide, with the aggravating circumstances of ferocity and great cruelty, and not for the crime of forced disappearance. Consequently, the Court could not exercise its contentious jurisdiction to declare a violation of the provisions of the aforementioned treaty. In addition, during the public hearing, the State asked the Court to consider the application of the principle of complementarity to the present case, given that "there is a definitive ruling by the Peruvian Judiciary on the facts of the case in which […] high financial reparations are established taking into account the domestic standards." Thus, it argued that the application of this principle in the case of *Zulema Tarazona et al. v. Peru* implied that the Court did not rule on the merits of the dispute, "which is closer to a preliminary ruling on the competence of the Court to hear a case." Likewise, it recalled that in the *Case of J. v. Peru,* the Court stated that the legal classification of the facts was a matter for the State. In addition, it noted that "there was no questioning by the lawyers of the alleged victims regarding the way in which the facts were classified" at the domestic level. Finally, it emphasized that the Public Prosecutor's Office, the Judiciary and the Truth and Reconciliation Commission all characterized the facts of the case as extrajudicial executions. For all the foregoing reasons, the State asked the Court to declare well-founded the preliminary objection *ratione materiae* with respect to said treaty.

48. The ***Commission*** and the ***representatives*** argued that the State sought to challenge the Court's jurisdiction on the basis of its disagreement with the classification of the facts as forced disappearance, which pertains to the merits of the case. Accordingly, they asked the Court to declare that the arguments raised by the State do not constitute a preliminary objection and, therefore, are inadmissible.

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[21] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, paras. 88 and 91, and Case of Cruz *Sánchez et al. v. Peru, supra,* para. 49.

[22] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary objection, merits, reparations and costs*. Judgment of June 30, 2009. Series C No. 197, para. 23, and Case of Cruz *Sánchez et al. v. Peru, supra,* para. 49.

[23] In its communication of September 21, 1992, the State merely indicated, with respect to the alleged failure to exhaust domestic remedies that, as it had stated in a note of November 4, 1991, "the corresponding complaint before the Permanent Court Martial had been formalized" and, according to "the Ministry of Defense, the criminal proceeding initiated was in the second jurisdictional instance, which would issue the respective judgment in the near future." *Cf.* Brief of the State of September 21, 1992, received by the Commission on September 23, 1992 (evidence file, folio 400).

[24] In briefs dated January 25, March 21, and May 17, 2011, Peru indicated that, "although initially the members of the Army who were involved [in the acts in this case] benefited from the effects of Amnesty Law No. 26179" *(sic)* and were released, the State itself ordered the reopening of the criminal proceedings and, as of this date, two cases are currently being processed against those allegedly responsible. *Cf.* Brief of the State of December 7, 2010, received by the Commission on January 25, 2011 (evidence file, folio 675); Brief of the State of March 21, 2011 (evidence file, folio 737), and brief of the State of May 17, 2011 (evidence file, folio 692).

B.2. Considerations of the Court

49. Peru ratified the Inter-American Convention on Forced Disappearance of Persons (hereinafter "ICFDP") on February 8, 2002. The State's arguments in relation to this preliminary objection question the Court's material jurisdiction with respect of this Inter-American Convention, arguing that the Court cannot exercise its contentious jurisdiction to declare a violation of the provisions of said international instrument for acts that, according to the State, would have been classified by the Peruvian judiciary as extrajudicial executions. Article XIII of the Inter-American Convention on Forced Disappearance of Persons, in relation to Article 62 of the American Convention, grants the Court the power to hear matters related to compliance with the commitments assumed by the States Parties to said instrument.[25] This article of the ICFDP establishes that:

> For the purposes of this Convention, the processing of petitions or communications presented to the Inter-American Commission on Human Rights *alleging the forced disappearance of persons* shall be subject to the procedures established in the American Convention on Human Rights and to the Statute and Rules of Procedure 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. (*Emphasis added).*

50. Therefore, the allegation that what occurred in the instant case could constitute a forced disappearance is sufficient for the Court to exercise its jurisdiction to examine a possible violation of said Convention.[26] In this case, both the classification of the facts as forced disappearances or extrajudicial executions, as well as the effectiveness of the investigation conducted in this regard, are issues that are part of the dispute in the case. Therefore, since the applicability or non-applicability of the ICFDP to the facts of this case cannot be considered without establishing the facts and analyzing the merits of the case, neither can this issue be analyzed by means of a preliminary objection.[27] Such analysis will be carried out in the corresponding chapters of this judgment.

51. Within the sphere of its jurisdiction, it is incumbent upon the Inter-American Court to assess the actions or omissions of State agents in the cases before it, according to the evidence presented by the parties, and in conformity with the American Convention and other inter-American treaties that grant it jurisdiction, in order to determine whether the State has incurred international responsibility.[28] Furthermore, it should be recalled that it is not for the Court to analyze the assumptions of responsibility made during the investigation of the facts and, consequently, to determine individual responsibilities, the definition of which is the purview of the domestic criminal courts.[29]

52. Accordingly, the Court dismisses the preliminary objection filed by the State.

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25 *Cf. Case of Gómez Palomino v. Peru. Merits, reparations and costs.* Judgment of November 22, 2005. Series C No. 136, para. 110, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 43.

26 *Cf. Case of Gómez Palomino v. Peru, supra,* para. 110, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 44.

27 *Cf. Case of Castañeda Gutman v. Mexico, supra,* para. 39, and *Artavia Murillo et. al. (In Vitro Fertilization) v. Costa Rica. Preliminary objections, merits, reparations and costs.* Judgment of November 28, 2012 Series C No. 257, para. 40.

28 In this regard, see *Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of 10 July 2007. Series C No. 167, para. 87, and Case of Cruz *Sánchez et al. v. Peru, supra,* para. 329.

29 *Cf. Case of Cantoral Huamaní and García Santa Cruz v. Peru, supra,* para. 87, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 500.

VI
PRELIMINARY CONSIDERATIONS

A. Inclusion of Marcelina Guillén Riveros as an alleged victim by the representatives

A.1. Arguments of the parties and the Commission

53. The ***State*** argued that, based on Article 35(1) of the Court's Rules of Procedure, Marcelina Guillén Riveros was not included in the list of alleged victims identified by the Commission in its Report on Admissibility and Merits, or in its brief submitting the case before the Court. Consequently, in order to guarantee the State's right of defense, she could not be considered as an alleged victim before this Court. Furthermore, it pointed out that the representatives have not submitted the judicial or notarial resolution that certifies her as the "sole heir or beneficiary" in an intestate succession proceeding or, in her case, as the "universal heir" of the Guillén Riveros family. Therefore, it asked the Court to declare inadmissible the inclusion of Marcelina Guillén Riveros as an alleged victim in the instant case. In its final written arguments, Peru stated that this reasoning with respect to Article 35(1) is consistent with the Court's jurisprudence and with Article 50 of the Convention. It also argued that "the instant case does not involve one of assumptions set forth in Article 35(2) of the Rules of Procedure, without indicating why.

54. The ***representatives*** requested that the Court include Marcelina Guillén Riveros as an alleged victim in this case. They explained that, due to difficulties inherent to the case, she did not learn of the international proceedings brought by the other alleged victims until after the issuance of the Report on Admissibility and Merits. These difficulties consisted of the following: the case involved serious human rights violations to the detriment of 15 persons and their next of kin; the characteristics of the territory, a rural area of Peru in which there are serious logistical difficulties in maintaining contact between members of the same community, since the time required to travel from a farm or to communicate with a neighbor or family member who lives in a farmhouse without electricity, telephone or transportation, can be long, and the rupture between members of the community that would have occurred as a result of the facts. They also pointed out that the identification of Marcelina Guillén as an alleged victim in this case would not impair the State's right of defense, especially in view of the fact that Peru had accepted its international responsibility in relation to her sister, Dionicia Guillén Riveros, and was fully aware of the inclusion of her parents as victims identified in the application. In their final written arguments, the representatives alleged that Marcelina Guillén Riveros was among the persons detained and threatened with death by military personnel in 1991 while they were dynamiting, the mine, and that the Army only let them go because they promised that they would say nothing about what happened in the mine. According to the representatives, the intimidating effect of this event "presented serious complications for her to maintain contact with the other relatives of the victims and the community in general."

55. The ***Commission*** pointed out that although Article 35(1) of the Rules of Procedure refers to the identification of the victims in the Merits Report, this rule is not absolute, since Article 35(2) of the same instrument refers to special situations in which this is not possible. On this basis, it considered that, due to the nature of the case, the explanation provided by the representatives was reasonable. It also argued that the alleged impairment of the State's right of defense was not justified, since the State had several opportunities in the proceedings before the Court to defend itself. Therefore, it requested that the Court "dismiss this preliminary objection."

A.2. Considerations of the Court

56. The Court recalls that alleged victims must be identified in the Merits Report of the Commission, issued in accordance with Article 50 of the Convention.[30] Article 35(1) of the Court's Rules of Procedure establishes that the case shall be submitted to the Court through the presentation of said report, which must contain "the identification of the alleged victims." Thus, under this provision, it is for the Commission, and not this Court, to identify precisely and at the proper procedural opportunity, the alleged victims in a case before the Court.[31] Legal certainty requires, as a general rule, that all the alleged victims be duly identified in the Merits Report; thus, it is not possible to add new alleged victims after this stage, except in the exceptional circumstance contemplated in Article 35(2) of the Court's Rules of Procedure.[32]

57. On the other hand, the Court recalls that, in accordance with Article 35(2) of the Rules of Procedure, "[w]hen it has not been possible to identify one or more of the alleged victims in the facts of the case because it concerns massive or collective violations, the Court shall decide in due course whether to consider those individuals as victims." In its case law on this matter, the Court has assessed the application of Article 35(2) of the Rules of Procedure based on the particular characteristics of each case,[33] and has emphasized that its purpose is not "to obstruct the proceedings with formalisms but, on the contrary, to align the definition provided in the judgment with the rightful need for justice."[34] Thus, the Court has applied Article 35(2) in massive or collective cases in which there are difficulties in identifying or contacting all the alleged victims, for example, due to situations of armed conflict,[35] displacement,[36] or the burning of the bodies of the alleged victims,[37] or in cases where entire families have disappeared, and there is no one to speak for them.[38] It has also taken into account the difficulty of accessing the area where the events occurred,[39] the lack of records regarding the local inhabitants[40] and the passage of time,[41] as well as particular characteristics of the alleged victims, for example, when

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30 *Cf. Case of Barrios Family v. Venezuela. Merits, reparations and costs*. Judgment of 24 November 2011. Series C No. 237, footnote 214, and Case of Cruz *Sánchez et al. v. Peru, supra,* para. 62.

31 *Cf. Case of the Ituango Massacres v. Colombia. Preliminary objection, merits, reparations and costs*. Judgment of 1 July 2006. Series C No. 148, para. 98, and Case of Cruz *Sánchez et al. v. Peru, supra,* para. 62.

32 *Mutatis mutandi, Case Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of 23 November 2009. Series C No. 209, para. 110, and *Case of the Human Rights Defender et al. v. Guatemala, supra,* para. 47.

33 It should be noted that the Court has applied Article 35(2) of its Rules of Procedure in the following cases: *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012 Series C No. 250; *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs.* Judgment of 24 October 2012. Series C No. 251; *Case of the Massacres of El Mozote and Nearby Places v. El Salvador. Merits, reparations and costs*. Judgment of October 25, 2012. Series C No. 252, and *Case the Displaced Afrodescendant Communities of the Cacarica River Basin (Operation Génesis) v. Colombia. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2013. Series C No. 270. It has also rejected its application in the following cases: *Case of Barbani Duarte et al. v. Uruguay. Merits, reparations and costs.* Judgment of October 13, 2011. Series C No. 234; *Case of Human Rights Defender et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of August 28, 2014. Series C No. 283; *Case of García and Family Members v. Guatemala. Merits, reparations and costs*. Judgment of November 29, 2012. Series C No. 258; *Case of Suárez Peralta v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of May 21, 2013. Series C No. 261; *Case of J. v. Peru. Preliminary objection, merits, reparations and costs*. Judgment of November 27, 2013. Series C No. 275; *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs.* Judgment of October 14, 2014. Series C No. 285, and *Case of Argüelles et al. v. Argentina. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014. Series C No. 288.

34 *Cf. Case of Río Negro* Massacres v. *Guatemala, supra,* para. 49, and *Case of the Displaced Afrodescendant Communities of the Cacarica River Basin (Operation Génesis) v. Colombia, supra,* para. 41.

35 *Cf. Case of Río Negro Massacres v. Guatemala, supra,* para. 48, and *Case of the Displaced Afrodescendant Communities of the Cacarica River Basin (Operation Génesis) v. Colombia, supra,* para. 41.

36 *Cf. Case of Nadege Dorzema et al. v. Dominican Republic, supra,* para. 30, and *Case of Displaced Afrodescendant Communities of the Cacarica River Basin (Operation Génesis) v. Colombia, supra,* para. 41.

37 *Cf. Case of the Massacres of El Mozote and Nearby Places v. El Salvador, supra,* para. 30.

38 *Cf. Case of Río Negro Massacres v. Guatemala, supra,* para. 48.

39 *Cf. Case of the Displaced Afrodescendant Communities of the Cacarica River Basin (Operation Génesis) v. Colombia, supra,* para. 41.

40 *Cf. Case of the Massacres of El Mozote and Nearby Places v. El Salvador, supra,* para. 30, and *Case of the Río Negro Massacres v. Guatemala, supra,* para. 48.

41 *Cf. Case of Río Negro Massacres v. Guatemala, supra,* para. 51, and *Case the Displaced Afrodescendant Communities of the Cacarica River Basin (Operation Génesis) v. Colombia, supra,* para. 41.

they are members of family clans with similar names and surnames,[42] or when they are migrants.[43] It has also considered the conduct of the State, for example, when there are allegations that the lack of investigation contributed to the incomplete identification of the alleged victims.[44]

58. The instant case is collective and involves 28 alleged victims identified in the Report on Admissibility and Merits, as well as Marcelina Guillén Riveros. Furthermore, the Court notes that the facts of this case took place during an armed conflict (*infra* para. 85) and that, according to Marcelina Guillén Riveros, she lives in a rural area far from where her sister Dionicia Guillén Riveros lived, with major technological, logistical and lifestyle obstacles to communication. In addition, when the Report on Admissibility and Merits was issued in 2011, the family members of Marcelina Guillén Riveros identified in the case (Justiniano Guillén Ccanto and Victoria Riveros Valencia, her father and mother) had died, which would have made it even more difficult to identify her.[45] In this context, the Court considers it reasonable to assume that it would have been complicated to identify Marcelina Guillén Riveros as an alleged victim. Therefore, in application of Article 35(2) of the Rules of Procedure, the Court will consider her as an alleged victim in this case.

B. Regarding the alleged victim Marino Huamaní Vergara

59. At the public hearing and in its final written arguments, the ***State*** requested that the Court declare the withdrawal of Marino Huamaní Vergara as an alleged victim in the case, since in a letter of January 12, 2015, the representatives reported that he "has stated that, for personal reasons, he does not wish to participate in the litigation of the case." According to Peru, "this is therefore a unilateral, free and voluntary decision that must be taken into account by the Court […] when making its decision."

60. In this regard, this Court confirmed that Marino Huamaní Vergara was identified in the Report on Admissibility and Merits as an alleged victim and, in the order of the President of the Court of December 4, 2014, the Court ordered him to testify about this case before a notary public.[46] In a communication dated January 12, 2015, entitled "Submission of affidavits and expert opinions formalized via email," the representatives stated that Mr. Huamaní had indicated that he did "not wish to participate in the litigation of the case," for which reason "it was not possible to obtain his affidavit," and withdrew their proposal that he "testify in this international proceeding."

61. In this context, it was not clear whether, by indicating that he did not wish to "participate in the litigation of the case," Mr. Huamaní Vergara was seeking to withdraw from the case as an alleged victim or was merely requesting not to participate in its litigation through the submission of a statement made before a notary public. During the public hearing, the representatives argued that "the victim Huamaní Vergara indicated […] that "he did not want to continue with the proceeding because of fear, because of his personal circumstances." In their final written arguments, the representatives also indicated that "Mr. Huamaní expressed his fear that he would be exposed to reprisals, harassment or pressure from the State if he participated in this

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42 *Cf. Case of Río Negro Massacres v. Guatemala, supra,* para. 48.

43 *Cf. Case of Nadege Dorzema et al. v. Dominican Republic, supra,* para. 30.

44 *Cf. Case of Río Negro Massacres v. Guatemala, supra,* para. 48, and *Case of the Massacres of El Mozote and Nearby Places v. El Salvador, supra,* para. 50.

45 *Cf.* Statement made by affidavit on January 9, 2015, by Marcelina Guillen Riveros (evidence file, folios 5069). Also, the death certificates of Justiniano Guillén Ccanto and Victoria Riveros Valencia, father and mother of Marcelina Guillen Riveros, were issued on December 29, 2001 and April 30, 2007 respectively (evidence file, folios 3745 to 3746).

46 *Cf. Case of the Peasant Community of Santa Bárbara v. Peru.* Order of the President of December 4, 2014, *supra,* first operative paragraph.

litigation," but specified that "Mr. Marino Huamaní Vergara continues to be a victim of the case, regardless of his participation or not as a declarant."

62. As it has done in previous cases,[47] the Court takes into account the wishes of the alleged victim identified in the Commission's Admissibility and Merits Report. In this case, the Court considers that the will of Marino Huamaní Vergara, expressed through his representatives, is to continue as an alleged victim in the case and, consequently, it will consider him as such.

C. Inadmissibility of new facts and/or arguments presented by the representatives of the alleged victims not raised by the Commission in its Admissibility and Merits Report: alleged violation of the right to property and the prohibition of arbitrary interference in family life (Articles 21 and 11(2) of the American Convention)

C.1. Arguments of the parties and the Commission

63. The ***State*** pointed out that the Commission failed to comply with Article 35(3) of the Rules of Procedure, since "did not specify which of the facts contained in the [Merits] Report it submitted to the consideration of the Court." It also argued that the Commission did not emphasize the alleged theft of animals in section "A. Considerations as to Fact: Established Facts" of its Admissibility and Merits Report, nor did it consider the matter in its "Considerations as to Law." However, the facts presented by the representatives in their pleadings and motions brief that could constitute violations of Articles 21 and 11(2) of the Convention, would be substantially greater than those established by the Commission, and cannot be considered as facts that explain, contextualize or clarify the facts considered as proven by the Commission in its Admissibility and Merits Report. In view of the foregoing, it indicated that this preliminary objection should be declared admissible and asked the Court "remove from the present proceedings the entire set of facts" set forth in the pleadings and motions brief "aimed at proving the alleged violation of the right to property and the [alleged] interference in the private and family life of the alleged victims, since it does not respect the delimitation of the factual framework considered by the [Commission]."

64. The ***Commission*** argued that the State's position could not be reviewed without analyzing the merits of the case, particularly the facts that were considered proven by the Commission in its Report on Admissibility and Merits. Nevertheless, it recalled that in said Report, both in the position of the petitioners and in the subsequent paragraphs, reference was made to the theft of livestock and to facts that can reasonably be understood to have been explained and clarified by the representatives. Therefore, it asked the Court to dismiss this "preliminary objection" filed by the State.

65. The ***representatives*** asked the Court to dismiss the State's request and to admit the facts presented by the Commission and the petitioners in their entirety, for their eventual analysis in the merits stage, since the facts that would support the violations of the right to property were duly included and documented in the Commission's Admissibility and Merits Report. They pointed out that the Commission included "diverse information and citations in its Report with reference to the violations of the victims' right to property, including several specific references to the [CVR] Final Report and the domestic judicial files of the case." They added that, in their arguments, the representatives did not stray from the version of the facts described in the Commission's Report and its annexes and, in any case, the sources they cited were incorporated as annexes to the Commission's Report. In this regard, they explained that they have cited these same annexes verbatim, while the Commission presented a summarized version of these, attached to its Report. However, there is no justification whatsoever for the exclusion

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[47] *Cf. Case of the Barrios Family v. Venezuela, supra,* para. 31, and *Case of Espinoza Gonzáles v. Peru, supra,* para. 31.

of these facts from the application, as the State would claim. Finally, they warned that "the State seeks to ignore the conclusions issued by its own judicial authorities in this regard, as well as the specific conclusions of the Final Report of the [CVR]."

C.2. Considerations of the Court

66. First, with regard to the State's allegation that the Commission failed to comply with Article 35(3) of the Court's Rules of Procedure because it "did not indicate which of the facts contained in the [Admissibility and Merits] Report were submitted to the consideration of the Court," the Court understands that, when the Commission indicated that "it decided to submit this case to the Inter-American Court because of the need to obtain justice for the [alleged] victims," without expressly excluding any fact, it evidently submitted all the facts of the case to the consideration of the Court, in application of Article 35(1) of the Rules of Procedure, which establishes that "[t]he case shall be presented to the Court through the submission of a report […] which must establish all the facts that allegedly gave rise to the violations […]."

67. Secondly, regarding the State's request that the Court exclude from the present proceedings the entire set of facts in the pleadings and motions brief aimed at proving the alleged violation of the right to property and non-interference in private and family life, the Court recalls that the factual framework of the proceedings before the Court is constituted by the facts contained in the Report on Admissibility and Merits submitted for its consideration. Consequently, it is not admissible for the parties to allege new facts that differ from those contained in said report, although they may present those that explain, clarify or reject the facts mentioned in the report that have been submitted to the Court's consideration. The exception to this principle are facts that are classified as supervening, provided these are related to the facts of the case.[48]

68. In this regard, the Court notes that in the instant case, the Commission established in paragraphs 109 and 111 of its Admissibility and Merits Report the following factual considerations: i) "military personnel raided the homes of Francisco Hilario Torres and Ramón Hilario Morán, located in the Laccaypampa area of the Rodeo Pampa sector, […] where they [….] caused damage and seized animals and other property", and ii) "when [Zósimo Hilario Quispe in the company of some representatives of the community,] reached the spot, they […found] burned-out houses, food, clothing and other property strewn on the ground." It also established the following legal considerations in paragraphs 184 and 224 of said Report: i) "on July 4, 1991, the 'Escorpio' patrol, in execution of Operation 'Apolonia' […], raided the homes of Francisco Hilario Torres and Ramón Hilario Morán", and ii) "Mr. Zósimo Hilario Quispe learned that on July 6, 1991, that […] his home had been burned down. Likewise, the [Commission] has proven that Mr. Ramón Hilario Morán [and his family] were removed from the other house that was raided."

69. For their part, the representatives alleged that, in the context of the "Apolonia" military operation, State agents stole money, livestock, provisions and other valuable property that they found in the homes of Francisco Hilario Torres and Ramón Hilario Morán. They described the items that were allegedly stolen, and maintained that said agents set fire to the homes.

70. Thus, the Court concludes that the facts alleged by the representatives explain and clarify the acts of destruction and theft of animals and other property, as well as the destruction and burning of houses by State agents mentioned in Commission's Admissibility and Merits Report. Consequently, the Court does not consider the State's objection to be admissible. The facts alleged by the representatives regarding the theft and destruction of property and the burning of homes will be considered as part of the factual framework, and the Court will analyze them in the corresponding chapters.

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[48] *Cf. Case of Five Pensioners v. Peru. Merits, reparations and costs.* Judgment of February 28, 2003. Series C No. 98, para. 153, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 47.

D. Delimitation of the dispute

71. During the public hearing and in its final written arguments, Peru argued that the alleged failure of the State to deliver the results of the DNA tests and the forensic work carried out since 2009 are not related to the central facts of the present dispute, and could not give rise to the State's international responsibility, since both the Commission and the representatives identified them not as an act in violation of the Convention, but as a proposed reparation measure in which the State should adopt a series of actions aimed at the final identification of the skeletal remains.

72. The Court considers that the State's arguments regarding the factual framework of the case are time-barred. Nevertheless, the Court notes that the State seeks to exclude from the legal analysis of the case a part of facts that have been argued as constituting the alleged forced disappearance of the victims. In this regard, the Court noted that in paragraphs 169, 170, 187 and 251 of the Report on Admissibility and Merits of July 21, 2011, the Commission referred to the following aspects in its analysis on the merits of the case: the forensic procedures carried out in 2010 consisting of the exhumation of remains found inside the "Misteriosa" mine; the forensic reports made in this regard; the taking of blood and saliva samples from the victims' next of kin for DNA testing, and the failure to deliver the results of the DNA tests in 2010. It is clear then that these elements are part of the factual framework of the case and, therefore, they will be considered by the Court.

VII
EVIDENCE

A. Documentary, testimonial and expert evidence

73. The Court received various documents submitted as evidence by the Commission and the parties, attached to their main briefs (*supra* paras. 4, 7 and 8). Likewise, it received from the State several documents requested as helpful evidence. It also received the statements rendered by affidavit[49] of Gabriella Citroni and Fredy Armando Peccerelli Monterroso, expert witnesses proposed by the Commission, as well as the statements of the expert witnesses Ronald Alex Gamarra Herrera, Miryam Rebeca Rivera Holguín, Alejandro Valencia Villa and Jaime Mario Urrutia Ceruti, and of the alleged victims Zósimo Hilario Quispe, Marcelo Hilario Quispe, Gregorio Hilario Quispe, Víctor Carhuapoma de la Cruz, Abilio Hilario Quispe and Marcelina Guillen Riveros, all of them proposed by the representatives. Likewise, it received the testimony of the witness Rurik Jurqi Medina Tapia, proposed by the State. Regarding the evidence given at the public hearing, the Court heard the testimony of Zenón Cirilo Osnayo Tunque and the expert opinion of José Pablo Baraybar do Carmo, proposed by the representatives, as well as the testimony of Luis Alberto Rueda Curimania, a witness proposed by the State. During the public hearing, the expert witness José Pablo Baraybar do Carmo presented his written expert report. Finally, the Court received documents presented by the State and the representatives attached to their respective final written arguments.

B. Admission of the evidence

[49] On January 12, 2015, the representatives withdrew the statement of Marino Huamaní Vergara. On January 5, 2015, the President of the Court approved the State's request to substitute the statement to be made at the public hearing with and affidavit rendered by the witness Rurik Jurqi Medina Tapia, who was "unable to appear as a witness [at the hearing] in the city of San José, Costa Rica" for professional reasons.

74. The Court admits those documents presented at the appropriate procedural opportunity by the parties and the Commission that were not disputed or challenged.[50] The documents requested by the Court that were provided by the State after the public hearing are included in the body of evidence, pursuant to Article 58 of the Rules of Procedure. In addition, the Court notes that both the representatives and the State presented documents together with their final written arguments that were dated after the submission of the pleadings and motions and answering briefs, respectively, which are included in the body of evidence in accordance with Article 57(2) of the Rules of Procedure.

75. Regarding the press reports submitted by the Commission and the State, the Court has indicated that these may be considered when they contain public and well-known facts or statements by State officials or when they corroborate aspects related to the case. Consequently, the Court decides to admit such documents that are complete or that, at least, make it possible to verify their source and date of publication.[51] With respect to some documents indicated by the parties and the Commission by means of electronic links, if a party provides at least the direct electronic link of the document it cites as evidence, and it is possible to access it up to the time of the issuance of the respective judgment, neither the legal certainty nor the procedural balance is affected because it is immediately accessible by the Court and by the other parties.[52]

76. The representatives submitted certain documents with their final arguments that are part of the Commission's case file, and that were included in accordance with Article 35(d) of the Rules of Procedure, as well as documents incorporated by the expert witness Miryam Rivera Holguín in her opinion provided by affidavit. In other words, this evidence was part of the body of evidence prior to the final written arguments and is therefore admitted. On the other hand, the State and the representatives submitted, together with their final written arguments, evidence not requested by the Court or its President, without giving any justification for its submission after their pleadings and motions brief, and answering brief, respectively.[53] Given that these are time-barred and that none of the exceptions set forth in Article 57(2) of the Rules of Procedure apply, the Court considers that the abovementioned documents are not admissible.

77. During his presentation at the public hearing (*supra* para. 10), the witness Luis Alberto Rueda Curimania presented eight photographs and a book entitled "Special Forensic Team (EFE), Photographic Album of Garments: 'Cabitos' Case." In its final arguments, the State again submitted these photographs. The representatives objected to the admission of the photographs numbered 1 and 2, considering that they had no bearing on the instant case. They also objected to the photographs numbered from 3 to 7, as these were not offered at the proper procedural opportunity, and were therefore time-barred. They did not object to photo number 8. In addition, they pointed out that Mr. Rueda Curimania "is only aware of the intervention of the Special Forensic Team that began at the end of 2009" and that "he is unaware of the [forensic] procedures carried out in 2011," so they asked the Court to only consider "the statements of the witness Luis Rueda in the context of the object of his testimony." Finally, they challenged the admissibility of the book submitted, since it was allegedly unrelated to the specific case, was presented extemporaneously and did not constitute a supervening fact.

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[50] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits. Judgment* of July 29, 1988. Series C No. 4, para. 140, and *Case of Canales Huapaya et al. v. Peru. Preliminary objections, merits, reparations and costs.* Judgment of June 24, 2015. Series C No. 296, para. 41.

[51] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 146, and *Case of Wong Ho Wing v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of June 30, 2015. Series C No. 297, para. 39.

[52] *Cf. Case of Escué Zapata v. Colombia. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case Canales Huapaya et al. v. Peru, supra,* para. 41.

[53] The document submitted by the representatives: Observations of the representatives to the State Report of June 27, 2013. Documents submitted by the State: Ruling of April 16, 2012, issued by the Supreme Court of Justice, in which it granted the appeal for annulment; Family composition chart from Francisco Hilario Torres and Dionicia Quispe Mallqui; Family composition chart from Ramón Hilario Morán and Dionicia Guillen Riveros, and Family composition chart from Elihoref Huamaní Vergara.

78. First, in relation to the photographs provided by the witness Rueda Curimania, the Court considers that the photographs numbered 1 and 2, as the witness explained, belong to an investigation of another case, and are therefore not admissible. On the other hand, the photographs numbered 3 to 8, are related to the facts of this case and were part of Mr. Rueda Curimania's testimony at the public hearing, and are therefore admitted. Secondly, given that the book entitled "Special Forensic Team (EFE), Photographic Album of Garments: 'Cabitos' Case" is not related to the instant case, it will not be considered part of the evidence. Finally, the Court will admit said testimony insofar as it is in keeping with the purpose established in the order of the President of the Court of December 4, 2014 (*supra* para. 10).

79. In its final written arguments, the State submitted observations regarding the relevance, scope, content, veracity and credibility of the expert opinions prepared by Miryam Rivera Holguín, Gabriela Citroni, Ronald Gamarra, Alejandro Valencia Villa and Jose Pablo Baraybar. The Court notes that the observations regarding all the above expert opinions are related to their evidentiary weight and scope, but do not affect the admissibility of the evidence.

80. On the other hand, in its final written arguments, the State argued that "the statement [of Marcelina Guillen Riveros] should not be taken into account either," since she was "not included" in the Commission's Merits Report and therefore "cannot be considered as an alleged victim." In addition, it held that the "psychological evaluation" made by Miryam Rivera Holguín of said person "should not be examined or evaluated by the Court," given that the State "has requested that this person not be considered as an alleged victim." The Court considers that the objections raised by the State with respect to the statement of Marcelina Guillen Riveros and the purpose of the expert opinion of Miryam Rivera Holguín are time-barred, and that said statements were admitted opportunely and their purpose was determined in the President's order of December 4, 2014.

81. The Court deems it pertinent to admit the statements and opinions rendered at the public hearing and through statements provided by affidavit, as long as they are in keeping with the object defined by the President in the order that required them and the purpose of the instant case.[54] During the public hearing the expert witness José Pablo Baraybar do Carmo presented his written expert report, which was forwarded to the parties so that they could submit any observations deemed pertinent in their final written arguments. The Court finds that said document, which was not contested, refers to the object duly defined by its President for said expert opinion and is useful for the assessment of the disputes raised in this case; it is therefore admitted on the basis of Article 58 of the Rules of Procedure.

C. Assessment of the evidence

82. Based on the provisions of Articles 46, 47, 48, 50, 51, 57 and 58 of the Rules of Procedure, as well as on its consistent case law concerning evidence and its assessment, the Court will examine and assess the evidence admitted in the previous section (*supra* paras. 74 to 81). In doing so, it will abide by the principles of sound judicial discretion, within the corresponding legal framework, taking into account the entire body of evidence and all the arguments presented in the case. It will also assess the statements made by the alleged victims together with all the evidence in the proceedings, insofar as they may provide further information on the presumed violations and their consequences.[55]

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[54] *Cf. Case of Espinoza González v, Peru. Merits, supra,* para. 45.

[55] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of Canales Huapaya et al. v. Peru*, *supra*, para. 58.

VIII
FACTS

83. In this chapter the Court will refer to the following facts that are proven in the instant case: a) the families involved in the instant case; b) the context in which the facts took place; c) the events that occurred in the peasant community of Santa Bárbara; d) the complaints filed, as well as the procedures for the removal of human remains and evidence found; e) the investigations and judicial proceedings related to the facts of the case, and f) the procedures related to the search for, recovery and identification of the human skeletal remains carried out by the State. The legal classification of the facts will be established in the merits of this judgment.

A. The families involved in the instant case

84. It is an undisputed fact, consistent with the evidence,[56] that the instant case refers to events involving two family groups, as well as Elihoref Huamaní Vergara (22 years old):[57]

a) The first family group, made up of three generations which, at the time of the facts, was constituted as follows: Francisco Hilario Torres and his wife Dionicia Quispe Mallqui (60 and 57 years old, respectively), who lived on a farm located in the Rodeo Pampa annex of the Miguel Pata sector of Santa Bárbara, Department of Huancavelica, with their two daughters and son, Antonia, Magdalena and Marcelo, all with the surnames Hilario Quispe, and with their respective families, namely:

   (i) Antonia Hilario Quispe (age 31) and her husband Zenón Cirilo Osnayo Tunque, who had three daughters named Yesenia, Miriam and Edith[58] Osnayo Hilario (ages 6 years, 3 years and 8 months, respectively);
   (ii) Magdalena Hilario Quispe (26 years old), who had a son named Alex Jorge Hilario (6 years old), and
   (iii) Marcelo Hilario Quispe and his wife Mercedes Carhuapoma de la Cruz[59] (21 years old and 20 years old, respectively), who had a son named Wilmer Hilario Carhuapoma (3 years old). Mercedes Carhuapoma de la Cruz was in her six month of pregnancy.
   (iv) In addition, Francisco Hilario Torres and Dionicia Quispe Mallqui had two other children who did not live in the community of Santa Bárbara, namely, Zósimo Hilario Quispe and Gregorio Hilario Quispe.

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[56] It should be noted that the information contained in the evidence file on the members of those family groups varies in some cases. Furthermore, some family members have died since the year 2000; however, the information on the dates of their deaths is inconsistent or is not available. Therefore, the Court has proceeded to point out those details that are consistent in the evidence and information provided by the parties and the Commission, without prejudice to any new evidence that could arise in this regard. *Cf.* Relationship of the alleged victims and their next of kin (evidence file, folio 31); Baptism certificate of December 3, 2012 (evidence file, folio 3876); Interview with Zenón Cirilo Osnayo Tunque, Expert Report No. 18, Investigation 2008-61-0 of April 18 and 19, 2010 (evidence file, folios 4340 to 4341 and 4350 to 4351); Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folio 4509); Statement rendered on January 9, 2015 by affidavit by Zósimo Hilario Quispe (evidence file, folio 5200); Statement rendered on January 9, 2015 by affidavit by Marcelo Hilario Quispe (evidence file, folios 5203 and 5207); Statement rendered on January 9, 2015 by affidavit by Gregorio Hilario Quispe (evidence file, folios 5209 and 5210); Statement rendered on January 9, 2015 by affidavit by Víctor Carhuapoma de la Cruz (evidence file, folio 5213); Statement rendered on January 9, 2015 by affidavit by Abilio Hilario Quispe (evidence file, folio 5217); Statement rendered on January 9, 2015 by affidavit by Marcelina Guillen Riveros (evidence file, folio 5220); Statement of Zenón Cirilo Osnayo Tunque in the public hearing held on January 26, 2015, and Death certificates (evidence file, folios 3745 and 3746).

[57] The father of Elihoref Huamaní Vergara was Alejandro Huamaní Robles (deceased) and his brother is Marino Huamaní Vergara. *Cf.* Death certificate (evidence file, folio 3744).

[58] Edith Osnayo Hilario is also identified as Roxana Osnayo Hilario.

[59] The mother of Mercedes Carhuapoma de la Cruz is Ana de la Cruz Carhuapoma (deceased), and her brother is Víctor Carhuapoma of the Cruz.

b) The second family group consisted of Ramón Hilario Morán[60] and his wife Dionicia Guillén Riveros[61] (aged 26 and 24, respectively), who had two children, Raúl and Héctor Hilario Guillén (1 year and 6 years old, respectively), and who lived on a second farm located in the Rodeo Pampa annex.

B. Context: the conflict in Peru and the situation in the Department of Huancavelica and the Santa Bárbara area

85. In previous cases, the Court has acknowledged that, from the early 1980s until the end of 2000, Peru experienced a conflict between armed groups and members of the police and the military forces.[62] This conflict was aggravated by the systematic practice of human rights violations, including extrajudicial executions and forced disappearances of persons suspected of belonging to illegal armed groups. These practices were also carried out by State agents following the orders of their military and police commanders.[63] The Court has noted that the suffering caused to Peruvian society by *Sendero Luminoso*[64] (the Shining Path) and the *Movimiento Revolucionario Túpac Amaru* (hereinafter "MRTA") is widely and publicly known. [65]

86. According to the Truth and Reconciliation Commission (*Comisión de la Verdad y Reconciliación*, hereinafter "CVR"), starting in October 1981 the use of "states of emergency was expanded" and "consequently, the constitutional guarantees relating to the inviolability of the home, freedom of movement, freedom of association and personal liberty and safety were suspended" for renewable periods of time."[66] In this regard, on June 14, 1991, an extension was decreed of the State of Emergency in the Department of Huancavelica, "suspending the exercise of the rights of inviolability of the home, free movement, assembly, and [the right] not to be detained except by a judicial order or in *flagrante delicto*." In addition, the Armed Forces assumed control of public order in that Department,[67] applying the legal provisions established by Law No. 24(1)50 of June 5, 1985,[68] which stated in articles 4 and 10:

> Article 4- The control of internal order in emergency zones is assumed by a Political-Military Command, under the authority of a High Ranking Officer appointed by the President of the Republic, and proposed by the Joint Command of the Armed Forces, who performs the functions inherent to the position established by the present law within the scope of his jurisdiction, in accordance with the directives and emergency plans approved by the President of the Republic.
>
> Article 10- Members of the Armed Forces or Police Forces, as well as all those subject to the Code of Military Justice who are serving in areas declared to be in a state of emergency, are subject to the application of the aforementioned code. The infractions specified in the Code of Military Justice that are committed in the exercise of their functions are the competence of the military jurisdiction, except for those that are not related to the service.
>
> Jurisdictional disputes shall be resolved within a maximum period of thirty days.

87. According to the CVR's Final Report, a curfew from 7:00 p.m. to 6:a.m. was imposed in the city of Huancavelica. However, under the pretext of maintaining order at night, members of

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[60] The parents of Ramón Hilario Morán are: Dolores Morán Paucar (deceased) and Viviano Hilario Mancha (deceased), and their son is Abilio Hilario Quispe.

[61] The parents of Dionicia Guillén Riveros are Justiniano Guillén Ccanto (deceased) and Victoria Riveros Valencia (deceased), and her sister is Marcelina Guillén Riveros.

[62] *Cf. Case of Miguel Castro Castro Prison v. Peru, supra,* para. 197.1, and Case of Cruz *Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of April 17, 2015. Series C No. 292, para. 140.

[63] *Cf. Case of Loayza Tamayo v. Peru. Merits, supra,* para. 46, and Case of Cruz *Sánchez et al. v. Peru***,** *supra,* para. 143.

[64] *Cf. Case of Miguel Castro Castro Prison v. Peru. Interpretation of the Judgment of Merits, reparations and costs.* Judgment of August 2, 2008. Series C No. 181, para. 41, and *Case of Espinoza Gonzáles v. Peru, supra,* para. 52.

[65] *Cf. Case of Espinoza Gonzáles v. Peru, supra*, paras. 52 and 53.

[66] *Cf. Case of J. v. Peru, supra*, para. 61, and *Case of Espinoza Gonzáles v. Peru*, *supra*, para. 54.

[67] *Cf.* Supreme Decree No. 031-91 DE-MINDEF of June 14, 1991, published on June 21, 1991, in the Official Gazette "El Peruano" (evidence file, folio 2472).

[68] *Cf.* Law No. 24.150 of June 5, 1985 (evidence file, folio 2473).

the army or military patrols would enter the homes of local residents, steal their belongings and animals, and in some cases, even committed murder and rape. In this context and specifically in the Santa Bárbara area of the Department of Huancavelica, there were also continuous incursions by the Shining Path [who committed] murders, theft of food, tools and livestock, rapes and much destruction, so that the villagers found themselves between two fronts, which caused many of them to move to the cities, abandoning their homes and their crop fields.[69] Specifically, the sector known as Rodeo Pampa, located in that region, was considered as a "subversive zone, where there were continuous confrontations between the Army stationed in Lircay and [members of] the Shining Path."[70]

C. Events in the peasant community of Santa Bárbara

88. The case of the fifteen inhabitants of the peasant community of Santa Bárbara was documented on August 28, 2003, in the CVR's Final Report, in a chapter entitled: "2.50. Extrajudicial Executions in Santa Bárbara (1991)." Subsequently, on February 9, 2012 and May 29, 2013, the National Criminal Chamber of the Superior Court of Justice of Lima and the Transitional Criminal Chamber of the Supreme Court of Justice of the Republic of Peru issued their respective judgments on this case. In this sub-section, the Court will refer to the way in which the events that occurred in the peasant community of Santa Bárbara were reported in those documents.

89. On July 2, 1991, two military patrols, (the "Escorpio" patrol, commanded by Infantry Lieutenant Javier Bendezú Vargas, and the "Angel" patrol, commanded by Lieutenant Abel Gallo Coca) set out from the military bases of Lircay and Santa Teresita, located in Huancavelica, to carry out "Operation Apolonia." They took separate routes but with a similar final destination.[71] This military operation "was designed as part of the State's policy to combat insurgents in the Province and Department of Huancavelica, by the Political and Military Commanders of Huancavelica, for the specific purpose of raiding the locality of Rodeo Pampa, community of Santa Bárbara" in order to "capture and/or destroy" terrorist elements operating in the area. The "Escorpio" patrol was accompanied by the child P.C.H,[72] supposedly a deserter from the Shining Path, who acted as their guide in the operation. The "Escorpio" patrol first headed towards the Cochajccsa area, then to the Julcani mine, and subsequently to Huarocopata and later to Palcapampa.[73] On July 3, 1991, this group met up with the "Ángel" patrol in Palcapampa, where both patrols spent the night.[74]

90. On July 4, 1991, the "Escorpio" patrol, accompanied by a number of civilians, reached the hamlet of Rodeo Pampa in the peasant community of Santa Bárbara. The soldiers entered the homes of the alleged victims, forced everyone who was inside to come out and set fire to their houses. After seizing a large number of livestock, small farm animals and the belongings of the detainees, the soldiers detained and took away 14 villagers, including three girls, four boys, a 60 year-old man, five adult women, one of whom was six months pregnant, and an adult man, namely: Yesenia Osnayo Hilario, Miriam Osnayo Hilario, Edith Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Hilario, Raúl Hilario Guillén and Héctor Hilario Guillén (6 years, 3 years, 8 months, 3 years, 6 years, 1 year and 6 years of age, respectively); Francisco Hilario Torres (aged 60); Mercedes Carhuapoma de la Cruz , who was six months pregnant (aged 20);

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69 *Cf.* Final Report of the CVR of Peru, Volume VII, Chapter 2.50, page 531.

70 *Cf.* Official letter No. 0462-91-MP-FPM-HVCA of July 23, 1991, sent by the Office of Huancavelica Mixed Provincial Prosecutor to the Senior Public Prosecutor of Huancavelica (evidence file, folios 3887 and 3888).

71 *Cf.* Final Report of the CVR of Peru, Volume VII, Chapter 2.50, page 544.

72 *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folio 4501).

73 *Cf.* Final Report of the CVR of Peru, Volume VII, Chapter 2.50, page 544.

74 *Cf.* Final Report of the CVR of Peru, Volume VII, Chapter 2.50, page 532, and Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folio 4503).

Dionicia Quispe Mallqui, Antonia Hilario Quispe, Magdalena Hilario Quispe and Dionicia Guillén Riveros (aged 57, 31, 26 and 24 years, respectively); and Ramón Hilario Morán (aged 26). The villagers were subjected to various forms of mistreatment and were then led toward an abandoned mine called "Misteriosa" or "Vallarón", located in Hornoranra, a community of Chunomayo, in the district of Huachocolpa, Department of Huancavelica, on the slopes of Huaroto hill and about four hundred meters from the Chulumayo river.[75]

91. That same day, Elihoref Huamaní Vergara, aged 22, who had recently been discharged from the Army and had served in that institution between 1988 and 1990, accompanied by his father Alejandro Huamaní Robles and Elías Pumacahua Huamaní, grandson of the latter and who was aged between 12 and 13, were intercepted by soldiers on the road to Rodeo Pampa. The soldiers forced Elihoref Huamaní Vergara to accompany them and to join the group of fourteen villagers that they were taking away. On the way, the detainees were beaten, forced to walk for several hours with their hands tied, and were not given food or water. When they reached the abandoned "Misteriosa" or "Vallarón" mine, the soldiers forced the fifteen detainees into the mine shaft and shot them with light submachine guns (FAL). Subsequently, dynamite charges were detonated in the mine, causing their bodies to shatter into pieces.[76]

92. On July 4, 1991, Zósimo Hilario Quispe, Zenón Cirilo Osnayo Tunque, Marcelo Hilario Quispe and Gregorio Hilario Quispe were all away from the Rodeo Pampa ranch, each in a different area. On July 6, 1991, and separately, they found out from the authorities and villagers of Santa Bárbara that their relatives had disappeared and that their homes had been burned. The following day, Zósimo Hilario Quispe returned to the ranch at Rodeo Pampa in the company of several representatives of the peasant community of Santa Bárbara and, upon reaching the spot, was met by the sight of burned-out houses, with food, clothing and other items strewn on the ground, and a lot of blood in the area around the houses.[77] That same day and separately, Zenón Cirilo Osnayo Tunque, Marcelo Hilario Quispe and Gregorio Hilario Quispe made their way to Santa Bárbara, where they found evidence of what had happened.

93. On July 8, 1991, in an effort to search for their family members and with the information provided by neighbors in the vicinity, Zenón Cirilo Osnayo Tunque, Marcelo Hilario Quispe and Gregorio Hilario Quispe went to the entrance of the "Misteriosa" or "Vallarón" mine, where they found the remains of human bodies and identified the belongings of some of their relatives. They were able to recognize the bodies of Antonia Hilario Quispe and her daughter, Miriam Osnayo Hilario, among the remains. Zenón Cirilo Osnayo Tunque was also able to recognize the body of his eight-month old daughter, Edith Osnayo Hilario, and the bodies of Ramón Hilario Morán and his son, Héctor Hilario Guillén. In addition, he observed freshly disturbed earth, shattered dynamite cartridges and broken dynamite guides.[78]

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[75] *Cf.* Final Report of the CVR of Peru, Volume VII, Chapter 2.50, pages 536 and 544. See also the judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folios 4505, 4506 and 4509).

[76] *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folios 4505, 4510 to 4512). See also the Final Report of the CVR of Peru, Volume VII, Chapter 2.50, pages 536 and 544.

[77] *Cf.* Final Report of the CVR of Peru, Volume VII, Chapter 2.50, page 534; statement of Zósimo Hilario Quispe of November 26, 2010 before the National Criminal Chamber of the Superior Court of Justice of Lima - Criminal File No. 42-06 (Judicial proceedings against Lieutenant Javier Bendezú Vargas and others) (evidence file, folios 4409 and 4410), and statement rendered by affidavit on January 9, 2015, by Zósimo Hilario Quispe (evidence file, folio 5201).

[78] *Cf.* Final Report of the CVR of Peru, Volume VII, Chapter 2.50, page 534; statement of Zenón Cirilo Osnayo Tunque of November 5, 2010 before the National Criminal Chamber of the Superior Court of Justice of Lima - Criminal File No. 42-06 (Judicial proceedings against Lieutenant Javier Bendezú Vargas and others) (evidence file, folios 4402 and 4403); Interview with Zenón Cirilo Osnayo Tunque, procedure of April 18 and 19, 2010, Expert Report No. 18, Investigation Fiscal 2008-61-0 (evidence file, folios 4345 to 4346); Statement rendered on January 9, 2015 by affidavit by Marcelo Hilario Quispe (evidence file, folios 5203 and 5204); Statement rendered on January 9, 2015 by affidavit by Gregorio Hilario Quispe (evidence file, folio 5209), and Statement of Zenón Cirilo Osnayo Tunque in the public hearing held on January 26, 2015.

94. On July 11, 1991, while searching for his relatives, Viviano Hilario Mancha came across a dog with a bloodstained muzzle at the entrance to the "Misteriosa" or "Vallarón" mine, and went to the entrance of the mine to look around. Unlike what happened on July 8, when family members identified at least five of the victims (*supra* para. 93), Viviano Hilario Mancha only found remains of half-buried human corpses that he could not recognize and, among them, the half-buried body of his six year-old grandson Héctor Hilario Guillén. At the entrance to the mine he also noticed two bundles of dynamite and, fearing that they might explode, he left the area.[79]

D. Complaints filed, the removal of human remains and evidence found

95. On July 8, 1991, Zósimo Hilario Quispe filed a complaint before Special Prosecutor's Office for Crime Prevention of Huancavelica for the detention and disappearance of nine of his relatives, who were allegedly taken by a group of 50 soldiers and civilians to the district of Lircay on July 4, 1991.[80] On July 10, 1991, the Special Provincial Prosecutor for Crime Prevention of Huancavelica sent an official letter to the Political Military Chief of Ayacucho to notify him about the complaint filed by Zósimo Hilario Quispe, and to ask him if the detainees had been taken to the military base of Lircay.[81] The Army denied the detention of these persons in an official letter dated July 11, 1991.[82] On July 22, 1991, said Prosecutor reiterated the official letter of July 10, 1991, requesting information on the patrolling activities carried out by personnel from the military bases of Huancavelica, Lircay, Acobamba and Mantas on July 3 and 4, 1991, to which the Political Military Chief of Huancavelica replied (*infra* para. 239).[83]

96. Similarly, on July 8, 1991, Nicolás Hilario Morán, president of the administrative council of the peasant community of Santa Bárbara, and Lorenzo Quispe Huamán, prosecutor of the community of Santa Bárbara, filed a complaint with the Special Prosecutor's Office for Crime Prevention of Huancavelica, for the abduction and disappearance of 14 community members, including elderly people and children, as well as the theft of their belongings, animals and provisions by Army soldiers and seven civilians, all of which occurred on July 4, 1991. They also asked the prosecutor to take the pertinent precautionary measures and to carry out a visual inspection at the site of the facts.[84]

97. On July 9, 1991, Viviano Hilario Mancha filed a complaint before the Special Prosecutor's Office for Crime Prevention of Huancavelica, in which he stated that on July 4, 1991, a number of soldiers, accompanied by civilians, had taken his son Ramón Hilario Morán, his son's wife, Dionicia Guillén Riveros, their two small children, and household goods from his home.[85]

98. On July 12, 1991, Viviano Hilario Mancha filed another complaint for the crime of aggravated homicide against his son Ramón Hilario Morán and others, by members of the Peruvian Army.[86] That same day, the administrative council of Santa Bárbara informed the Mixed

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79 *Cf.* Record of appearance of Viviano Hilario Mancha before the Office of the Special Attorney of the Ombudsman of July 23, 1991, (evidence file, folio 53), and Parte No. 158-SE-JLP of August 26, 1991 (evidence file, folio 3910). Al respect, see also the Final Report of the CVR of Peru, Volume VII, Chapter 2.50, page 535.

80 *Cf.* Complaint of Zósimo Hilario Quispe of July 8, 1991, before the Special Prosecutor's Office for Crime Prevention of Huancavelica (evidence file, folios 27 to 29).

81 *Cf.* Report No. 17-91-FPEPD-HVCA of August 8, 1991, sent by the Special Prosecutor for Crime Prevention to the Senior Assistant Criminal Prosecutor in charge of the Special Attorney's Office of the Human Rights Ombudsman (evidence file, folio 197).

82 *Cf.* Brief of the State of September 23, 1991 (evidence file, folio 68).

83 *Cf.* Report No. 17-91-FPEPD-HVCA of August 8, 1991, submitted by the Special Prosecutor for Crime Prevention to the Senior Assistant Criminal Prosecutor in charge of the Special Attorney's Office of the Human Rights Ombudsman (evidence file, folios 197 to 199).

84 *Cf.* Complaint of Nicolás Hilario Morán and Lorenzo Quispe Huamaní of July 8, 1991, before the Special Prosecutor's Office for Crime Prevention of Huancavelica (evidence file, folios 60 and 61).

85 *Cf.* Complaint of Viviano Hilario Mancha of 9 July 1991 before the Special Prosecutor's Office for Crime Prevention of Huancavelica (evidence file, folio 64).

86 *Cf.* Police report No. 158-SE-JLP of August 26, 1991, which includes the complaint filed by Viviano Hilario Mancha of July 12, 1991, before the Special Prosecutor's Office for Crime Prevention of Huancavelica (evidence file, folio

Provincial Prosecutor's Office of Huancavelica that the 14 villagers abducted by members of the Army had been "found dead in the locality of Chunomayo, jurisdiction of Huachocolpa," and that they had been "identified by their relatives, Ponciano Hilario, Viviano Hilario and others." They also requested that the 14 bodies be removed.[87]

99. In response to these complaints (*supra* paras. 95 to 98), which also reported that the bodies were found in an abandoned mine in a place called "Rodeo-Pampa" in the "Chunomayo" sector, personnel from the Mixed Provincial Prosecutor's Office of Huancavelica went to Lircay on July 14, 1991, and the following day visited the Chunomayo Mine, guided by Viviano Hilario Mancha, without finding anything, "since they apparently got lost arriving at [the] wrong place."[88]

100. On July 17, 1991, Nicolás Hilario Morán, president of the administrative council of the Santa Bárbara peasant community, and Máximo Pérez Torres, treasurer of its municipal agency, filed two complaints. The first was filed before the Special Prosecutor of the Ombudsman's Office,[89] and the second before the Minister of Defense,[90] for the homicide of 14 community members on July 4, 1991, including seven children and two elderly people, who had been detained in a military operation carried out in the community of Santa Bárbara by military personnel from the Huancavelica and Lircay military bases. That same day, Nicolás Hilario Morán, together with Lorenzo Quispe Huamán, prosecutor of the community of Santa Bárbara, reiterated their request to the Provincial Prosecutor's Office of Huancavelica to set a date for the removal of the bodies from the "Misteriosa" or "Vallarón" mine.[91]

101. On July 18, 1991, the assigned prosecutor together with the examining magistrate, police officers and villagers from Santa Bárbara, including Zósimo Hilario Quispe and Viviano Hilario Mancha, traveled to the "Misteriosa" or "Vallarón" mine, where they found only fragments of human remains at the mine entrance: a "large" braid of human hair with scalp particles, a "medium-sized" lock of human hair, a strand of human hair, a strand of human hair attached to a segment of scalp, a segment of a foot (terminal region), a vulvar segment with part of the anus and part of the perineum region and human external and internal female genitalia, a human skull bone particle, a "large segment" of a human tongue, a human bone segment, two human bone articular surfaces, a human distal forearm and hand segment, a lung parenchyma segment, three bone tissue segments and soft tissue segments, and a portion of hair attached to human scalp segment, among others. In addition, 35 dynamite cartridges, 6 pieces of fuse and other remains were found in that location; these items were sent on July 22, 1991, to the Departmental Headquarters of the Technical Police of Cercado, for investigative purposes and to clarify the facts. The examining magistrate sent the rest of the remains found to the forensic medical examiner to determine whether these fragments were human remains.[92] In this regard, a record exists of the "Preliminary Anatomical-Pathological Identification" of July 19, 1991, issued by the Directorate of Forensic Medicine and Morgues of Huancavelica, which describes the identification

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3900), and record of the statement made by Viviano Hilario Mancha before the Office of the Special Attorney of the Ombudsman of July 23, 1991, (evidence file, folio 53).

87 *Cf.* Official letter No. 020-CCSB-91 of July 12, 1991 (evidence file, folio 50).

88 *Cf.* Official letter No. 0462-91-MP-FPM-HVCA of July 23, 1991, sent by the Huancavelica Mixed Provincial Prosecutor's Office to the Senior Public Prosecutor of Huancavelica (evidence file, folios 3887 and 3888), and brief of the State of September 23, 1991 (evidence file, folio 67). See also, Parte No. 158-SE-JLP of August 26, 1991, which includes an account of the procedure carried out on July 15, 1991 (evidence file, folio 3904).

89 *Cf.* Complaint of Nicolás Hilario Morán and Máximo Pérez Torres filed on July 17, 1991 before the Office of the Special Attorney of the Ombudsman (evidence file, folios 22 to 25).

90 *Cf.* Complaint of Nicolás Hilario Morán and Máximo Pérez Torres of July 17, 1991 before the Ministry of Defense of Peru (evidence file, folios 91 to 93).

91 *Cf.* Brief submitted on July 17, 1991, before the Huancavelica Provincial Prosecutor's Office (evidence file, folio 193).

92 *Cf.* Official letter No. 0462-91-MP-FPM-HVCA of July 23, 1991, sent by the Huancavelica Mixed Provincial Prosecutor's Office to the Senior Public Prosecutor of Huancavelica (evidence file, folios 3887 and 3888), and brief of the State of September 23, 1991 (evidence file, folio 67).

of 19 fragments of probable human remains,[93] sent by the forensic medicine experts to Lima for the respective analysis, since they did not have the necessary equipment.[94] The file contains no record of any subsequent action related to the items and remains found on July 18, 1991, and, as reported by the State, the Special Forensic Team (EFE) of the Institute of Legal Medicine and Forensic Sciences of the Public Prosecutor's Office "did not provide information concerning the procedure of July 18, 1991."

102. For his part, Alejandro Huamaní Robles filed at least five complaints regarding the detention and disappearance of his son, Elihoref Huamaní Vergara, on July 4, 1991, by fifteen soldiers from the military base of Huancavelica and/or Lircay, indicating that since that date his whereabouts have been unknown. The complaints were filed on the following dates: July 15, 1991, before the Special Prosecutor's Office for Crime Prevention of Huancavelica;[95] July 18 1991, before the Huancavelica Senior Superior Court Prosecutor;[96] July 23 and August 2, 1991, before the Office of the Special Attorney of the Human Rights Ombudsman;[97] and August 5, 1991, before the Minister of Defense.[98] According to the account contained in some of these reports, after the soldiers ordered Elihoref Huamaní Vergara to accompany them, Alejandro Huamaní Robles, who did not express concern when his son was forced to join the soldiers,[99] and his grandson Elías Pumacahua Huamaní, were forced to continue on their way. During their journey, they again encountered two more groups of soldiers; the second group included civilian detainees who were herding a large number of cattle and horses. Ten days later, Alejandro Huamaní Robles found out that his son had not returned.[100]

103. On July 18, 1991, Alejandro Huamaní Robles filed a writ of habeas corpus on behalf of his son Elihoref Huamaní Vergara before the Examining Magistrate's Court of Huancavelica.[101] On July 22, 1991, said court declared the habeas corpus action inadmissible, given that "based on the findings and the statements received from the units of the Security Police, General Police, Technical Police and the Military Base and Political-Military Command[,] the detention of Elihoref Huamaní Vergara has not been proven, therefore [,] the facts set forth in the complaint have not been shown to have actually taken place, for which reason the complaint has no concrete factual basis."[102] The ruling was appealed by Alejandro Huamaní Robles on August 5, 1991, before the same court, [103]but there is no record in the case file to show if the appeal was decided.

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93 *Cf.* Preliminary Anatomical-Pathological Identification Record of 19 fragments of probable human remains of July 19, 1991 (evidence file, folio 3866), and Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folio 4446).

94 *Cf.* Report No. 17-91-FPEPD-HVCA of August 8, 1991, sent by the Special Prosecutor for Crime Prevention al Senior Assistant Criminal Prosecutor in charge of the Office of the Special Attorney of the Ombudsman (evidence file, folio 200).

95 *Cf.* Complaint of Alejandro Huamaní Robles of July 15, 1991, before the Special Prosecutor's Office for Crime Prevention of Huancavelica (evidence file, folios 34 and 35).

96 *Cf.* Complaint of Alejandro Huamaní Robles of July 18, 1991, before the Huancavelica Senior Superior Court Prosecutor (evidence file, folio 42).

97 *Cf.* Complaint of Alejandro Huamaní Robles of July 23, 1991, before the Office of the Special Attorney of the Ombudsman (evidence file, folios 38 to 39), and Complaint of Alejandro Huamaní Robles of August 2, 1991 before the Office of the Special Attorney of the Ombudsman (evidence file, folios 77 to 79).

98 *Cf.* Complaint filed by Alejandro Huamaní Robles on August 1, 1991 before the Ministry of Defense (evidence file, folios 96 and 97).

99 *Cf.* Final Report CVR of Peru, Volume VI, Chapter 1.2, page 533.

100 *Cf.* Complaint filed by Alejandro Huamaní Robles of July 15, 1991, before the Special Prosecutor's Office for Crime Prevention of Huancavelica (evidence file, folios 34 and 35), and Complaint filed by Alejandro Huamaní Robles the July 23, 1991 before the Office of the Special Attorney of the Ombudsman (evidence file, folios 38 and 39).

101 *Cf.* Writ of habeas corpus filed by Alejandro Huamaní Robles on behalf of his son Elihoref Huamaní Vergara the July 18, 1991 before the Examining Magistrate's Court of Huancavelica (evidence file, folio 82).

102 *Cf.* Ruling of the Examining Magistrate's Court of Huancavelica of July 22, 1991, on the habeas corpus action filed on July 18, 1991 (evidence file, folio 85).

103 *Cf.* Appeal filed on August 5, 1991, against the order of the Examining Magistrate's Court of Huancavelica of July 22, 1991 (evidence file, folio 88).

E. Investigation and judicial proceedings opened in connection with the facts of this case

104. The investigations and judicial proceedings initiated in connection with the facts of this case include additional facts attributed to military personnel to the detriment of persons that are not part of the fifteen victims in this case, as well as the alleged commission of other crimes, such as rape, theft and extortion against persons who have not been identified as victims in this case. The Court will refer exclusively to the facts of the case that has been submitted to this Court in order to achieve a detailed understanding.

E.1. The Military Jurisdiction: Sixth Permanent Military Tribunal of the Second Army Judicial District of Ayacucho (Military proceedings against Lieutenant Javier Bendezú Vargas and others)

105. After the complaint was filed before the Permanent Court-Martial of the Second Army Judicial District for the abuses committed by a counterinsurgency patrol from Battalion No. 43-Pampas against 14 members of the Santa Bárbara peasant community, identified as "alleged subversive criminals of the peasant community of Rodeo Pampa," said military court decided on October 23, 1991, to open an investigation for the crimes of aggravated homicide, theft, abuse of authority, disobedience, negligence, extortion and offenses against the duty and dignity of the service, among others, against the following persons: Infantry Lieutenant Javier Bendezú Vargas; Communications Lieutenant Abel Gallo Coca; NCO, Second Class, Fidel Eusebio Huaytalla; NCO, Third Class, Duilio Chipana Tarqui; Sergeant, First Class, Oscar Alberto Carrera Gonzáles; Sergeant, Second Class, Carlos Manuel Prado Chinchay, and Sergeant, Second Class, Dennis Pacheco Zambrano. In addition, the jurisdiction of the Sixth Permanent Military Tribunal of Ayacucho was authorized to investigate and process the case.[104]

106. In a ruling of October 28, 1991, the judge of the Sixth Permanent Military Tribunal of Ayacucho decided to take up the case and to receive preliminary statements from the accused, for whom he issued pre-trial detention orders. He also ordered several evidentiary procedures to be carried out and to notify the Superior Court of Justice of Huancavelica, requesting information as to whether there was a proceeding underway on the same charges.[105]

107. On December 1 and 31, 1991, the death certificates of Francisco Hilario Torres and Dionicia Quispe Mallqui were registered, stating the date of death as July 4, 1991. According to said certificates, the death was accredited with a medical certificate.[106] On February 25, 1992, the judge of the Sixth Permanent Military Tribunal of Ayacucho ordered the registration of the death certificates of Antonia Hilario Quispe, Ramón Hilario Morán, Dionicia Guillén Riveros, Magdalena Hilario Quispe, Mercedes Carhuapoma de la Cruz and Elihoref Huamaní Vergara, as well as those of the children Yesenia and Miriam Osnayo Hilario, Raúl and Héctor Hilario Guillén, Alex Jorge Hilario and Wilmer Hilario Carhuapoma. This was carried out on March 6, 1992. The Court has found that in these death certificates, the date of death was given as July 4, 1991, and the ages given in those documents do not coincide with the ages of those persons as of July 4, 1991; furthermore, the ages of the six children were indicated as being over 18 years of age.[107]

108. In a judgment handed down on October 16, 1992, the Permanent Court Martial of the Second Army Judicial District decided to convict Infantry Lieutenant Javier Bendezú Vargas for the crime of abuse of authority, with the aggravating factor of mendacity, to the detriment of

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104 *Cf.* Record of opening of the preliminary investigation of October 23, 1991, of the Permanent Court-Martial of Peru (evidence file, folio 123), and Official letter No. 6671/SEMD-D of the Ministry of Defense of October 25, 1991 (evidence file, folios 70 to 72).

105 *Cf.* Ruling of October 28, 1991, of the Sixth Permanent Military Court of Ayacucho (evidence file, folio 3914).

106 *Cf.* Death certificates (evidence file, folios 3738 and 3747).

107 *Cf.* Death certificates (evidence file, folios 3731 to 3743).

the civilians who died in the military operation "Apolonia;" he was sentenced to 18 months imprisonment and the payment of 500 new soles in civil reparations, to be paid jointly with the State. The same court also o convicted NCO, Second Class, Fidel Gino Eusebio Huaytalla for the offenses of disobedience with the aggravating factor of larceny, and sentenced him to ten months imprisonment and the payment of 200 new soles in civil reparations. In addition, the court convicted NCO, Third Class, Duilio Chipana Tarqui, for offenses against the duty and dignity of service, handing down a prison term of 8 months and the payment of 100 new soles in civil reparations. However, it acquitted Infantry Lieutenant Javier Bendezú Vargas, Communications Lieutenant Abel Hipólito Gallo Coca, NCO, Second Class, Fidel Gino Eusebio Huaytalla, NCO, Third Class Duilio Chipana Tarqui, Sergeant, First Class, Oscar Alberto Carrara Gonzales, Sergeant, Second Class, Dennis Wilfredo Pacheco Zambrano and Corporal Simón Fidel Breña Palante of the crimes of aggravated homicide, theft, abuse of authority, disobedience, negligence and extortion.[108]

109. On February 10, 1993, the Review Chamber of the Supreme Council of Military Justice confirmed the judgment of the Permanent Court Martial of October 16, 1992 and, regarding the conviction of Infantry Lieutenant Javier Bendezú Vargas for the crime of abuse of authority with the aggravating factor of mendacity, amended the penalty and the amount of the civil reparations imposed, sentenced him to ten years imprisonment and set the amount to be paid as civil reparations at 4,000 new soles. It also imposed the additional penalty of permanent disqualification from serving in the armed forces or in the national police of Peru.[109]

E.2. Jurisdictional dispute between the Military Jurisdiction and the Ordinary Jurisdiction

110. On November 29, 1991, Zósimo Hilario Quispe filed a complaint with the Huancavelica Mixed Provincial Prosecutor's Office against Javier Bendezú Vargas, "Fidel Eusebio Huayta [*sic*]", Oscar Carrera Gonzalez, Carlos Prado Chinchay and Dennis Pacheco, "all former members of the Peruvian Army," for crimes against life (aggravated homicide) and property, among others, committed on July 4, 1991, to the detriment of 14 community members of Santa Bárbara. Certified copies of the investigation carried out by the Prosecutor's Office for Crime Prevention of Huancavelica were attached.[110]

111. On December 4, 1991, lawyers from the Center for Studies and Action for Peace(CEAPAZ) requested that the Public Prosecutor ensure that those responsible for the facts under investigation be tried in the ordinary courts, for which the Prosecutor of Huancavelica should file the respective criminal charges before the Examining Magistrate's Court of Huancavelica.[111] Likewise, on February 5, 1992, Zósimo Hilario Quispe filed a declination of jurisdiction before the Second Army Judicial District, requesting that the Permanent Military Tribunal of Ayacucho refrain from hearing the case and refer it to the Huancavelica Examining Magistrate, on the grounds that the military jurisdiction was only competent to examine offenses committed in the line of duty.[112]

112. On February 7, 1992, the person in charge of the Huancavelica Mixed Provincial Prosecutor's Office filed a criminal complaint before the Examining Magistrate against Javier Bendezú Vargas, Duilio Chipana Tarqui, "Fidel Ausebio Huaytalla", Oscar Carrera Gonzáles, Carlos Prado Chinchay and Dennis Pacheco Zambrano, all former members of the Peruvian Army

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108 Cf. Judgment of October 16, 1992, of the Second Army Judicial District (evidence file, folios 127 to 139).

109 *Cf.* Review of February 10, 1993 of the Supreme Council of Military Justice (evidence file, folios 142 to 145).

110 *Cf.* Complaint of Zósimo Hilario Quispe of November 29, 1991 before the Huancavelica Mixed Provincial Prosecutor's Office (evidence file, folios 100 and 101).

111 *Cf.* Brief of CEAPAZ of December 4, 1991, submitted to the Public Prosecutor's Office (evidence file, folios 104 and 105).

112 *Cf.* Application of Zósimo Hilario Quispe of February 5, 1992 for declination of jurisdiction filed before the Second Army Judicial District (evidence file, folios 108 and 109).

(Counter Subversive Battalion No. 43-Pampas led by Commander Caro), for crimes of genocide, theft, damages and abuse of authority, among others, to the detriment of Francisco Hilario Torres and others, all members of the community of Santa Bárbara. [113]

113. On February 20, 1992, the judge of the Sixth Permanent Military Tribunal of Ayacucho presented a motion challenging the jurisdiction of the Examining Magistrate of the ordinary criminal court of Huancavelica, in view of the imminent opening of an investigation against the military personnel allegedly responsible for perpetrating the crimes. This challenge was filed in compliance with the provisions of the Constitution and Article 10 of Law No. 24(1)50 (*supra* para. 86), due to the fact that the events occurred during the state of emergency decreed in the Department of Huancavelica, and that the members of the armed forces and the national police who were serving in declared "emergency areas", were subject to the application of the Code of Military Justice.[114] The military court did not suspend the proceedings initiated for the events of July 4, 1991 while the dispute over jurisdiction was being settled. (*supra* paras. 90 and 91).

114. The jurisdictional challenge was submitted to the consideration of the Criminal Chamber of the Supreme Court of Justice. In the context of said proceeding, in his briefs of January 18 and May 13, 1993, respectively, the Senior Assistant Prosecutor and the representative of CEAPAZ, on behalf of the families of the alleged victims of the peasant community of Santa Bárbara, requested that the President of that Chamber settle the jurisdictional dispute in favor of the ordinary jurisdiction.[115]

115. On June 17, 1993, the Supreme Court of Peru settled the jurisdictional dispute, declaring that the ordinary courts should investigate and try the facts denounced.[116]

E.3. Ordinary Jurisdiction: Criminal Court of Huancavelica – Criminal Case File No. 1993-027 (Judicial proceedings against Lieutenant Javier Bendezú Vargas and others)

116. Following the criminal complaint filed by the Mixed Provincial Prosecutor's Office of Huancavelica on February 7, 1992, (*supra* para. 112) and with regard to the fifteen victims in this case, the Huancavelica Criminal Court ordered an investigation to be opened on February 26, 1992 against Javier Bendezú Vargas, Duilio Chipana Tarqui, "Fidel Ausebio Huaytalla," Oscar Alberto Carrera Gonzáles, Carlos Prado Chinchay and Dennis Pacheco Zambrano, for the crimes of abuse of authority, genocide, offenses "against the administration of justice," theft and damages, among others, and ordered several evidentiary procedures to be carried out.[117] On January 12, 1993, all the defendants in the case were declared in default as fugitives.[118] After the dispute over jurisdiction between the military and ordinary courts was settled (supra para. 115) and the preliminary investigation stage was completed, the Superior Provincial Prosecutor's Office of Huancavelica filed an indictment against these individuals, who were fugitives from justice, by means of a ruling dated July 3, 1994, and its clarification dated August 5, 1994.[119]

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113 *Cf.* Complaint No. 19-92 of February 7, 1992, filed by the Provincial Prosecutor of Huancavelica (evidence file, folios 111 to 116).

114 *Cf.* Ruling of February 20, 1992, of the Sixth Permanent Military Tribunal of the Second Army Judicial District of Ayacucho (evidence file, folio 125).

115 *Cf.* Brief of the Senior Assistant Prosecutor of January 18, 1993, addressed to the President of the Criminal Chamber of the Supreme Court of Justice (evidence file, folios 3950 and 3951), and brief of the Center for Studies and Action for Peace (CEAPAZ) of May 26, 1993 sent to the President of the Criminal Chamber of the Supreme Court of Justice (evidence file, folios 162 to 170).

116 *Cf.* Decision of June 17, 1993 of the Supreme Court of Justice of Peru (evidence file, folio 3960).

117 *Cf.* Record of investigation of February 26, 1992, Huancavelica Criminal Court (evidence file, folios 158 to 160).

118 *Cf.* Judgment of the National Criminal Chamber of March 4, 2008 (evidence file, folio 4155).

119 *Cf.* Indictment filed by the Senior Provincial Prosecutor of Huancavelica of July 3, 1994 (evidence file, folios 3962 to 3965) and Clarification of the Senior Provincial Prosecutor of Huancavelica of August 5, 1994 (evidence file, folio 3966).

117. On August 19, 1994, the Mixed Chamber of the Huancavelica Superior Court declared that there was merit to initiate oral proceedings against Javier Bendezú Vargas, Duilio Chipana Tarqui, Fidel Gino Eusebio Huaytalla, Oscar Alberto Carrera Gonzáles, Carlos Saa Prado Chinchay and Dennis Wilfredo Pacheco Zambrano for the crimes of genocide, abuse of authority, damages, theft and offenses against the administration of justice, among others. It also set dates for various evidentiary procedures and, without declaring the accused as absent defendants, asked the Military Tribunal of Lima Military Police Battalion No. 501-Rímac, to order the transfer of the defendant Javier Bendezú Vargas to the prison of Huancavelica, and requested that the Second Army Judicial District of the Permanent Military Tribunal of Ayacucho, order the appearance of the defendants Duilio Chipana Tarqui, Fidel Gino Eusebio Huaytalla, Oscar Alberto Carrera Gonzáles, Carlos Saa Prado Chinchay and Dennis Wilfredo Pacheco Zambrano.[120]

E.4. Application of Amnesty Law No. 26.479 in the Military Jurisdiction and the Ordinary Jurisdiction

118. On June 14, 1995, Congress enacted Law No. 26.479, Articles 1, 4 and 6 of which established that:

> Article 1: A general amnesty is granted to military and police personnel and civilians, regardless of the corresponding military, police or functional situation, who are denounced, investigated, indicted, tried or convicted for common or military crimes in the ordinary or military jurisdictions for any act arising from or occurring as a consequence of the fight against terrorism and that might have been committed individually or as a group from May 1980 until the date of the enactment of the present Law.
>
> Article 4: The ordinary and military courts and judicial and executive branches shall immediately proceed, under responsibility, to cancel the police, judicial or criminal records that might have been filed against those persons who are amnestied by this Law, as well as to lift any restrictive measure of freedom that might affect them. They shall also proceed to release from prison those amnestied who have been arrested, detained, imprisoned or preventively deprived of their freedom, not including the administrative measures.
>
> Article 6: The actions or crimes included in the present amnesty, as well as the definitive acquittals and absolutions cannot be subject to investigations, searches or summaries; leaving all judicial cases, in proceedings or execution, definitively archived.[121]

119. On June 16, 1995, the Amnesty Chamber decided to apply the benefit of amnesty in the military jurisdiction to Javier Bendezú Vargas and the other defendants, for the crimes of abuse of authority and others. It also ordered the immediate release from prison of Javier Bendezú Vargas, who had been convicted by a judgment of the Review Chamber of the Supreme Council of Military Justice on February 10, 1993[122] (*supra* para. 109).

120. On June 28, 1995, Congress adopted Law N° 26.492, which interpreted Article 1 of Law N° 26479 in the sense that observance of the general amnesty was mandatory for all jurisdictional bodies and that it encompassed all acts arising from or occurring as a consequence of the fight against terrorism from May 1980 until June 14, 1995, irrespective of whether or not the military, police or civilian personnel involved were accused, investigated, prosecuted or convicted, and that all judicial proceedings in process or under enforcement were permanently dismissed.[123]

121. As the oral stage of the trial was about to begin in the ordinary jurisdiction against the defendants in this case (*supra* para. 117), the Criminal Chamber of Huancavelica Superior Court issued an order on July 4, 1995, declaring that Article 1 of Amnesty Law No. 26.479 was applicable to the accused and ordering the permanent dismissal of the proceedings. It also

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120 *Cf.* Auto of August 19, 1994, of the Mixed Chamber of the Superior Court of Justice of Huancavelica (evidence file, folios 3972 to 3976).

121 *Cf.* Law No. 26.479 of June 14, 1995 (evidence file, folio 2474).

122 *Cf.* Decision of June 28, 2002, Plenary of the Supreme Council of Military Justice (evidence file, folio 5359).

123 *Cf.* Law No. 26.492 of June 28, 1995 (evidence file, folio 2476).

ordered the annulment of the judicial and police records of the six defendants who benefited from the amnesty.[124] The application of the amnesty law was endorsed by the Senior Prosecutor for Criminal Matters and was also confirmed by the First Transitional Criminal Chamber of the Supreme Court of Justice of Peru by order of January 14, 1997.[125]

122. On March 14, 2001, the Inter-American Court issued a judgment in the *Case of Barrios Altos v. Peru*, in which it found that Amnesty Laws No. 26.479 and No. 26.492 were incompatible with the American Convention and, consequently, lacked legal effect. Subsequently, in its interpretation of that judgment, the Court considered that, "given the nature of the violation that Amnesty Laws 26479 and 26492 constitute, the effects of the decision in the judgment [of March 14, 2001] are general in nature."[126]

E.5. Reopening of the case in the Military and the Ordinary Jurisdictions

123. Based, *inter alia*, on the judgment of the Inter-American Court in the *Case of Barrios Altos v. Peru* (*supra* para. 122), on June 28, 2002, the Plenary Chamber of the Supreme Council of Military Justice declared the Supreme Decree of June 16, 1995 null and void and ordered that the case be reopened in execution of the judgment.[127] There is no record in the file of any subsequent action in this regard. Meanwhile, in the ordinary jurisdiction, on June 24, 2004, the Huancavelica Provincial Criminal Prosecutor requested that the Prosecutor General reopen Criminal File No. 1993-027, and refer the case files to the Supreme Court of Justice so that, subject to the opinion of its Chief Prosecutor, it would order the reopening of the proceedings.[128] On June 22, 2005, the Superior Mixed Prosecutor's Office of Huancavelica considered that the Mixed Chamber of the Huancavelica Superior Court of Justice should declare null and void the decision to final archive the proceedings in application of Amnesty Laws Nos. 26.479 and 26.492, and, in accordance with Article 151 of the Organic Law of the Judiciary, reopen the case.[129]

124. On July 14, 2005, the Mixed Chamber of the Superior Court of Huancavelica declared null and void the decision of July 4, 1995 (*supra* para. 121) and ordered the case to be reopened and to join it to the preliminary investigation assigned No. 808-2002, which had been initiated after the CVR's Final Report for the same facts. On August 26, 2005, said chamber reiterated the trial order issued on July 3, 1994, which had not been executed (*supra* para. 116). Given that the defendants had absconded, it withheld the date for starting the oral proceedings, until they could be located and/or placed at the disposal of the judicial authority.[130] On November 10, 2005, the Public Prosecutor's Office in Huancavelica indicated that the criminal proceeding should continue from the stage it had reached when the decision of July 4, 1995, was issued and, consequently, that a date should be set for the hearing.[131]

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[124] *Cf.* Resolution of May 5, 2004 of the Specialized Provincial Prosecutor for Human Rights, Forced Disappearances, Extrajudicial Executions and Exhumations of Clandestine Graves in Huancavelica (evidence file, folios 172 to 178).

[125] *Cf.* Auto of January 14, 1997, of the First Transitional Criminal Chamber of the Supreme Court of Justice (evidence file, folios 154 to 156).

[126] *Cf. Case of Barrios Altos v. Peru. Merits. Judgment* of March 14, 2001. Series C No. 75, paras. 39 and 44, and *Case of Barrios Altos v. Peru. Interpretation of judgment on the merits. Judgment* of September 3, 2001. Series C No. 83, para. 18.

[127] *Cf.* Resolution of June 28, 2002 of the Plenary of the Supreme Council of Military Justice (evidence file, folios 5359 and 5360).

[128] *Cf.* Official letter No. 1085-2004-MP-FPP-HUANCAVELICA of June 24, 2004, of the Provincial Prosecutor's Office of Huancavelica (evidence file, folio 180).

[129] *Cf.* Report No. 12 of June 22, 2005 of Mixed Prosecutor's Office of Huancavelica (evidence file, folios 3978 and 3979).

[130] *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folio 4374).

[131] *Cf.* Report No. 22/2005-VARIOS of Mixed Prosecutor's Office of Huancavelica of November 10, 2005, File No. 1993-027 (evidence file, folio 182).

E.6. Ordinary Jurisdiction: National Criminal Chamber of the Superior Court of Justice of Lima – Criminal Case No. 42-06 (Judicial proceedings against Lieutenant Javier Bendezú Vargas and others)

125. On October 31, 2006, the National Criminal Chamber of Lima decided to hear the case since it had been assigned jurisdiction to hear crimes against humanity and common crimes that may have constituted violations of human rights, as well as related rights.[132] Accordingly, on November 14, 2006, the Mixed Chamber of the Huancavelica Superior Court forwarded the case file.[133] Once the case was taken up, on December 18, 2006, the National Criminal Chamber approved the dismissal of the proceedings against the detainee and defendant Carlos Manuel Prado Chinchay (also identified as Carlos Saa Prado Chinchay), on the grounds that he was a minor at the time of the events. It also ordered his immediate release, the suspension of the arrest warrants issued against him and the annulment of any records generated.[134] According to information provided by the State, Carlos Manuel Prado Chinchay is not involved in any investigation or criminal proceedings related to the facts of this case.

126. On December 6, 2007, the trial against Oscar Alberto Carrera Gonzáles (prison inmate who had been captured), Javier Bendezú Vargas, Duilio Chipana Tarqui, Fidel Gino Eusebio Huaytalla and Dennis Wilfredo Pacheco Zambrano (defendants *in absentia*) began. In relation to the facts attributed to military personnel to the detriment of 15 victims in this case, in the judgment of March 4, 2008, at the end of the trial the National Criminal Chamber dismissed the criminal action against Oscar Alberto Carrera Gonzáles for the crimes of damages, theft and the offenses against the administration of justice owing to the statute of limitations, and acquitted him of the crime of genocide. Regarding the proceedings against the absent defendants Javier Bendezú Vargas, Duilio Chipana Tarqui, Fidel Gino Eusebio Huaytalla and Dennis Wilfredo Pacheco Zambrano, these were placed on hold, until they could be apprehended. The judge also ordered that certified copies of the file be sent to the Provincial Prosecutor's Office of Huancavelica, in order to open a criminal investigation against Simón Fidel Breña Palante for allegedly committing the crime of genocide in relation to the facts of this case.[135]

127. The Superior Public Prosecutor's Office and the civil party filed a motion for annulment against that judgment.[136] On April 15, 2009, the Transitional Criminal Chamber of the Supreme Court of Peru issued a final judgment (*ejecutoría suprema*), consistent with the opinion of the Public Prosecutor's Office, ruling that there was no annulment of the judgment of March 4, 2008, in those aspects that declared, *ex officio,* the criminal action against Oscar Alberto Carrera González extinguished based on the statute of limitations for the crimes of aggravated theft and damages, and null and void in the aspects that acquitted him of the crime of genocide, ordering that a new trial be held on these aspects.[137] Consequently, the case was returned to the National Criminal Chamber which, on November 9, 2009, issued the following order:

> The absent defendant Javier Bendezú Vargas registers domicile in the city of Lima, being retired from the Peruvian Army; the defendant Duilio Chipana Tarqui is, according to a report from the General Secretariat of the Ministry of Defense, active in the unit Esc. Cmdos.; likewise, the defendant Fidel Gino Eusebio Huaytalla appears as a member of the Peruvian Army active in the unit BTN CS.N.77 and Dennis Wilfredo Pacheco registers domicile address in Buenos Aires Argentina; therefore, in view of his legal situation it is appropriate to order the following: a) To request the National Directorate of Migration to submit the report on the migratory

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132 *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folio 4374).

133 *Cf.* Official letter No. 868-2007-JUS/CNDH-SE of May 31, 2007 from the Executive Secretary of the National Human Rights Council to the Representative of the Judiciary before the National Human Rights Council (evidence file, folio 184).

134 *Cf.* Decision of December 18, 2006 of the National Criminal Chamber (evidence file, folios 4149 to 4151).

135 *Cf.* Judgment of the National Criminal Chamber of March 4, 2008 (evidence file, folios 4196 and 4198 to 4200).

136 *Cf.* Motions for annulment filed by the Superior Public Prosecutor's Office and the civil party against the judgment of March 4, 2008 (evidence file, folios 4202 to 4239).

137 *Cf.* Judgment of the First Transitional Criminal Chamber of the Supreme Court of Justice of April 15, 2009 (evidence file, folios 4241 to 4250).

movements of the aforementioned defendants; b) To send letters reiterating the orders for the location and capture of the absent defendants at the national and international level; c) To request the Peruvian Army to submit updated information on the unit where the defendants Chipana Tarqui and Eusebio Huaytalla are serving, informing them of their status as absent defendants in the present case.[138]

128. Once the maximum pre-trial detention term of the defendant Oscar Alberto Carrera González expired and once he had requested his "release due to excess prison time," on June 15, 2010, the National Criminal Chamber changed the measure to appearance with restrictions, effective as of June 29, 2010. In addition, an order was issued to prevent him from leaving the country in order to guarantee his presence at trial.[139]

129. In July 2010, the oral proceedings began against the defendant Oscar Alberto Carrera Gonzáles, who was on conditional restricted release from prison to ensure his appearance at trial, subject to compliance with rules of conduct. At that time, the other accused - Javier Bendezú Vargas, Duilio Chipana Tarqui, Fidel Gino Eusebio Huaytalla and Dennis Wilfredo Pacheco Zambrano - were classified as absentee defendants since they had not been apprehended.[140] Between July 2010 and November 2011, statements were received from the defendants, witnesses and experts, and documentary evidence was received and discussed at the hearing. The following documents were also examined during the proceedings: a) the CVR's Final Report, attached to joined File No. 808-2002, on the Santa Bárbara Peasant Massacre; b) the complaints filed by Santa Bárbara community members in July 1991, included in the main case file; c) the testimonial statements included in the main file; d) records of the removal of remains and objects from the "Vallarón" mine, on July 18, 1991, and record of the preliminary anatomical-pathological identification of July 19, 1991; e) the Forensic Archaeology Expert Report of November 16 and 18, 2009, an expert report of January 25, 2010, the record of the recovery of human remains from March 1 to 8, 2010, and an expert report dated April 18 and 19, 2010; f) investigative and testimonial statements from the case file of the military jurisdiction; g) record of findings and collection of explosives of July 4, 1991, military jurisdiction file; h) outline of the Apolonia Plan, military jurisdiction file; i) the "Manual of Non-Conventional War," "Information Report sent to BSC Lircay, by Escorpio" and "Manual of Non-Conventional Counter-Insurgency War", and j) parts of the military file and judgments issued in the military jurisdiction.[141]

130. On January 28, 2011, the representative of the Public Prosecutor's Office requested the dismissal of the written accusation regarding the crime of genocide in order to establish a new legal classification of the offense as a crime of aggravated homicide with the aggravating factors of ferocity and great cruelty, in relation to the deaths of the fifteen villagers of Rodeo Pampa.[142]

131. On February 9, 2012, the National Criminal Chamber of Lima's Superior Court of Justice classified the events of July 4, 1991 in the peasant community of Santa Barbara, as a crime against humanity and, consequently, ruled that liability for these acts was not subject to any statute of limitations. In that judgment, Oscar Alberto Carrera Gonzáles was convicted as a secondary accomplice to the crime of aggravated homicide with ferocity and premeditation y and sentenced to nine years imprisonment and the payment of 25,000 new soles as civil reparations in favor of each of the legal heirs of the victims, jointly and severally with those responsible for the criminal act. The Court also reserved judgment of the absent defendants Javier Bendezú Vargas and Dennis Wilfredo Pacheco Zambrano and issued national and international warrants for their immediate arrest, together with an impediment to leave the country, notifying the

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138 *Cf.* Ruling of the National Criminal Chamber of November 9, 2009 (evidence file, folios 4252 to 4254).

139 *Cf.* Ruling of the National Criminal Chamber of February 9, 2012 (evidence file, folio 4376).

140 *Cf.* Official letter No. 042-06-SPN of August 23, 2010, National Criminal Chamber (evidence file, folio 186), Report of the Recording Secretary to Coordinator of the National Criminal Chamber (evidence file, folio 202).

141 *Cf.* Court records, National Criminal Chamber (evidence file, folios 2874 to 3594), Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folios 4380 to 4452).

142 *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folio 4377).

National Police Requisition Division and the National Central Bureau-Lima of INTERPOL. However, it declared the statute of limitations regarding the criminal action in favor of the accused for the crimes of aggravated robbery, damages, offenses against the administration of justice and abuse of authority. Likewise, it acquitted Duilio Chipana Tarqui and Fidel Eusebio Huaytalla for the crime of aggravated homicide. In addition, it ordered certified copies of the case to be sent to the Public Prosecutor's Office so that it could investigate five other individuals.[143]

132. By virtue of an appeal for annulment of that judgment filed by the convicted person's defense attorney and the Superior Prosecutor, the Transitional Criminal Chamber of the Supreme Court of Justice of Peru issued a Final Judgment (*ejecutoría suprema*) on May 29, 2013, amending the conviction of Oscar Alberto Carrera Gonzales from a secondary accomplice to a primary accomplice in the crime of aggravated homicide and sentencing him to 20 years imprisonment. Thus, with the reduction for time served in prison from June 30, 2007 to June 25, 2010, his prison term will expire on February 3, 2029.[144]

E.7. Ordinary Jurisdiction: Fourth Supra Provincial Criminal Court of Lima – Criminal File No. 2011-0196-0 (Judicial proceedings against Simón Fidel Breña Palante)

133. On February 16, 2011, the Huancavelica Provincial Criminal Prosecutor's Office of the Public Prosecutor's Office filed a criminal complaint against Simón Fidel Breña Palante for a crime against humanity in the form of genocide.[145] On August 1, 2011, the Fourth Supra Provincial Criminal Court of Lima opened an investigation against Simón Fidel Breña Palante for the alleged crime of genocide in relation to the facts of this case. Subsequently, the Public Prosecutor's Office amended the legal classification of the indictment in order to charge him for the crime of aggravated homicide with the aggravating circumstances of ferocity with great cruelty, in a context of crimes against humanity.[146] On October 27, 2011, Simón Fidel Breña Palante was brought before the court, since he was a detainee in a penitentiary establishment in Lima, and on November 30, 2011 and January 11, 2012, he gave his preliminary statement before the judge of the case.[147] The evidence shows that Mr. Breña Palante's defense attorney requested the discontinuation of the oral trial arguing that he was a minor at the time of the facts. On January 4, 2013, the indictment against Breña Palante was issued and, regarding the request for the discontinuation of the trial, it was indicated that this should be decided at the beginning of the oral proceedings.

134. On February 22, 2013, the National Criminal Chamber of the Supreme Court of Justice of Peru decided that the proceedings against Simón Fidel Breña Palante should be terminated, given that on July 4, 1991 he was under 18 years of age (17 years, 10 months and 22 days). Thus, it ordered his immediate release from prison and that he appear before a Family Judge in order to resolve his legal situation.

135. The National Criminal Chamber took into consideration that there were two markedly different situations in the case. On the one hand, various documents gave his date of birth as August 13, 1972, which was acknowledged by the accused himself both in his testimony and in

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143 *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folios 4540, 4541, 4552, 4563 and 4578 to 4580).

144 *Cf.* Decision of the Transitional Criminal Chamber of the Supreme Court of Justice of Peru of May 29, 2013 (evidence file, folios 3729 and 3730).

145 *Cf.* Criminal complaint filed by the Public Prosecutor's Office on February 16, 2011 (evidence file, folio 5390).

146 *Cf.* Order to open investigation of August 1, 2011 (evidence file, folio 5399); Decision of February 22, 2013 of the National Criminal Chamber of the Supreme Court of Justice of Peru (evidence file, folios 4590 to 4596), and ruling of February 22, 2013 of the National Criminal Chamber of the Supreme Court of Justice of Peru (evidence file, folios 4590 to 4596).

147 *Cf.* Preliminary statement of Simón Fidel Breña Palante of October 27, 2011 (evidence file, folios 3748 and 3749), and continuation of the preliminary statement of Simón Fidel Breña Palante of November 30, 2011, and January 11, 2012 (evidence file, folios 3750 to 3758).

his preliminary statement. On the other hand, there was a certified copy of the birth certificate of the accused Simón Fidel Breña Palante issued by the National Registry of Identification and Civil Status, in which his date of birth was given as August 13, 1973. Given that this certificate was the result of an administrative process of extemporaneous registration in 2012, the National Criminal Court decided that:

> Although the certificate in question does not provide the Court with complete certainty as to the appellant's date of birth, since there are documents that contradict the year in which he was born, the fact is that it is [..] a valid public document, obtained through a regular administrative process, which necessarily demands compliance with certain requirements, as established in the rules on the matter, Therefore[,] the consequences that may be generated by said birth certificate must be complied with in a mandatory manner since, being the result of an administrative process, it enjoys constitutional legitimacy, even more so if its validity has not been questioned by the competent authority. Consequently[,] since it is a valid document, the true date of birth of the appellant must be considered to be the one stated in said document.

136. In the decision of February 22, 2013, the National Criminal Chamber ordered the certified copies of the documents mentioned in the resolution of the criminal proceeding to be sent to the Provincial Criminal Prosecutor's Office of Lima, in order to initiate the investigations and rule out a possible criminal act.[148] This resolution was not challenged; therefore, on March 18, 2013, it was decided to annul the police and judicial records that had been generated against Simón Fidel Breña Palante and to annul the arrest warrants and orders to prevent him from leaving the country.[149] Finally, on February 21, 2014, the Provincial Criminal Prosecutor's Office of Lima referred the preliminary investigation initiated to the Provincial Criminal Prosecutor's Office of Huancavelica due to the extemporaneous registration of Simón Fidel Breña Palante before the National Registry of Identification and Civil Status in 2012.[150] No further information is available in this regard.

F. Proceedings related to the search, recovery and identification of human skeletal remains in the abandoned "Misteriosa" or "Vallarón" mine (Supra-Provincial Criminal Prosecutor's Office of Huancavelica - File No. 2008-61-0)

137. The Court is unclear as to the number of proceedings carried out in the search for and recovery of the human skeletal remains found in the abandoned "Misteriosa" or "Vallarón" mine. From the body of evidence in this case, it appears that, between 2009 and 2011, various proceedings were carried out, which are described in this section.

138. The evidence shows that on October 23, 2009, a search and inspection procedure was carried out at the abandoned "Misteriosa" or "Vallarón" mine, during which a presumed grave was found inside the mine. It was recommended that the corresponding archaeological intervention be carried out between April and October to avoid the rainy season.[151] However, it was not until November 16 to 18, 2009, that steps were taken to recover the human skeletal remains from the mine, with the demarcation of four excavation units identified as A, B, C and D from the external part to an inner section of the mine. Evidence was recovered from the exterior section, consisting of a skull fragment of a species to be defined, fragments of colored clothing, and some cable that appeared to be a slow dynamite fuse, which was taken to the Forensic Investigation Laboratory in Ayacucho. In addition, a complete forensic archaeological intervention was recommended at the site.[152]

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148 *Cf.* Ruling of February 22, 2013 of the National Criminal Chamber of the Supreme Court of Justice (evidence file, folios 4590 to 4596).

149 *Cf.* Ruling of March 18, 2013 of the National Criminal Chamber of the Supreme Court of Justice (evidence file, folio 5456).

150 *Cf.* Decision of February 21, 2014 of the Provincial Criminal Prosecutor's Office of Lima (evidence file, folio 5461).

151 *Cf.* Expert Report of October 23, 2009 (evidence file, folios 5548 to 5550).

152 *Cf.* Expert Report No. 20090014 on procedures, November 16-18, 2009 (evidence file, folios 4324 to 4329).

139. Subsequently, on December 15, 2009, an exploratory inspection was conducted to assess the safety conditions for carrying out the investigative work and an expert report was prepared on January 21, 2010 by the mining engineer appointed for that purpose. The report concluded that in the mine shaft "there are rock settlements, and these are produced for two reasons: first, due to natural causes, such as water seepage and weakening of the rock mass in the area, due to the passage of time. Second, due to the detonation of an explosive charge." The report noted that the site was unsafe for work due to the conditions and the state it was in, and recommended the placement of "struts or posts in a line, shoring up the area and making a head guard to prevent loose material from falling." It also suggested "that the [struts] be placed by a master timber worker to ensure people's safety."[153] From the evidence presented in this case, it is not possible to verify whether these recommendations were implemented.

140. From March 1 to 8, 2010, the second stage of the recovery of human remains and associated items was carried out in the abandoned "Misteriosa" or "Vallarón" mine. The Supra Provincial Criminal Prosecutor of Huancavelica, members of the specialized forensic team of the Institute of Legal Medicine and Forensic Sciences for the judicial districts of Ayacucho and Huancavelica participated in these actions, as well as Zenón Cirilo Osnayo Tunque. On that occasion, three workers with mining experience "installed an electrical system inside the mine (mine lighting)" and "the roof and walls of the mine were shored up at the weakest point, which was approximately ten meters from the entrance to the mine," with the support of Zenón Cirilo Osnayo Tunque. Subsequently, five excavation units identified as D, E, F, G and H were demarcated after the expansion of unit D in November 2009, and human bone fragments, vertebrae in anatomical order, dental pieces, fragments of clothing, footwear, firearm shells, slow explosive fuses and other associated elements were found. Most of the evidence recovered was found in units G and H, the place where Mr. Osnayo Tunque said he saw the remains of his relatives in June 1991. After the recovery of the remains from unit H, "one more meter was excavated vertically and horizontally, but no more evidence of forensic interest was found, thus completing the excavation process at this site." The evidence recovered was taken to the Forensic Investigations Laboratory of Ayacucho. As stated in the report of March 8, 2010, Mr. Osnayo Tunque said he was satisfied with the work carried out, indicating that there is no other evidence beyond the excavated area.[154]

141. Given that the intervention was carried out in March, the forensic archaeologist Luis Alberto Rueda Curimania explained: "[t]he main difficulties we encountered were the constant rock falls which at times put our lives at risk, despite the fact that the walls had been shored up, and the constant seepage of water on the site, which made the ground muddy at the place where the work to recover the remains was being done."[155]

142. On October 12, 2011, a judicial inspection was carried out at the mine, with the participation of the judge of the Fourth Criminal Court, the Supra Provincial Criminal Prosecutor of Lima, Zenón Cirilo Osnayo Tunque, the defense attorney for the civil party and police officers. During this procedure, a landslide took place that revealed the remains of clothing, apparent firearms and bone fragments, which were packaged and sent to the Criminalistics Department of the Peruvian National Police (PNP).[156] In this regard, the State reported that the Specialized Forensic Team (EFE) of the Institute of Legal Medicine and Forensic Sciences of the Public Prosecutor's Office "did not participate, and did not have formal knowledge of this intervention."

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153 *Cf.* Expert Report of January 21, 2010 (evidence file, folios 4331 to 4334).

154 *Cf.* Recovery of human skeletal remains carried out on March 1-8, 2010 (evidence file, folios 190 and 5495 to 5506); Report prepared for the Inter-American Court of Human Rights by the Specialized Forensic Team of the Institute of Legal Medicine and Forensic Sciences of the Public Prosecutor's Office (evidence file, folios 5465 to 5467), and statement of Luis Alberto Rueda Curimania at the public hearing held on January 26, 2015.

155 *Cf.* Statement of Luis Alberto Rueda Curimania in the public hearing held on January 26, 2015.

156 *Cf.* Record of judicial inspection of October 12, 2011 (evidence file, folios 5551 to 5553).

143. Based on the intervention of October 12, 2011, it cannot be ruled out that skeletal remains and evidence may still be found at the site.[157] There is no record of any action taken subsequently.

144. Once the forensic anthropology and odontology analyses were performed of the skeletal remains recovered between March 1 and 8, 2010 in the abandoned "Misteriosa" or "Vallarón" mine (*supra* para. 140), in April and May 2010, the Forensic Investigations Laboratory and the Institute of Legal Medicine of the Public Prosecutor's Office recommended their biomolecular analysis at the genetic level (DNA).[158] The Court notes that the information from the Public Prosecutor's Office on the processing of the recovered remains is disaggregated and contains serious inconsistencies. However, from the evidence it is possible to conclude that on September 30, 2010, six family members were sampled, obtaining the complete genetic profiles of Zenón Cirilo Osnayo Tunque, Zósimo Hilario Quispe, Marino Huamaní Vergara, Abilio Hilario Quispe, Gregorio Hilario Quispe and Víctor Carhuapoma de la Cruz.[159] In addition, samples were taken from the bone remains recovered, obtaining four complete genetic profiles, which were used for comparison with the six samples taken from the family members; however, according to the report of the Public Prosecutor's Office of October 24, 2012, none of them matched.[160] Subsequently, on January 21, 2015, the complete profile of Marcelo Hilario Quispe was also obtained.[161] Finally, although a re-analysis of the samples from the case began on January 22, 2015, there is still uncertainty about their correspondence with the victims in this case,[162] none of whom have been identified.

G. Alleged cover-up mechanisms, lack of due diligence and irregularities in the capture of the absent defendants and the forensic procedures

145. A fundamental part of the facts of this case concerns the allegations of the Commission and the representatives that, from the outset of the alleged forced disappearances, a series of cover-up mechanisms were used, which were clearly deliberate and included, at least: the denial of the detentions; the use of dynamite on several occasions and during the first ten days after the events occurred in the abandoned "Misteriosa" or "Vallarón" mine as a mechanism to destroy the evidence of what happened, to permanently eliminate the remains of the victims and thus avoid revealing their fate; harassment and arrests of villagers who reported the facts, and threats against judicial operators. They also alleged the lack of due diligence and irregularities in the capture of the absent defendants, as well as in the forensic procedures, arguing that the latter situation has prevented the identification of the skeletal remains recovered and their

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157 *Cf.* Expert Report of José Pablo Baraybar do Carmo of January 26, 2015 (merits file, folio 1218), and statement of Zenón Cirilo Osnayo Tunque at the public hearing held on January 26, 2015.

158 A Forensic Investigations Laboratory Expert Report, a Forensic Anthropological Report and an Odontological Expert Report of April and May 2010, recommended "the taking of DNA samples from the next of kin" and "the registration [of their] genetic profile," as well as "the individualized bone elements to be subjected to biomolecular analysis at the genetic (DNA) level." Specifically, the Forensic Anthropological Report indicated that from the analysis performed up to that moment, "in no case is the presumed positive identification probable," as supported by "[t]he use and application of methods and techniques typical of anthropology and forensic odontology" and, therefore, the "biomolecular analysis at the genetic level (DNA)" was suggested. *Cf.* Expert Report of the Forensic Investigations Laboratory No. 018 on procedures carried out on April 18 and 19, 2010 (evidence file, folios 4340 and 4352); Forensic Anthropological Report, Case of the "Misteriosa" or "Vallarón Mine", 2010 (evidence file, folios 4256 to 4307), and Odontological Expert Report on teeth recovered from the "Misteriosa" or "Vallarón" mine, 2010 (evidence file, folios 4308 to 4323).

159 *Cf.* Official letter of the Criminalistics Department of the Institute of Legal Medicine, Public Prosecutor's Office, of March 20, 2014 (evidence file, folios 4624 and 4625); results corresponding to the "Mina Misteriosa" Case, DNA tests, Public Prosecutor's Office of October 24, 2014 (evidence file, folios 5582 to 5596), and Memorandum of May 28, 2013 del Molecular Biology and Genetics Laboratory of the Public Prosecutor's Office (evidence file, folios 5599 and 5600).

160 *Cf.* Results corresponding to the case of Mine Misteriosa, DNA test, Public Prosecutor's Office of October 24, 2012 (evidence file, folios 5582 to 5596).

161 *Cf.* Official letter of the Molecular Biology and Genetics Laboratory of the Institute of Legal Medicine of February 19, 2015 (evidence file, folios 5513 and 5514).

162 *Cf.* Official letter of the Molecular Biology and Genetics Laboratory of the Institute of Legal Medicine of February 19, 2015 (evidence file, folios 5510 and 5515).

delivery to the relatives, who to this day have no certainty as to the fate and final whereabouts of the disappeared victims. The determination of whether these facts have been proven and their possible legal consequences will be made in Chapter IX of this Judgment.

IX
MERITS

146. It has been alleged that the facts proven in this case constitute violations of several rights and obligations enshrined in the American Convention, the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on Forced Disappearance of Persons. Specifically, violations of the following rights have been alleged:

a) Rights to personal liberty, personal integrity, life and recognition of juridical personality, as well as the right to special protection of children and the right to protection of the family;
b) Right to property and to private and family life;
c) Rights to judicial guarantees and judicial protection, to personal liberty and Articles I and III of the Inter-American Convention on Forced Disappearance of Persons, as well as Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, and
d) The right to personal integrity of the next of kin of disappeared persons.

147. These arguments will be addressed in the order specified in the preceding paragraph.

IX.I
RIGHTS TO PERSONAL LIBERTY, PERSONAL INTEGRITY, LIFE AND RECOGNITION OF JURIDICAL PERSONALITY, AS WELL AS THE RIGHT TO SPECIAL PROTECTION OF CHILDREN

148. The ***Commission*** and the ***representatives*** argued that what happened to the fifteen victims in this case should be classified as forced disappearance. The ***State*** based its defense on the legal definition of the facts as extrajudicial executions. In this chapter the Court will consider the arguments of the Commission and the parties, establish the legal classification of the facts of this case, and proceed to examine the alleged violations of the rights to recognition of juridical personality,[163] to life,[164] to personal integrity,[165] to personal liberty,[166] to protection of honor and dignity,[167] to protection of the family[168] and to the rights of the child,[169] in relation to

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[163] Article 3 of the American Convention establishes that: "Every person has the right to recognition as a person before the law."

[164] Article 4(1) of the American Convention establishes that: "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life."

[165] Article 5 of the American Convention establishes, where pertinent, 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."

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

[167] Article 11 of the American Convention establishes 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."

[168] Article 17(1) of the American Convention establishes that: "1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State."

[169] Article 19 of the American Convention establishes that: "Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the State."

the obligations to respect and guarantee rights established in Article 1(1)[170] of the American Convention, to the detriment of fifteen victims in the instant case.

A. Arguments of the Commission and the parties

149. The ***Commission*** presented the following arguments to support the legal definition of the facts as forced disappearance:

a) The facts of this case include the following constituent elements of forced disappearance: i) there was an illegal and arbitrary detention on the part of the State security forces; ii) the victims were taken to an isolated spot a considerable distance from where they where they were detained, precisely for the purpose of covering up and concealing the facts; iii) the authorities refused to cooperate in the judicial investigation; and iv) a few days after the events occurred, military personnel returned to the mine with the intention of erasing all material traces of the crime and preventing any subsequent investigation or clarification.

b) The *modus operandi* used to destroy the evidence in this case coincides with the methods described in the CVR Report, which included the mutilation or incineration of the victims' mortal remains with the aim of eliminating the evidence of forced disappearance.

c) To date, the results of the DNA tests carried out in 2010 have not been delivered to the victims' next of kin, and to this day they do not know exactly, through reliable means that offer certainty, the fate and final whereabouts of the disappeared victims.

d) The facts of this case took place in a context in which the victims of forced disappearance in Peru at that time were generally persons identified by the police authorities, the military forces or paramilitary commandos, as alleged members, collaborators or sympathizers of *Sendero Luminoso* (the Shining Path) or the MRTA.

150. In view of the foregoing, the Commission held that the State violated the rights to personal liberty, personal integrity, life and recognition of juridical personality, recognized in Articles 7, 5, 4(1) and 3 of the American Convention, in relation to the obligations established in Article 1(1) of the same instrument, to the detriment of the fifteen victims in this case, with the aggravating circumstance that seven of the victims were children at the time of the events, in the following terms:

a) There was an illegal and arbitrary detention on the part of the State security forces.

b) At the time of the events, forced disappearances were often preceded by cruel, inhuman or degrading treatment, generally aimed at forcing victims to make self-incriminating confessions, getting them to provide information about subversive groups or instilling fear in the population to deter them from collaborating with these groups. In this specific case, while the fifteen victims were being taken to the "Misteriosa" mine on July 4, 1991, they were beaten and forced to walk for several hours with their hands bound and a rope tied around their necks, and they were not provided with food or water. Consequently, the victims, some of whom were children, were humiliated, tortured and in fear of their lives.

c) Based on all the evidence and the CVR Report, it was reasonable to conclude that members of the "Escorpio" military patrol killed the victims and subsequently dynamited their bodies. In its final arguments, the Commission maintained that in cases of forced

[170] Article 1(1) of the American Convention establishes that: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

disappearance, the death of the victims has always been present since the beginning of the jurisprudence of this Court, in which the violation of the right to life was declared, among other reasons, because such death was presumed, and the existence of more or less evidence of such death did not modify the classification as forced disappearance. It explained that the act as disappearance is characterized precisely by what State agents do after killing the victim - that is, taking measures aimed at erasing any traces of the bodies to prevent their identification or their fate and whereabouts from being established.[171]

d) By its very nature, the forced disappearance of persons seeks the legal annulment of the individual in order to deprive him or her from the protection afforded by the law and justice. In this way, the repressive apparatus guarantees that people can be deprived of their rights with impunity, placing them beyond the reach of any possible judicial protection.

151. The Commission also argued that the community of Santa Bárbara was regarded as a "red zone" by the Army, because it had allegedly detected the presence of subversive groups who were making incursions into mines and nearby villages, and that the detention of Ramón Hilario Morán and Francisco Hilario Torres and their relatives was carried out because they were perceived to be members or relatives of members of subversive groups. In this sense, the forced disappearance of the victims in the case, including the seven children, was intended to punish the two families, as well as to intimidate the rest of the community and the local population in general. Therefore, the State had failed in its obligation to protect the family, recognized in Article 17 of the Convention, to the detriment of the fifteen victims and their next of kin, as well as its obligations to provide the seven missing children with the necessary guarantees and protection derived from their special condition of vulnerability, established in Article 19 of the Convention.[172] In addition, it noted that, according to the proven facts, the child P.C.M., an alleged deserter from *Sendero Luminoso*, acted as a guide for Operation "Apolonia" despite the prohibition of the recruitment of children into the armed forces or other armed groups and their use in hostilities, in contravention of the international *corpus juris* on the protection of the rights of children and adolescents.

152. The ***representatives*** substantially agreed with the Commission's arguments and, in addition, asked the Court to determine the State's aggravated responsibility in two aspects: i) because all the violations committed in this case occurred in the context of a military strategy created and executed by the State and ii) due to the serious lack of protection provided to children. They also alleged that the State is responsible for a breach of the duty to provide guarantees owing to the lack of an effective investigation of the facts to the detriment of the disappeared victims, given the State's interference "aimed at preventing a serious and effective investigation of the forced disappearance of the victims."

153. The representatives alleged that, in this case, the military made no distinction in their treatment of the child victims, flagrantly violating the duty of special protection owed to them. Likewise, the facts of the case were part of a generalized context of violence against children, both nationally and in the region of Huancavelica. They also pointed out that the State concealed the fact that the victims were minors in official documents, that is, their death certificates showed false ages. Consequently, they asked the Court to declare the State responsible for the violation of the obligation to adopt special protection measures for children in the context of the internal

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[171] In this regard, the Inter-American Commission referred in detail to the cases of *Rodríguez Vera et al. (Palace of Justice) v. Colombia*, *Durand and Ugarte v. Peru, 19 Merchants v. Colombia, Mapiripán Massacre v. Colombia and Ibsen Cárdenas and Ibsen Peña v. Bolivia*.

[172] The Commission referred to various provisions of the Convention on the Rights of the Child, Article 3 common to the Geneva Conventions, Article 13 of the Additional Protocol II to these and to resolutions of the United Nations Security Council that would be applicable to the situation of the child victims in the present case.

armed conflict in Peru,[173] in breach of Article 19 of the Convention, to the detriment of the seven forcibly disappeared children, and that it declare that the State incurred in aggravated responsibility, given the existing context of human rights violations against children.

154. Finally, the representatives agreed with the Commission's arguments regarding the violation of the right to protection of the family, established in Article 17 of the Convention. They also added that the State violated the right to private and family life contained in Article 11 of the Convention, since it prevented the victims - permanently and irreversibly- from establishing relationships with their family group and with the persons who form part of it. Finally, they alleged non-compliance with the duty to guarantee due to the lack of a proper investigation of the facts to the detriment of the disappeared victims, and the State's interference "aimed at preventing a serious and effective investigation."

155. The ***State*** legally classified the facts of this case as extrajudicial executions, acknowledged the violations of Articles 4, 5, 7 and 19 of the American Convention, but disputed the possible violation of Article 3 thereof, arguing that it is not a case of forced disappearances. It also argued that it is not acceptable for the Commission to attempt to apply Additional Protocol II of the Geneva Conventions of 1977 immediately and opposed the representatives' demand that the State be declared to have "aggravated responsibility." On the other hand, the State pointed out that the right to protection of the family has not been the subject of debate in the domestic courts, and that although there is a final conviction of one person, it could not be concluded from the process followed in the domestic courts that there was a deliberate act on the part of the State to affect entire family groups.

156. Furthermore, at the public hearing and in its final written arguments, the State requested the application of the principle of subsidiarity and complementarity of the inter-American system in the instant case. It argued that in the case of *Zulema Tarazona et al. v. Peru* the application of this principle meant that the Court did not rule on the merits of the dispute, but rather came closer to "a preliminary ruling on the Court's jurisdiction to hear a case." It also recalled that, in the case *J. v. Peru,* the Court indicated that the legal classification of the facts was a matter for the State. According to Peru, the events that occurred in the community of Santa Bárbara on July 4, 1991, which are the same facts submitted to the consideration of the Court, were the subject of an investigation, trial, punishment and determination of reparations by the domestic courts through the judgment issued by the National Criminal Chamber on February 9, 2012, and the *ejecutoría suprema* of May 29, 2013, which constituted a final judgement with the character of *res judicata* and of a binding nature. It argued that the competent national organs for the administration of justice are the ones called upon to legally classify such acts and, in the present case, that is precisely what the national courts did, since neither the Commission nor the representatives questioned the legal classification established by the national jurisdictional bodies after the case was reopened in 2005. Accordingly, it held that it is not appropriate for the Court to determine and declare the international responsibility of the State for the violation of the rights contained in Articles 4, 5, 7 and 19 of the Convention, based on an unrestricted respect for the principle of subsidiarity or complementarity in the inter-American system.

B. Considerations of the Court

157. In the instant case, the events that took place in the peasant community of Santa Bárbara on July 4, 1991, which have been established and are not in dispute, were investigated, prosecuted and punished by the State through the judgment of February 9, 2012, of the National Criminal Chamber of Lima's Superior Court of Justice and the final judgment of May 29, 2013 of

[173] The representatives alleged that in the present case Articles 1 and 38 of the Convention on the Rights of the Child, the Geneva Conventions and the II Additional Protocol to these should serve to define the content and scope of the protection required under Article 19 of the ACHR.

the Transitional Criminal Chamber of the Supreme Court of Justice of Peru (*supra* paras. 131 and 132). The judgment of February 9, 2012, gave a detailed account of the legally proven facts and concluded that the fifteen victims "were murdered" inside the "Misteriosa" or "Vallarón" mine, that "almost immediately the mine where the victims had been killed was blown up with one or two dynamite charges in order to eliminate the evidence," that "the dynamite explosion destroyed most of the victims' bodies," and that "in the judicial inspection process […] only human remains were found."[174] The Court appreciates the efforts of the State in issuing these domestic judgments and considers that they are important landmarks in the State's actions.

158. On the other hand, the dispute between the parties continues regarding the events that occurred after July 4, 1991, as well as on whether the alleged forced disappearance of the fifteen victims actually took place and whether it is attributable to the State. In this regard, the State's defense is based mainly on the fact that there are clear elements to determine that what happened to the victims was an extrajudicial execution and requested that the principle of subsidiarity and complementarity be applied in the instant case, since a final domestic judicial decision has been issued which is *res judicata* and binding.

159. The Court recalls the principle of subsidiarity or complementarity that permeates the inter-American system of human rights which, as stated in the Preamble to the American Convention, "reinforce[es] or complement[s] the protection provided by the domestic law of the American States." Thus, the State "is the principal guarantor of human rights and, consequently, if a violation of said rights occurs, the State must resolve the issue in the domestic system and, if applicable, redress the victim before resorting to international forums such as the inter-American system of protection of human rights; since it derives from the ancillary nature of the international system in relation to domestic systems for the protection of human rights."[175] The subsidiary nature of the international jurisdiction means that the system of protection established by the American Convention on Human Rights is not a substitute for the national jurisdictions, but rather it complements them.

160. In this regard, the Court applied the principle of subsidiarity or complementarity in the case of *Tarazona Arrieta et al.* after making a substantive analysis of the investigations carried out in this case and concluding that these were effective.[176] Likewise, in the *Case of J.* it applied this principle by stating that it was up to the State, within the context of its obligation to investigate,[177] to determine the specific legal classification of the alleged mistreatment suffered by Ms. J, but it did so because it had already conducted a substantive analysis of the facts in which it determined that they constituted a violation of Article 5(2) of the Convention and that Peru had not conducted any investigation in this regard.[178] In short, in both cases, it was not a preliminary ruling on the Court's jurisdiction to hear a case, but rather a conclusion reached by this Court once it had conducted an analysis of the merits in those cases. In the instant case, based on the arguments presented by the parties and the Commission, and taking into account the aspects that remain in dispute, the Court does not find elements to depart from the precedents indicated. Therefore, it will analyze the merits of this case and, subsequently, will consider whether it is appropriate to apply the principle of subsidiarity or complementarity to it.

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174 *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folios 4512 and 4513).

175 *Case of Acevedo Jaramillo et al. v. Peru. Interpretation of Judgment. Preliminary objections, merits, reparations and costs*. Judgment of November 24, 2006. Series C No. 157, para. 66, and *Case of Tarazona Arrieta et al. v. Peru, supra,* para. 137.

176 *Cf. Tarazona Arrieta et al. v. Peru, supra,* paras. 135 to 141. The Court found that "[…] evidence in the record shows that agencies responsible for the administration of criminal justice in Peru effectively investigated, tried and convicted the accused and provided reparations to the next of kin of Zulema Tarazona Arrieta and Norma Pérez Chávez, as well as Luis Bejarano Laura."

177 *Cf. Case of J. v. Peru. Interpretation of the Judgment. Preliminary objection, merits, reparations and costs*. Judgment of November 20, 2014. Series C No. 291**,** para. 20.

178 *Cf. Case of J. v. Peru, supra,* paras. 353 and 366.

161. The Court recalls that the forced disappearance of persons is a human rights violation consisting of three concurring elements: a) deprivation of liberty, b) the direct intervention of State agents or their acquiescence, and c) the refusal to acknowledge the detention and reveal the fate or whereabouts of the persons concerned.[179] In its case law, this Court has established the pluri-offensive nature of forced disappearance, as well as its permanent or continuous nature, whereby the disappearance and its execution begin with the deprivation of the person's liberty and the subsequent lack of information about his or her fate, and continue until such time as the whereabouts of the disappeared person are known or his or her remains are found, so as to determine with certainty his or her identity.[180] As long as the disappearance continues, States have the correlative duty to investigate it and, eventually, to punish those responsible, in accordance with their obligations under the American Convention and, in particular, under the Inter-American Convention on Forced Disappearance of Persons (ICFDP).[181]

162. In the instant case, there is no dispute that fourteen victims were taken from their homes and deprived of their liberty on July 4, 1991, and that on the same day one more victim was also deprived of his liberty on the road to Rodeo Pampa. The fifteen victims remained deprived of their liberty and under State custody while they were taken to the abandoned mine called "Misteriosa" or "Vallarón," an isolated place, away from the road and at a considerable distance from their homes. Thus, the Court must now address the aspects that are still disputed by the parties regarding the events that occurred after July 4, 1991, and determine whether the fifteen victims in this case were subjected to extrajudicial execution or forced disappearance.

163. According to the definition contained in the Inter-American Convention on Forced Disappearance of Persons (ICFDP)[182] and the jurisprudence of this Court, "one of the characteristics of forced disappearance, unlike extrajudicial execution, is the State's refusal to acknowledge that the victim is under its control and to provide information in this regard, for the purpose of creating uncertainty as to his or her whereabouts, life or death, and to cause intimidation and suppression of rights."[183] This Court has recognized that forced disappearance has frequently included the execution of detainees, in secret and without trial, followed by the concealment of the body to erase the material traces of the crime and to ensure the impunity of those who committed it.[184] In this sense, the Court has heard cases in which the existence of more or less evidence of the death of the victims did not alter its classification as an enforced disappearance.[185]

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179 *Cf. Case of Gómez Palomino v. Peru. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 136, para. 97, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra*, para. 226.

180 *Cf. inter alia*, *Case of Velásquez Rodríguez v. Honduras. Merits, supra*, paras. 155 to 157, and *Case of Osorio Rivera and Family Members v. Peru, supra*, para. 31.

181 *Cf. Case of Radilla Pacheco v. Mexico, supra*, para. 145, and *Case of Osorio Rivera and Family Members v. Peru, supra,* para. 115.

182 Article II of the Inter-American Convention on Forced Disappearance of Persons states that: "forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

183 *Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009, para. 91, and *Case of Osorio Rivera and Family Members, supra*, para. 156.

184 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 157, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia,* Preliminary objections, merits, reparations and costs. Judgment of November 14, 2014. Series C No. 287, para. 323.

185 In this sense see, *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala. Merits, reparations and costs*. Judgment of November 20, 2012. Series C No. 253, paras. 199, 206 and 214, and *Case of the Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of September 4, 2012. Series C No. 250, paras. 123 and 125.

164. Specifically, based on an analysis of the cases of *Rodríguez Vera et al. (Disappeared of the Palace of Justice),*[186] *Ibsen Cárdenas and Ibsen Peña,*[187] *La Cantuta,*[188]*Gómez Palomino,*[189] *19 Merchants,*[190] *Bámaca Velásquez*[191] and *Castillo Páez,*[192] the element that characterized the act as a forced disappearance was precisely the actions taken by the State agents after killing the victims: that is, measures aimed at hiding what had really happened or erasing all traces of the bodies to prevent their identification or to prevent their fate and whereabouts from being established.[193]

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[186] The Court considered that Carlos Horacio Urán was executed while in the custody of State agents, that his body was undressed and washed, probably to hide what had really happened, and that the forced disappearance ceased when his remains were identified. *Cf. Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra*, paras. 367 to 369.

[187] The Court declared the forced disappearance of Rainer Ibsen Cárdenas, who was detained and later taken to the Achocalla detention center, in the city of La Paz. He was deprived of his liberty for approximately nine months, after which he was killed as a result of several shots to the skull, all while in the custody of the State. The forced disappearance ceased when his remains were identified in 2008. The Court reached this conclusion notwithstanding the existence of evidence proving the death of Mr. Rainer Ibsen Cárdenas; however, the Court considered of special relevance "the existence of various irregularities of origin that prevented [it] from reaching the conviction that the remains of Rainer Ibsen Cárdenas were found in 1983, as alleged by the State." *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, reparations and costs*. Judgment of September 1, 2010. Series C No. 217, paras. 80 and 81, 84 to 88, 92 and 94.

[188] The Court considered that with respect to the victims of forced disappearance, "the discovery of other human remains and the recognition of objects belonging to some of the detained persons found in [...] clandestine graves would suggest that Armando Amaro Cóndor, Juan Gabriel Mariños Figueroa, Robert Teodoro Espinoza and Heráclides Pablo Meza were also killed. Without prejudice to the foregoing, the Court considered that, until the whereabouts of these persons had been determined, or their remains had been duly located and identified, the appropriate legal treatment for the situation of these four persons [was] that of forced disappearance of persons, as in the cases of Dora Oyague Fierro, Marcelino Rosales Cárdenas, Felipe Flores Chipana and Hugo Muñoz Sánchez". *Cf. Case of La Cantuta v. Peru. Merits, reparations and costs*. Judgment of November 29, 2006. Series C No. 162, paras. 114 and 116.

[189] The Court declared the forced disappearance of Santiago Fortunato Gómez Palomino. In this regard, it considered as proven that in the course of the investigation by the Specialized Provincial Prosecutor's Office of Lima, a statement was obtained from a person who availed himself of the law of effective collaboration, "who declared that he had witnessed the manner in which the disappearance and execution of Santiago Gómez Palomino took place and indicated the place where his remains were buried at La Chira beach." *Cf. Case of Gómez Palomino v. Peru, supra*, paras. 54.14 and 54.15.

[190] The Court concluded that members of a "paramilitary" or criminal group that operated with the support and collaboration of members of law enforcement bodies detained and murdered the 19 tradesmen, dismembered their bodies and threw them into the waters of a stream, so that they would disappear and not be found or identified, which is what happened. The Court declared the forced disappearance of the victims more than sixteen years after the facts had occurred, without their remains having been found or identified. *Cf. Case of 19 Merchants v. Colombia. Merits, reparations and costs*. Judgment of July 5, 2004. Series C No. 109, paras. 138 and 155.

[191] The Court found that Efraín Bámaca Velásquez was captured and detained by the Army, constituting a case of forced disappearance. It considered that, "the circumstances in which the detention by State agents of Bámaca Velásquez occurred, the victim's condition as a guerrilla commander, the State practice of forced disappearances and extrajudicial executions" and "the passage of eight years and eight months since he was captured, without any more news of him, cause the Court to presume that Bámaca Velásquez was executed." The Court also noted that several judicial remedies were attempted in this case to identify the whereabouts of Bámaca Velásquez. "Not only were these remedies ineffective but, furthermore, high-level State agents exercised direct actions against them in order to prevent them from having positive results. These obstructions were particularly evident with regard to the many exhumation procedures that were attempted; to date, these have not made it possible to identify the remains of Efraín Bámaca Velásquez." *Cf. Case of Bámaca Velásquez v. Guatemala. Merits. Judgment* of November 25, 2000. Series C No. 70, paras. 170, 173 and 200**.**

[192] The Court concluded that Ernesto Rafael Castillo Páez was detained and forcibly disappeared by members of the National Police of Peru. It considered that, "it may be concluded that the victim was deprived of his life, given the time that has elapsed since October 21, 1990." In the proceedings before the inter-American system, the family members of the disappeared victim testified that, according to unofficial information, Mr. Castillo Páez had been killed "and that his remains had been taken to a beach south of Lima and exploded." During the public hearing on the merits of the case held before the Court on February 6 and 7, 1997, it was stated that "Commandant Juan Carlos Mejía León was the officer responsible for Mr. Castillo Páez's death" and was the one who reported that "his remains were taken to a beach south of Lima and exploded." *Cf. Case of Castillo Páez v. Peru. Merits. Judgment* of November 3, 1997. Series C No. 34, paras. 30 a) and e), and 71.

[193] In this regard, the United Nations Working Group on Enforced and Involuntary Disappearances has stated that "a detention followed by an extrajudicial execution constitutes an enforced disappearance in the real sense, provided that such detention or deprivation of liberty was carried out by government agents, of any sector or at any level, or by organized or private groups acting on behalf of or with the direct or indirect support, consent or acquiescence of the Government and who, subsequent to the arrest, or even after the execution has been carried out, refuse to disclose the fate or whereabouts of such persons or to acknowledge that the act was committed at all." Enforced or Involuntary

165. Thus, as noted previously, the acts that constitute forced disappearance are permanent in nature for as long as the victim's whereabouts are unknown or his remains are not found. However - particularly in relation to the latter aspect- the Court has reiterated that it is not merely a matter of finding the remains of a certain person but that this, logically, must be accompanied by tests or analyses that make it possible to prove that, in fact, those remains correspond to that person. Therefore, in cases of presumed forced disappearance in which there are indications that the alleged victim has died, the determination of whether a forced disappearance existed and has ceased, and when the remains have been located, necessarily involves establishing, in the most reliable manner, the identity of the individual to whom the remains belong. In this regard, the relevant authorities must proceed to the prompt exhumation of the mortal remains so that these may be examined by a competent professional.[194] Such exhumation must be carried out in a manner that protects the integrity of the remains in order to establish, to the extent possible, the identity of the deceased person, the date of death, the manner and cause of death, and the existence of possible injuries or signs of torture.[195] Until the remains are duly located and identified, the forced disappearance continues to be executed.[196]

166. The Court recalls that a forced disappearance is constituted by multiple violations of several rights, owing to the multiple acts which, combined towards a single purpose, violate permanently, while they subsist, rights protected by the Convention.[197] Thus, the legal analysis of a possible forced disappearance must be consistent with the complex violation of human rights that it entails, and should not focus in an isolated, divided and fragmented manner only on the detention, or the possible torture, or the risk of loss of life.[198] In that regard, its analysis must encompass the totality of the facts submitted to the consideration of the Court. Only in this way is the legal analysis of the forced disappearance consistent with the complex violation of human rights involved.[199] Given the multiple and complex nature of forced disappearance, the Court will analyze in the following order the elements that, taken together, serve to determine whether in this case the victims were forcibly disappeared: a) the refusal of the military authorities to acknowledge the detention of the victims in the first days after the events occurred; b) the *modus operandi* used to destroy evidence during the first days after the events; c) uncertainty regarding the evidence collected on July 18, 1991; d) the registration of death certificates in 1991 and 1992 with false ages, and e) procedures related to the search, recovery, analysis and eventual identification of human remains.

a) The refusal of the military authorities to acknowledge the detention of the victims in the first days after the events occurred

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Disappearances, Information Leaflet No. 6/REV.3, Office of the United Nations High Commissioner for Human Rights, 2009, p. 14, and Report of the Working Group on Enforced and Involuntary Disappearances, *General Comment on the definition of enforced disappearances,* A/HRC/7/2, January 10, 2008, p. 14, para. 10. The foregoing, "even though [the detention] is of short duration." Report of the Working Group on Enforced and Involuntary Disappearance, A/HRC/7/2, January 10, 2008, p. 95, para. 427.

194 *Cf. Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra***,** para. 82, and *Case Gudiel Álvarez and other ("Diario Militar") v. Guatemala, supra*, para. 207.

195 *Cf. Case of La Cantuta v. Peru, supra,* para. 114, and *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, *supra*, para. 82. In this regard see the "Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions", recommended by the United Nations Economic and Social Council in Resolution 1989/65 of May 24, 1989. See also, the "Model Protocol for Disinterment and Analysis of Skeletal Remains" of the Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, U.N. Doc. ST/CSDHA/12 (1991).

196 *Cf. Case of La Cantuta v. Peru***,** *supra*, para. 114, and *Case Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra*, para. 207.

197 *Cf. Case of Radilla Pacheco v. Mexico. Preliminary objections, merits, reparations and costs.* Judgment of November 23, 2009. Series C No. 209, para. 138, and *Case of García and Family Members v. Guatemala, supra*, para. 99.

198 *Cf. Case of Heliodoro Portugal v. Panama. Preliminary objections, merits, reparations and costs.* Judgment of August 12, 2008. Series C No. 186, para. 112, and *Case of García and Family Members v. Guatemala, supra,* para. 99.

199 *Cf. Case of Heliodoro Portugal v. Panama, supra*, para. 112, and *Case of Osorio Rivera and Family Members v. Peru, supra*, para. 116.

167. It is a proven fact that, in the context of the investigations conducted by the Special Provincial Prosecutor for Crime Prevention of Huancavelica, on July 11, 1991, military authorities denied the detention of the fourteen villagers of the community of Santa Bárbara (*supra* para. 95). In this regard, the judgment of the National Criminal Chamber of Lima's Superior Court of Justice of February 9, 2012, considered it proven that, "after the murder of the injured parties, the ['Escorpio' army] patrol returned to the Lircay Military Base, issuing a false report on the circumstances of the deaths" and indicating that "the entire plan had been carried out without incident [,] thereby concealing the killing of the villagers of Rodeo Pampa."[200] This suggests that the military authorities concealed information on what happened to the victims, which, if true, is consistent with the denial of information that forms part of a forced disappearance.

b) The modus operandi *used to destroy evidence during the first days after the events*

168. It is a proven fact that, on July 4, 1991, and after the victims had been shot with FAL submachine guns, their remains were dynamited, causing them to fragment into pieces. Subsequently, on July 8, 1991, during the search for the victims, three of their family members discovered the remains of human bodies in the mine and some of them were able to recognize the bodies of at least five of their relatives as well as some of their belongings. On the other hand, on July 11, that is, three days later, another relative of the victims only recognized the corpse of a family member among half-buried human bodies. Finally, in the search carried out on July 18, only various human body parts and organs were found scattered around the place, and on that occasion it was not possible to recognize any of the bodies or belongings of the victims. In other words, between July 4, 8, 11 and July 18, 1991, the human remains that were presumably left in the mine gradually became unrecognizable, since on all those occasions dynamite cartridges and pieces of fuse were observed (*supra* paras. 93, 94 and 101).

169. In this regard, in its judgment of February 9, 2012, the National Criminal Chamber of the Superior Court of Justice of Lima established as a proven fact that four soldiers were ordered "to return to erase the evidence of the crime, and that they accepted, returning by truck to the Misteriosa mine, just two days after the events occurred– on July 6, 1991."[201] The National Criminal Chamber did not determine what happened after that. The internal statements given by a defendant and two witnesses indicate that although four people set off for the mine, they did not arrive there and did not comply with the order.[202] In turn, another witness stated in his testimony that, "one week later," the Lieutenant in command of the "Escorpio" patrol ordered them to "return to the mine to move the bodies […]. This mission was entrusted to a group of 8 or 10 soldiers dressed as civilians." He explained that "[t]he entrance to the mine was blocked with stones, which [they] removed to extract the limbs of the dismembered human bodies, and placed them in backpacks, which were not very large." He stated that he *carried a leg inside these*, and being unable to collect the other human body parts, they proceeded to blow them up with dynamite, which presumably belonged to the base. An hour later, they placed the human body parts in sacks, sinking them in the river with stones that they put inside [the backpacks], and once they had finished this action, they returned to the base."[203]

170. The above elements allow the Court to conclude that, during the first fourteen days after the events occurred, State agents tampered with and dynamited, on several occasions, the site where the remains of the victims were allegedly found, with the clear intention of permanently eliminating the evidence and erasing all material traces of the crime. In the cases of *Anzualdo*

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200 *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folios 4512 and 4541).
201 *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folio 4513).
202 *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folios 4392, 4396 and 4434).
203 *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folios 4413 and 4414).

Castro,[204] *Gómez Palomino*[205] and *La Cantuta,*[206] all against Peru and all involving the forced disappearance of victims, the Court took into account that, in accordance with the CVR's Final Report, the methods used to destroy evidence of the crimes committed during the Peruvian armed conflict included, *inter alia*, the mutilation, incineration, abandonment or burial of the mortal remains of victims in inaccessible or isolated areas, as well as the scattering of remains in different places.[207] Thus, the Court notes that the aforementioned *modus operandi* coincides with the one used in the present case, which, for the purpose of determining what happened to the victims, constitutes an indication of their possible forced disappearance.

c) Uncertainty regarding the evidence collected on July 18, 1991

171. The search and recovery of remains was carried out on July 18, 1991, and on the following day they were identified as 19 pieces of probable human remains. Although these remains were sent to the Medical Examiner, there is no evidence of any subsequent steps taken to identify to whom they belonged. That same day, dynamite cartridges, pieces of fuse and other remains were also found and were sent to the Departmental Headquarters of the Cercado Technical Police for investigation. There is no evidence of any subsequent procedure in this regard. Moreover, being in State custody, it is still unknown what has happened to the evidence collected, as reported by the State (*supra* para. 101).

172. Given the military authorities' refusal to acknowledge the detention of the victims during the first days after the events and the *modus operandi* used to destroy the evidence, the Court considers that the current uncertainty about the fate of the human remains and evidence found in 1991 is not an isolated fact; on the contrary, if this actually occurred, it contributed to the refusal by the State authorities to provide information and reveal the fate or whereabouts of the victims, which constitutes an additional indication of what happened to them.

d) Registration of death certificates in 1991 and 1992

173. It is a proven fact that in December 1991, the death certificates of two victims in this case were registered, with the date of death given as July 4, 1991. These certificates also showed that the deaths were accredited with a medical certificate, which clearly did not occur. In March 1992, the death certificates of another twelve victims in this case were registered, which also stated the date of death as July 4, 1991. These records were made by order of the judge of the Sixth Permanent Military Tribunal of Ayacucho and the six children were reported to be over 18 years old (*supra* para. 107). In this regard, the judgment of February 9, 2012, issued by the National Criminal Chamber of the Superior Court of Justice of Lima, considered that "an attempt was made to conceal the real ages of the victims, for which the military jurisdiction ordered the registration of the death certificates with ages ranging from 19 to 42 years, ages that would allow them to claim that the deaths were the result of an armed confrontation with subversive elements."[208]

174. The irregularities in the manner in which the death certificates were registered in December 1991, together with the details included therein, in the context of the investigation and military criminal proceedings, constituted an additional element that created uncertainty regarding the fate of the fifteen victims in the case.

e) Search, recovery and eventual identification of the human skeletal remains recovered

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204 *Cf. Case of Anzualdo Castro v. Peru*, *supra*, para. 83.
205 *Cf. Case of Gómez Palomino v. Peru*, *supra*, para. 54.2.
206 *Cf. Case of La Cantuta v. Peru*, *supra*, para. 80.8.
207 *Cf. Final Report of the CVR of Peru*, Volume VI, Chapter 1(2), pages 71, 72 and 114.
208 *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folio 4541).

175. The State's witness, Luis Alberto Rueda Curimania, explained that the stages of an internationally regulated forensic anthropological investigation consist of: "a first stage, which is the preliminary forensic investigation; a second stage, which involves the recovery of human remains and associated elements, also called exhumation; and the third stage is the analysis of the recovered remains for the purposes of identification and determination of the cause and manner of death."[209] As indicated in the following paragraphs, these stages present particularly serious omissions and deficiencies that have persisted until the present day.

176. First of all, after the procedure of July 18, 1991, and even while in State custody, it is not known what happened to the remains recovered and the evidence collected on that occasion. On this point, during the public hearing before this Court, the State was asked to present, as helpful evidence, updated information on the actions taken to locate the remains found in the mine in July 1991. In response, Peru indicated that the Specialized Forensic Team (EFE) of the Institute of Legal Medicine and Forensic Sciences of the Public Prosecutor's Office "did not provide information concerning the procedure of July 18, 1991." For the Court, it is especially significant that, for more than 23 years, the State has not made any effort to locate the remains and that, despite having been requested by this Court, said information has not been provided (*supra* paras. 101 and 171).

177. Second, during the first 18 years after the events occurred, there was an absolute omission on the part of the State to carry out any investigative activity to search for, recover and eventually identify the fifteen victims of this case. During that period, there is no record to indicate that the mine site was guarded in order to prevent tampering by third parties. From the evidence presented in this case, it is clear that it was not until 2009 that the "Misteriosa" or "Vallarón" mine was again investigated (supra paras. 137-139). In addition, after interviews were conducted with witnesses and family members, as well as surveys (instrument –*ante mortem* data sheet), on April 18 and 19, 2010, a summary of the *ante mortem* data sheets was prepared.[210] On September 30, 2010, six family members were "sampled", obtaining their complete genetic profiles and, subsequently, on January 21, 2015, the complete profile of one more family member was obtained (*supra* para. 144). There is no record of any efforts to locate and obtain additional information from other relatives.

178. Third, although the evidence is not clear on the number of procedures carried out in the search and recovery of human skeletal remains in the mine between 2009 and 2011, it is clear that the recommendations made by the experts regarding the intervention of the site were not followed. In fact, despite the recommendation that the forensic archaeological intervention should be carried out between April and October to avoid the rainy season, this was carried out from November 16 to 18, 2009 and from March 1 to 8, 2010. Nor is it possible to determine whether the recommendations regarding the safety measures to be taken at the site, based on the expert report of January 21, 2010, were complied with. Consequently, the procedures carried out from March 1 to 8, 2010, had to contend with constant water seepage at the site which muddied the ground as well as constant rock falls (*supra* paras. 138 to 141).

179. Fourth, while in State custody, there is no record regarding the processing and whereabouts of the evidence collected on November 16 to 18, 2009 and on October 12, 2011, which was taken to the Forensic Investigations Laboratory of Ayacucho and packed in order to be sent to the Criminalistics Department of the PNP. Nor is it possible to verify whether the new evidence found at the site was investigated (*supra* paras. 138, 142 and 143).

180. Fifth, prior to the excavation and exhumation of skeletal remains in 2009 and 2010, it is clear that there was no adequate record of the location and determined area of the grave site or

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209 Statement of Luis Alberto Rueda Curimania at the public hearing held on January 26, 2015.

210 *Cf.* Expert Report No. 018 on procedures of April 18 and 19, 2010 (evidence file, folios 4340 and 4352).

classification of the remains according to age, characteristics and state of preservation,[211] so as to identify the probable depth and area where evidence was located in the grave. In this regard, the forensic archaeologist Luis Alberto Rueda Curimania explained that, in the intervention of March 2010, "we excavated from the beginning of the mine shaft towards the place indicated by the family member [Zenón Cirilo Osnayo Tunque], where there are around 5 cubic meters in an area of 3 x 2, and that is what we investigated and we advanced a little further to see that there was no more evidence left." He explained that the intervention was carried out taking into account the spot where this relative indicated that he "saw the bodies piled up" in 1991 and that upon leaving the place he "heard three explosions."[212] For the Court, the absence of a record on the state of the mass grave and of a plan suitable for the conditions at the site meant that, after the interventions of November 2009 and March 2010, in October 2011, when a landslide occurred, new evidence was found. Thus, it cannot be ruled out that skeletal remains may still be found at the site (*supra* paras. 142 and 143).

181. Sixth, the Court confirmed that in April and May 2010, it was recommended that biomolecular analyses at the genetic level (DNA) be carried out of the skeletal remains recovered in the abandoned "Misteriosa" or "Vallarón" mine between March 1 and 8, 2010. However, the information from the Public Prosecutor's Office on their processing between 2010 and 2015 is disaggregated and contains serious inconsistencies. Indeed, the information regarding the calculation of the minimum number of individuals "MNI" varies from 8, 13 and 15 probable individuals, according to three reports made in May 2010, October 2012 and February 2015.[213] For the Court, a timely and adequate estimate of the minimum number of individuals in the analysis of the recovered remains is an important aspect in cases such as this, in which it is highly probable that the remains are intermingled. On the other hand, the information on the results of the DNA laboratory tests indicates that four complete genetic profiles were obtained from the recovered remains, which were used to compare with the samples of six family members; however, none of them matched. Regarding the number of incomplete genetic profiles obtained from the skeletal remains, the information ranges from nine profiles to eleven profiles, according to two reports made in October 2012 and February 2015. It should be noted that on March 20, 2014, it was reported that the reprocessing of the nine skeletal remains that resulted with incomplete profiles would be regularized, even though there were "few possibilities of identifying the human skeletal remains." On February 19, 2015, it was reported that on January 22, 2015, samples from this case had been re-analyzed, and "it was possible to "obtain 3 more complete genetic profiles that probably belonged to the same family group."[214]

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[211] See *Manual de Investigación eficaz ante el hallazgo de fosas con restos humanos en el Perú* Office of the Ombudsman and Peruvian Forensic Anthropology Team-Epaf. Lima, Peru. May 2002. http://www.derechos.org/nizkor/peru/libros/fosas/index.html

[212] Statement of Luis Alberto Rueda Curimania in the public hearing held on January 26, 2015.

[213] In a first Forensic Anthropological Report of the Ayacucho Forensic Investigations Laboratory of the Institute of Legal Medicine of the Public Prosecutor's Office, prepared from May 3 to 10, 2010, it was indicated that a minimum number of eight bone fragments (individuals) from the mine were identified. On the other hand, in a report of the Public Prosecutor's Office on the results of the DNA laboratory tests, dated October 24, 2012, it is stated that by that date all 13 skeletal remains had been processed. On the other hand, in a Report of the Laboratory of Molecular Biology and Genetics of the Institute of Legal Medicine of the Public Prosecutor's Office dated February 19, 2015, it appears that from September 20 to 24, 2010, 16 bone fragments were sampled, and that 8 bone samples had already been individualized and 8 bone samples had not been individualized. In addition, it was found that 2 of them shared the same profile, therefore, it would probably be a total universe of 15 individuals. *Cf.* Forensic Anthropological Report, f "Misteriosa" or "Vallarón" Mine Case, July 23, 2010 (evidence file, folios 4256 to 4307); Odontological Expert Report on the teeth recovered from the "Misteriosa" or "Vallarón" mine on July 23, 2010 (evidence file, folios 4308 to 4323); Results corresponding to the Misteriosa Mine Case, DNA test, Public Prosecutor's Office, October 24, 2012 (evidence file, folio 5582 to 5595), and Official letter del Molecular Biology and Genetics Laboratory of the Institute of Legal Medicine of February 19, 2015 (evidence file, folios 5510 to 5516). See also, statement of the expert witness José Pablo Baraybar do Carmo at the public hearing held on January 26, 2015. Report of the expert witness José Pablo Baraybar do Carmo of January 26, 2015 (merits file, folio 1239).

[214] The report of the Laboratory of the Public Prosecutor's Office, dated October 24, 2012, on the DNA test results indicated that by that date four complete genetic profiles and nine incomplete genetic profiles had been obtained. The complete profiles were used for comparison with the samples from family members; however, none of them matched. This information was reiterated by units of the Public Prosecutor's Office on May 28, 2013, and March 20, 2014. On the

182. In conclusion, although the reports from the Public Prosecutor's Office of April and May 2010 recommended biomolecular analyses at the genetic level (DNA), more than five years after the scientific recommendation was made, there is still no certainty about the methodological and scientific rigor of the analyses performed on the skeletal remains recovered from the mine and no concrete results about their possible identification.

183. Consequently, the Court concludes that the forensic investigation in the search, recovery, analysis and eventual identification of remains has been characterized by a clear lack of thoroughness and due diligence - a particularly serious situation, which began in July 1991, continued during the first 18 years after the events occurred, and persisted after 2009 and up to the present date. Therefore, there is still a lack of conclusive proof of the whereabouts of the victims and uncertainty as to whether the remains found - and those that may still be in the mine- are those of the victims in this case. In its defense on these specific aspects of the case, the State has invoked its own negligence, since the investigations by the Public Prosecutor's Office have not been conducted properly. All this is an additional indication of what happened to the victims in this case.

C. Determination of the occurrence of the alleged forced disappearances and their continuation over time in the present case

184. The Court has determined that the fifteen victims in this case were deprived of their liberty by State agents and were in the State's custody while they were taken to the abandoned mine called "Misteriosa" or "Vallarón." There, they were taken into the mineshaft and shot with rifles by military personnel and almost immediately their bodies were immolated by detonating dynamite charges, causing them to fragment into pieces. Based on the subsequent actions of the authorities and the State agents, the Court concludes that these acts were intended to eliminate evidence of the crime and conceal what had really happened or to erase all traces of the bodies to prevent their fate and whereabouts from being established. Therefore, there was a refusal by the State to acknowledge the detention and to provide information on the fate of the victims in order to generate uncertainty as to their whereabouts, life or death, and to provoke intimidation and suppression of rights.

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latter date, it was also reported that, "[[i]n view of the fact that as of this year we already have the materials, supplies and reagents necessary for the processing of bone remains, [...] the reprocessing of the 09 bone remains that resulted with incomplete profiles is being regularized, since this Laboratory has standardized and validated a new extraction protocol exclusively for these types of old samples, following the recommendations of the International Commission on Missing Persons (ICMP)." However, it indicated that "the possibilities of identification of the human skeletal remains are limited," due to the lack of samples from relatives with which to compare the four DNA profiles obtained from the skeletal remains, the small quantity of skeletal remains obtained at the place of the facts, and the poor state of preservation in which they were found, due to the conditions of the area where they were obtained and the passage of time. According to a Report of the Laboratory of Molecular Biology and Genetics of the Institute of Legal Medicine of the Public Prosecutor's Office dated February 19, 2015, the sampling of the skeletal remains was carried out from September 20 to 24, 2010, and it was possible to obtain 4 complete genetic profiles, 11 incomplete genetic profiles and 1 without a genetic profile. The same report also indicated that there were 9 incomplete profiles and 2 degraded samples whose profiles were not included in the final expert report due to the condition of the samples. In addition, it explained that one of the samples (dental piece) was depleted in the first phase of processing, so no genetic material or profile was obtained from it. Finally, the four complete genetic profiles were used for comparison; however, none of these matched any of the profiles analyzed on October 24, 2012. It should be noted that, according to the aforementioned report of February 19, 2015, the re-analysis of the case samples began as of January 22, 2015, the results of which modified the initial expert report of October 24, 2012 by obtaining 3 more complete genetic profiles that would probably belong to the same family group. *Cf.* Results corresponding to the "Misteriosa Mine" Case, DNA tests, Public Prosecutor's Office, of October 24, 2012 (evidence file, folio 5582 to 5595); Memorandum of May 28, 2013, of the Molecular Biology and Genetics Laboratory of the Public Prosecutor's Office (evidence file, folios 5599 to 5601); Official letter of the Criminalists Division of the Institute of Legal Medicine, Public Prosecutor's Office, of March 20, 2014 (evidence file, folios 4624 and 4625), and Official letter del Molecular Biology and Genetics Laboratory of the Institute of Legal Medicine of February 19, 2015 (evidence file, folios 5510 to 5516). See also, statement of the expert witness José Pablo Baraybar do Carmo at the public hearing held on January 26, 2015, Report of the expert witness José Pablo Baraybar do Carmo of January 26, 2015 (merits file, folio 1239).

185. Indeed, in this case the Court has confirmed the military authorities' initial refusal to acknowledge the detention of the victims, as well as the fact that they concealed and altered information about what happened to them, despite the complaints and proceedings filed by their relatives and residents of the Santa Bárbara community, as well as by the organs in charge of the investigations. Moreover, the *modus operandi* used in this case to destroy the evidence supports this conclusion. In this regard, the Court is aware that human remains were recovered in 1991, 2009, 2010 and 2011 at the location where the bodies were dynamited and that, owing to various irregularities derived from the actions of the State authorities themselves, to date there is no certainty that the remains of the fifteen victims have been found and identified, nor has there been a definitive explanation as to their fate, a situation that continues to this day.

186. For the Court, the judgments handed down by the domestic courts on February 9, 2012, and May 29, 2013, are an important and positive landmark in the actions of the judiciary. However, given that in this case the forensic investigation in the search, recovery, analysis and eventual identification of the victims' remains has been characterized by a clear lack of thoroughness and due diligence, which is particularly serious, the Court does not find it appropriate to accept the State's argument on the applicability of the principle of subsidiarity and complementarity. Thus, in the present case the forced disappearance of the victims persists to this day.

187. Therefore, the Court considers that the State is responsible for the forced disappearance of the fifteen victims of this case: Yesenia Osnayo Hilario, Miriam Osnayo Hilario, Edith Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Hilario, Raúl Hilario Guillén, Héctor Hilario Guillén, Francisco Hilario Torres, Mercedes Carhuapoma de la Cruz, Dionicia Quispe Mallqui, Antonia Hilario Quispe, Magdalena Hilario Quispe, Dionicia Guillén Riveros, Ramón Hilario Morán and Elihoref Huamaní Vergara.

D. Alleged violations of Articles 7, 5(1), 5(2), 4(1), 3, 11, 17 and 19 of the American Convention relating to the forced disappearances

188. The Court notes that the initial detention of the fifteen victims in this case was carried out by military forces in the context of a state of emergency and suspension of guarantees, whereby the Armed Forces assumed control of public order in the Department of Huancavelica (*supra* paras. 86 and 87), and that this deprivation of liberty was a prior step to their disappearance. For the Court, the fact that the victims were taken to the mine without being brought before the competent authority clearly constituted an abuse of power which, under no circumstances, can be construed as a military action to guarantee national security and maintain public order in the national territory. Therefore, the State is responsible for the violation of Article 7 of the American Convention, in relation to Article 1(1) of this instrument, to the detriment of the fifteen victims indicated above (*supra* para. 187).

189. Upon being deprived of their liberty, the victims were beaten and forced to walk for several hours, tied up and without food or water; they were then led into the mine shaft prior to their elimination (*supra* para. 91), placing them in a serious situation of vulnerability. It should be considered that this situation likely caused the children feelings of loss, intense fear, uncertainty, anguish and pain, which may have varied and intensified depending on the age and the particular circumstances of each one. Therefore, the Court considers that the victims suffered treatment contrary to the inherent dignity of the human being while in State custody, which affected their psychological, physical and moral integrity. These acts also constituted forms of torture because they were committed intentionally and caused the victims severe suffering, due to the uncertainty of what could happen to them and the deep fear that they might be violently killed, as indeed occurred, with the deprivation of life being the ultimate purpose of said acts. Therefore, the Court finds that the State is responsible for the violation of the right to personal

integrity, recognized in Articles 5(1) and 5(2) of the American Convention, in relation to Article 1(1) thereof, to the detriment of the fifteen victims indicated above (*supra* para. 187).

190. The Court also concludes that the State is responsible of the violation of Article 4(1) of the American Convention, in relation to Article 1(1) of the same instrument, to the detriment of the fifteen civilians who were taken into the "Misteriosa" or "Vallarón" mine and then riddled with bullets and their bodies dynamited. The Court considers that this violation was further aggravated in relation to the seven children and the pregnant woman. Regarding the alleged violation of Article 3 of the Convention and in accordance with the Court's recent case law, [215] in this case the Court considers that the fifteen victims (*supra* para. 187) were placed in a situation of legal uncertainty that prevented them from effectively exercising their rights in general terms, which in turn entailed a violation of their right to recognition of juridical personality.

191. The Court reiterates that those cases in which the victims of human rights violations are children are especially serious,[216] since children are not only entitled to the rights established in the American Convention, but also to the special measures of protection contemplated in Article 19, which must be interpreted according to the particular circumstances of the specific case.[217] The adoption of special measures for the protection of the child corresponds to the State, the family, the community, and the society to which the child belongs,[218] and includes measures related to non-discrimination, the prohibition of torture, and the conditions that must be observed in cases in which children are deprived of liberty.[219]

192. In the instant case, where at least seven of the victims were children between the ages of 8 months and 6 years, the violation of their rights was also configured in relation to Article 19 of the American Convention. In this regard, the Court notes that the CVR's Final Report found that, "within the militaristic mindset, the death of children was a 'cost' to eradicate the insurgency", and "in the struggle to destroy the enemy it did not matter that the dead [were] innocent [people] and even less so children."[220] It is a proven fact that an attempt was made to conceal the real ages of the child victims in this case in the death certificates issued by order of the judge of the Sixth Permanent Military Tribunal of Ayacucho of February 25, 1992, which indicated that they were older than 18 years of age (*supra* paras. 107 and 173). Thus, the State once again disregarded its duty to ensure the special protection of children.

193. Lastly, the Court does not have sufficient evidence to conclude the alleged violation of Articles 11 and 17 of the American Convention in this case, in the terms set forth by the Commission and the representatives (*supra* paras. 148, 151 and 154).

194. In conclusion, the Court finds that Peru has incurred international responsibility for the forced disappearance of the fifteen victims: Yesenia Osnayo Hilario, Miriam Osnayo Hilario, Edith Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Hilario, Raúl Hilario Guillén, Héctor Hilario Guillén, Francisco Hilario Torres, Mercedes Carhuapoma de la Cruz, Dionicia Quispe Mallqui, Antonia Hilario Quispe, Magdalena Hilario Quispe, Dionicia Guillén Riveros, Ramón Hilario Morán

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215 *Cf. Case of Anzualdo Castro v. Peru, supra*, para. 101, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 323.

216 The Inter-American Court has considered that, in general terms, a child is defined as "any person who has not yet turned 18 years of age." *Juridical Condition and Human Rights of the Child.* Advisory Opinion OC-17/02 of August 28, 2002. Series A No. 17, para. 42, and *Case of Mendoza et al. v. Argentina. Preliminary objections, Merits and Reparations*. Judgment of May 14, 2013, paras. 67 and 140.

217 *Cf. Case of Gelman v. Uruguay. Merits and Reparations.* Judgment of February 24, 2011. Series C No.221, para. 121, and *Case Mendoza et al. v. Argentina, supra,* para. 141.

218 *Cf. Juridical Condition and Human Rights of the Child, supra*, para. 62, and *Case of Mendoza et al. v. Argentina, supra*, para. 141.

219 *Cf. Case of the Gómez Paquiyauri Brothers v. Peru. Merits, reparations and costs*. Judgment of July 8, 2004. Series C No. 110, para. 168, and *Case of the Massacres of El Mozote and Nearby Places v. El Salvador, supra*, para. 150.

220 *Cf.* Final Report CVR, Volume VI, Chapter 1.8, pages 596 to 597 (evidence file, folios 2060 to 2061).

and Elihoref Huamaní Vergara, initiated on July 4, 1991, since there is no certainty that their remains have been located and identified, nor has there been any clear response regarding their fate. Consequently, the State violated the rights recognized in Articles 7, 5(1), 5(2), 4(1), and 3 of the American Convention, in relation to Article 1(1) thereof, to the detriment of all the aforementioned persons. Furthermore, the Court concludes that the violations also occurred in relation to Article 19 of the Convention with respect to Yesenia, Miriam and Edith Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Hilario, Raúl and Héctor Hilario Guillén, who were children at the time when their forced disappearance began (*supra* para. 90). Likewise, in application of the *iura novit curia* principle,[221] the Court concludes that the violations indicated also occurred in relation to Article I.a) and II[222] of the Inter-American Convention on Forced Disappearance of Persons, as of March 15, 2002, the date of its entry into force in Peru. The Court also considers that said violations, which occurred in a context of a systematic practice of forced disappearances (*supra* para. 85), constitute serious human rights violations.

195. Finally, the Court deems it pertinent to analyze, in Chapter IX.III of this judgment, the alleged breach of the duty to provide guarantees, given the lack of a diligent, serious and effective investigation of the facts (*supra* paras. 152 and 154).

IX.II
RIGHTS TO PROPERTY AND TO PRIVATE AND FAMILY LIFE

A. Arguments of the Commission and the parties

196. The ***representatives*** alleged that the State violated the rights to property and to private and family life based on two arguments. First, they alleged that State agents stole the livestock, provisions and all other valuable property they found in the victims' homes, in the context of a military operation that resulted in their disappearance; to date the victims have not recovered said property or received compensation of any kind. According to the representatives, initial reports of the events indicated that the soldiers seized 450 alpacas, 300 sheep, 15 horses and 19 head of cattle, together with foodstuffs consisting of corn, barley, potatoes and other supplies from the ranch where the family houses were located. In this regard, the representatives emphasized that "the victims and their next of kin have a close link with their livestock, which is their main source of subsistence," and that "due to the adverse socioeconomic circumstances in which the victims lived, the illegal removal of their property by military personnel had a greater impact on them." Consequently, they requested that the Court declare the violation of the right to property, established in Article 21 of the Convention, of "the victims and their next of kin."

197. Secondly, the representatives alleged that State agents set fire to two houses belonging to the families of Francisco Hilario Torres and Ramón Hilario Morán, in which 14 of the victims

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[221] The Court has ruled based on the *iura novit curia* principle, solidly supported by international jurisprudence, on repeated occasions. *Cf.* Among other cases*: Case of "Five Pensioners" v. Peru. Merits, reparations and costs*. Judgment of February 28, 2003. Series C No. 98**,** para. 153; *Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs*. Judgment of November 25, 2003. Series C No. 101**,** para. 128; *Case of Maritza Urrutia v. Guatemala. Merits, reparations and costs.* Judgment of November 26, 2003. Series C No. 103**,** para. 134; *Case of Herrera Ulloa v. Costa Rica. Preliminary objections, merits, reparations and costs*. Judgment of July 2, 2004. Series C No. 107**,** para. 142; *Case of the Gómez Paquiyauri Brothers v. Peru, supra***,** para. 178; *Case of the "Juvenile Reeducation Institute" v. Paraguay. Preliminary objections, merits, reparations and costs*. Judgment of September 2, 2004. Series C No. 112**,** paras. 124 to 126; *Case of the "Mapiripán Massacre" v. Colombia. Preliminary objections*. Judgment of March 7, 2005. Series C No. 122, para. 28, and *Case of the Human Rights Defender et al. v. Guatemala*, *supra*, para. 160.

[222] Article I (a) of the Inter-American Convention on Forced Disappearance of Persons establishes: "The States Parties to this Convention undertake: a) Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees." Article II of this instrument establishes: "For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

of forced disappearance and their relatives lived, arguing that this constituted an additional violation of the right to property and also of the right to private and family life. They pointed out that "the soldiers illegally raided the victims' homes, forced them to leave and then set fire to them" and that, when the relatives of the 14 missing victims returned, they "found a devastating scene: burned houses, looted belongings, dead animals, a lot of blood around the houses, […] clothes strewn on the ground and footprints that suggested that that the victims were forced to walk barefoot." Therefore, they alleged that "[t]he destruction of the victims' homes by agents of the State constitutes an abusive and arbitrary interference in the private life and the home of the victims, in addition to a violation of the right to property." Accordingly, they asked the Court to declare that the State violated Articles 21 and 11(2) of the American Convention, also in breach of Article 1(1) of the same instrument.

198. The ***Commission*** did not present legal arguments regarding the alleged violation of Articles 21 and 11(2) of the American Convention. The ***State*** did not present arguments in this regard either, since it considered that the facts described by the representatives are outside the factual framework of this case (*supra* para. 16).

B. Considerations of the Court

199. In its case law, this Court has developed a broad concept of property that encompasses, *inter alia*, the use and enjoyment of "property," defined as appropriable material possessions, as well as any right that may form part of a person's assets. This concept includes all movable and immovable property, tangible and intangible elements, and any other immaterial object that may have a value.[223]

200. In turn, the Court recalls that Article 11(2) of the Convention[224] recognizes that a personal sphere exists that must be exempt and immune from abusive or arbitrary interference or attacks by third parties or by public authorities. In this sense, the home and private and family life are intrinsically connected, because the home becomes a space in which private and family life can unfold freely.[225]

201. As already established in this judgment, in the area of the community of Santa Barbara, it was common for the Peruvian army to enter the homes of the inhabitants and steal their food, tools and livestock (*supra* para. 87). In the instant case, the Court notes, on the one hand, that the testimonies of the alleged victims and witnesses mention that during Operation "Apolonia", soldiers raided the houses of the Hilario Quispe and Hilario Guillén families, seized their alpacas and cattle and burned down their homes. In this regard, Mr. Zósimo Hilario Quispe, son of Francisco Hilario Torres and Dionicia Quispe, stated that "[…] at the ranch [his] parents had 400 alpacas and 30 cows […]."[226] However, when he arrived at the community a few days after the events of July 4, 1991, he did not find the animals. His brother, Marcelo Hilario Quispe, who was also a livestock farmer and who raised alpacas, sheep and cows, stated and that upon returning to Rodeo Pampa he found his house burned down and his animals and work tools gone.[227] Likewise, Gregorio Hilario Quispe, who was also a cattle farmer, stated that the soldiers had burned down the house of his father, Francisco Hilario Torres, and had taken approximately 400

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[223] *Cf. Case of Ivcher Bronstein v. Peru. Merits, reparations and costs.* Judgment of February 6, 2001. Series C No. 74, para. 122, and *Case of Granier et al. (Radio Caracas Televisión) v. Venezuela. Preliminary objections, merits, reparations and costs*. Judgment of June 22, 2015. Series C No. 293, para. 335.

[224] Article 11(2) of the American Convention establishes that: "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."

[225] Cf. *Case of the Ituango Massacres v. Colombia, supra,* paras. 193 and 194, and *Case of J. v. Peru, supra*, para. 128.

[226] *Cf.* Statement rendered by affidavit by Zósimo Hilario Quispe January 9, 2015 (evidence file, folios 5200)

[227] *Cf.* Statement rendered by affidavit by Marcelo Hilario Quispe January 9, 2015. (evidence file, folios 5203 and 5207)

alpacas and 30 cows. For his part, Víctor Carhuapoma de la Cruz affirmed that "the house of [his] sister [Mercedes Carhuapoma de la Cruz, wife of Marcelo Hilario Quispe,] was burned, [and] that to date, her animals and belongings […]have not been restored, recognized or rebuilt."[228]

202. Furthermore, in Criminal Proceeding No. 42-06 before the National Criminal Chamber of Peru, Oscar Gonzáles Carrera, a soldier who participated in Operation "Apolonia", stated that "[…] *ronderos* […] took […] approximately two hundred cattle, and they herded them and […] arrived […] together with Lieutenant Javier Bendezú […] at the Churumayo bridge, with all the livestock, which had been seized in Rodeo Pampa."[229] He added that "the cattle were supposedly seized from the terrorists, since […] they were in the habit of going to different villages and stealing cattle, so they had been rounded up to be returned to their legitimate owners, and that is what Lieutenant Javier Bendezú Vargas told me."[230] Similarly, during the same proceeding, a witness and alleged participant in the military operation, FPA, stated that "they […] took care of the animals that were there, including llamas and sheep […]" owned by the villagers of the peasant community of Santa Bárbara, while they took the detainees from that community to the "Misteriosa" mine.[231] Based on these statements, in its judgment of February 9, 2012, the National Criminal Chamber of Peru found it proven that "during the operation against the inhabitants of Rodeo Pampa, various abuses were committed […] they set fire to some houses, stole the animals, and deprived the victims of their liberty." He added that "[…] during the incursion into Rodeo Pampa, in addition to setting fire to the victims' homes […] their belongings were seized and taken to the military base at Lircay."[232]

203. These details are also consistent with the CVR's Final Report, which indicates that "[…] in the hamlet of Rodeo Pampa military personnel entered the two houses belonging to the Hilario family […] and set fire to them; they returned hours later to take possession of a large number of livestock, smaller animals and belongings of the detainees […]."[233]

204. In view of the aforementioned testimonies, the determination of the facts by the National Criminal Chamber of Peru in its judgment of February 9, 2012, as well as the findings of the CVR, the Court considers it proven that military personnel involved in Operation "Apolonia" burned the homes of the families of Hilario Quispe and Hilario Guillén and seized their livestock. These acts are a violation of Article 21 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Francisco Hilario Torres, Dionicia Quispe Mallqui, Antonia Hilario Quispe, Zenón Cirilo Osnayo Tunque, Yesenia Osnayo Hilario, Miriam Osnayo Hilario, Edith Osnayo Hilario, Magdalena Hilario Quispe, Alex Jorge Hilario, Marcelo Hilario Quispe, Mercedes Carhuapoma de la Cruz, Wilmer Hilario Carhuapoma, Ramón Hilario Morán, Dionicia Guillén Riveros, Raúl Hilario Guillén and Héctor Hilario Guillén, who were living in the community at the time of the facts (*supra* para. 84 a and b) and were unjustifiably deprived of their property.

205. Furthermore, in addition to being a violation of the right to the use and enjoyment of property, the Court considers that the burning of the houses belonging to members of the Santa Bárbara community by the Army constitutes an abusive and arbitrary interference in their private life and home. The people who lost their homes also lost the place where they lived their private lives. Consequently, the State also violated their right to not suffer arbitrary or abusive interference in their private life and home, recognized in Article 11(2) of the American

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228 *Cf.* Statement of Víctor Carhuapoma de la Cruz rendered by affidavit on January 9, 2015. (Evidence file, folio 5215)

229 *Cf.* Statement of Oscar Carrera Gonzáles of August 3, 2010 in Proceeding No. 42-06 of National Criminal Chamber (evidence file 2903)

230 *Cf.* Statement of Oscar Carrera Gonzáles in Proceeding No. 42-06 of National Criminal Chamber. (evidence file, folio 2927).

231 *Cf.* Statement of FPA in Proceeding No. 42-06 of National Criminal Chamber (evidence file, folio 2974).

232 Judgment of National Criminal Chamber of February 9, 2012. File No. 42-06 (evidence file, folios 4505 and 4506)

233 *Final Report of the CVR of Peru*, Volume VII, Chapter 2.50, page 544.

Convention, in relation to Article 1(1) of said instrument, to the detriment of the persons indicated in the preceding paragraph.[234]

IX.III
THE RIGHT TO JUDICIAL GUARANTEES, JUDICIAL PROTECTION AND TO PERSONAL LIBERTY, AND ARTICLE I (b) OF THE INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PERSONS, AS WELL AS ARTICLES 1, 6 AND 8 OF THE INTER-AMERICAN CONVENTION TO PREVENT AND PUNISH TORTURE

A. Arguments of the Commission and of the parties

206. The ***Commission*** alleged that the State violated the rights recognized in Articles 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 thereof, and I (b) and III of the Inter-American Convention on Forced Disappearance of Persons, as well as Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, to the detriment of the eight adults and seven children who disappeared and their next of kin. In this regard, it referred in detail to the numerous complaints filed with various State authorities after the alleged detention and disappearance of the victims in this case, noting that those authorities did not order timely and necessary measures to determine their whereabouts. It also pointed out that neither of the two habeas corpus actions filed by Alejandro Huamaní on behalf of his son, Elihoref Huamaní, were effective. In addition, the Commission held that these alleged violations stemmed from: i) the submission of the case to the military justice system; ii) the fact that the criminal proceedings before the ordinary jurisdiction began only on February 26, 1992; iii) the deficiencies in the investigation in the ordinary jurisdiction during the first years; iv) a series of cover-up mechanisms; v) the application of the amnesty law in 1995; vi) the archiving of the investigation for 10 years; vii) the lack of due diligence in the search for the alleged perpetrators who are fugitives; viii) the delay of more than 20 years from the time of the events to the first and only conviction; ix) the lack of information about what happened to the remains exhumed in 1991; x) the prolonged delay of 18 years - between 1991 and 2009 - in carrying out any kind of follow-up to the forensic activities; xi) the deficiencies in current procedures for the identification of the victims' remains, and xii) the failure to prosecute all those responsible, including high-level commanders. The Commission concluded that the courts of justice had shown a lack of diligence and willingness to conduct criminal proceedings to clarify all the facts that occurred on July 4, 1991, and to punish those responsible. Moreover, almost 20 years after the alleged forced disappearances - and with the full truth about the facts still unknown - the domestic criminal proceedings have not been effective in determining the victims' fate or guaranteeing their rights of access to justice and to know the truth, through the investigation and eventual punishment of those responsible and comprehensive reparation.

207. The ***representatives*** substantially agreed with the Commission's arguments. They also alleged the violation of the reasonable time limit in the present case, explaining that when alleged forced disappearances are involved, the excessive duration of the process seriously affects the rights of the alleged victims' next of kin, as it unnecessarily prolongs the pain and uncertainty of not knowing what happened to their loved ones and the whereabouts of their remains.[235]

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[234] Also, see: *Case of the Massacres of El Mozote and Nearby Places v. El Salvador, supra*, para. 182.

[235] During the public hearing, the representatives alleged for the first time the existence of testimonies in the domestic case file that would indicate rape against the women during the operation. However, "the domestic judicial proceedings did not include these as related crimes, but as crimes subject to the statute of limitations […]." They also emphasized that the Public Prosecutor's Office had considered that the facts did not constitute forced disappearance, applying Article 320 of the Peruvian Criminal Code, which the Court has declared contrary to the provisions of the Convention. According to the representatives, the State has also fragmented the investigations, since Mr. Bendezú Vargas was under investigation in two different proceedings. They also objected to the failure to prosecute the two soldiers, who were minors at the time, and who participated in Operation "Apolonia."

208. In addition, the representatives alleged that the State violated the right to know the truth, inasmuch as it has concealed information relevant to the case and has not implemented the necessary proceedings and mechanisms to clarify the truth of what happened, in violation of Articles 8, 13 and 25 of the American Convention, and non-compliance with Articles 1(1) and 2 of the same instrument, "understood as an autonomous and independent right."

209. The ***State*** referred to the criminal proceedings in the domestic courts with the final judgment (*ejecutoría suprema*) of May 29, 2013, which resulted in the conviction of Oscar Alberto Carrera Gonzáles as a primary accomplice to crimes against life, the person and health, in the form of aggravated homicide to the detriment of the fifteen alleged disappeared victims. It argued that the purpose of this process was to avoid impunity for the facts, and therefore the State has complied with Articles 8(1) and 25(1) of the Convention, and Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture. It held that the rulings issued by the national courts have respected judicial guarantees throughout the judicial proceedings, without violating any right protected by the Convention.

210. Regarding the first months of the investigation, it described the steps taken by the authorities in response to the various complaints filed. In this regard, it stressed that it was not indifferent to the events that had taken place and that there was no inaction on the part of the State; rather, it insisted that every effort was made to investigate the facts. It also indicated that the investigations had ensured the petitioners' full access and ability to act at all stages of the proceedings.

211. In relation to the steps taken to arrest the two absentee defendants, Javier Bendezú Vargas and Denis Pacheco Zambrano, the State indicated that these individuals were subject to national and international arrest warrants and INTERPOL "Red Notice" alerts, and described the efforts made at the domestic level to capture them.

212. As for the alleged violation of the reasonable time limit, the State argued that the Court has already sanctioned Peru for the repercussions caused by trial systems contrary to the Peruvian Constitution and the Convention, and that in compliance with the Court's mandate, the State has taken steps to make the national justice system compatible with international standards. Thus, it considered that the Court should evaluate the State's efforts to comply with said precedents related to the amnesty laws, given that this situation has been rectified. In this regard, it argued that in order to establish an alleged violation of the principle of reasonable time in this case, the period of time should be calculated from June 22, 2005 - the date on which the Senior Prosecutor of the Mixed Superior Prosecutor's Office of Huancavelica ordered the case to be reopened - until May 29, 2013, the date on which Supreme Executory Judgment became final, which gives a term of 7 years and 11 months. It also argued that the process followed against Javier Bendezú and others for the crime of aggravated homicide against fifteen members of the Santa Bárbara peasant community is complex, due to the seriousness of the facts investigated and the number of defendants, a matter that is corroborated in the various decisions and judgments issued in the domestic courts. In addition, in order to clarify the facts and determine the responsibility of the accused, it has been necessary to resort to various evidentiary means, some of them specialized.

213. Regarding the actions of the military justice system, the State pointed out that at the time of the events of the case (1991) the standards applied by the Court on military justice differed markedly from the standards used nowadays, in terms of the requirement of competence, independence and impartiality of military courts, and regarding their jurisdiction to hear cases of human rights violations. For the State, it is clear that the standards currently established by the inter-American human rights system could not be required of Peru in the present case, since this

would imply their retroactive application. For its part, Peru's domestic legal system would have determined the jurisdictional disputes between the military jurisdiction and ordinary courts.[236]

214. At the public hearing, the State emphasized that the representatives of the alleged victims did not question the classification of the facts by the Public Prosecutor's Office in the domestic proceedings, were not present during the forensic procedures in 2010, nor did they request the domestic courts to include the State as a civilly liable third party. Thus, it pointed out that the domestic remedies for the protection of rights were set aside in order to have recourse to international remedies. Finally, in its final written arguments, Peru pointed out that it is noteworthy that an infringement of the right to know the truth is being claimed, disregarding the results of the investigation and the determination of the proven facts in the judgment of the National Criminal Chamber, and confirmed by the Supreme Court of Justice.

B. Considerations of the Court

215. In the instant case, a trial was opened in the military jurisdiction before the Sixth Permanent Military Court of the Second Army Judicial District of Ayacucho. However, a jurisdictional dispute ensued between the military jurisdiction and the Examining Magistrate of the ordinary criminal jurisdiction of Huancavelica, which was submitted to the consideration of the Criminal Chamber of the Supreme Court of Justice. The latter ruled that the ordinary jurisdiction should hear the case, and therefore oral proceedings were initiated by the Mixed Chamber of the Superior Court of Justice of Huancavelica. In 1995, Amnesty Law No. 26.479 was applied in both jurisdictions; however, in 2002, the case was reopened in the military jurisdiction, and in 2005 in the ordinary jurisdiction. There is no record in the file of any subsequent proceedings in the military jurisdiction. However, in the ordinary jurisdiction, in October 2006, the National Criminal Chamber of Lima took charge of the proceedings that later resulted in the conviction of Oscar Alberto Carrera Gonzales to 20 years imprisonment, and in which the capture of the absentee defendants was ordered. In August 2011, the Fourth Supra Provincial Criminal Court of Lima opened an investigation that resulted in the dismissal of the case against Simón Fidel Breña Palante, through the February 2013 ruling of the National Criminal Chamber of the Supreme Court of Justice (*supra* paras. 106, 113 to 119, 123 to 125 and 131 to 134).

216. The Court recalls that, by virtue of the protection granted under Articles 8 and 25 of the Convention, States are obliged to provide effective judicial remedies to the victims of human rights violations, which must be substantiated in accordance with the rules of due process of law.[237] The Court has also indicated that the right of access to justice must guarantee, within a reasonable time, the right of the alleged victims or their next of kin to ensure that everything necessary is done to learn the truth of what happened and to investigate, prosecute and, if appropriate, punish those responsible.[238]

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[236] In this regard, the Constitutional Court's rulings of March 16, 2004 and June 9, 2004, declared the unconstitutionality of certain articles of the Code of Military Justice, Decree Law No. 23214 and of the Organic Law of Military Justice, Decree Law No. 23201, thus modifying the legislation on Military Justice. Likewise, the crime of military function was defined in order to establish and clearly delimit the competences of the military and ordinary jurisdictions and to determine which crimes committed by members of the Armed Forces or the National Police of Peru that affect legal assets under the ordinary jurisdiction were to be exclusively heard by the ordinary jurisdiction. In addition, the Plenary of the Peruvian Constitutional Court issued a new ruling on the matter on December 15, 2006, stating that the military courts could not hear common crimes defined in the Criminal Code. It also declared the unconstitutionality of certain articles of Legislative Decree No. 961, Code of Military and Police Justice. Thus, Article 169 of the former Code of Military Justice, which regulated the crime of Abuse of Authority, was codified in Article 139, paragraph 1 of Legislative Decree No. 961, Code of Military and Police Justice, with the title of "Excesses in the Authority of Command", which was declared unconstitutional by the aforementioned ruling of the Constitutional Court.

[237] *Cf. Case of Velásquez Rodríguez v. Honduras*. *Exceptions*. Judgment of 26 June 1987. Series C No. 1, para. 91, and *Case of Espinoza Gonzáles v. Peru*. Preliminary objections, merits, reparations and costs. Judgment of November 20, 2014. Series C No. 289, para. 237.

[238] *Cf. Case of Bulacio v. Argentina*, *Merits, reparations and costs. Judgment of September 18, 2003. Series C No. 100,* para. 114, and *Case of Espinoza Gonzáles v. Peru***,** *supra,* para. 237.

217. The obligation to investigate human rights violations is one of the positive measures that States must adopt to guarantee the rights recognized in the Convention.[239] Thus, since its first judgment, this Court has emphasized the importance of the State's duty to investigate and punish human rights violations,[240] which takes on particular importance given the seriousness of the crimes committed and the nature of the rights infringed.[241]

218. Furthermore, the obligation to investigate, prosecute and, where appropriate, punish those responsible for human rights violations is not only derived from the American Convention; in certain circumstances and depending on the nature of the facts, it is also derived from other inter-American instruments that establish the obligation of States Parties to investigate conduct prohibited by such treaties. In relation to the facts of this case, the State's obligation to investigate possible acts of torture or other cruel, inhuman or degrading treatment is reinforced by the provisions of Articles 1, 6 and 8 of the Inter-American Convention against Torture, which oblige the State to "take effective measures to prevent and punish torture within the sphere of its jurisdiction," and to "prevent and punish […] other cruel, inhuman or degrading treatment or punishment." This obligation is applicable to Peru with the entry into force of said Convention on April 28, 1991. Likewise, the obligation to investigate is reinforced by Article I (b) of the Inter-American Convention on Forced Disappearance of Persons, in force in Peru since March 15, 2002.[242]

219. The Court notes that the specific obligations derived from the aforementioned specialized conventions are enforceable by the State from the date of deposit of the instruments of ratification of each one, and enter into force for that State, even if they were not in effect at the time the forced disappearances and other violations alleged in the instant case began to be committed.

220. Based on the arguments of the parties and the Commission, the Court will now analyze the alleged violations in relation to the investigations of the facts of the case, in the following order: 1) due diligence in the first investigative proceedings; 2) the effectiveness of the habeas corpus remedy; 3) obstacles in the investigations; 4) the lack of due diligence in the proceedings initiated after the reopening of the case, and 5) the right to know the truth.

B.1. Due diligence in the initial investigative proceedings

221. The Court has already pointed out that, once a forced disappearance has occurred, it is essential that it be effectively addressed and treated as an unlawful act that may result in the imposition of sanctions on anyone who commits, instigates, conceals or in any other way participates in its perpetration. Consequently, whenever there are reasonable grounds to suspect that a person has been subjected to enforced disappearance, a criminal investigation must be initiated.[243] This obligation is separate from the filing of a complaint, since in cases of forced disappearance, international law and the general duty of guarantee, impose the obligation to investigate the case *ex officio*, without delay, and in a serious, objective and effective manner, so

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239 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, *supra,* paras. 166 and 176, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia*, *supra,* para. 436.

240 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 166, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia*, *supra,* para. 436.

241 *Cf. Case of Goiburú et al. v. Paraguay, supra,* para. 128, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia*, *supra,* para. 436.

242 Article I(b) of the ICFDP establishes: "The States Parties to this Convention undertake to: […] b) Punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories."

243 *Cf. Case of Anzualdo Castro v. Peru, supra,* para. 65, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia*, *supra,* para. 475.

that such action does not depend on the procedural initiative of the victim or his next of kin or on the provision of evidence by private individuals.[244]

222. In this regard, the Court has indicated that the authorities must conduct the investigation as an inherent legal obligation, and not leave this to the initiative of the next of kin.[245] This is a basic and determinant element for the protection of the rights affected by such situations.[246] Consequently, the investigation should be conducted using all available legal means for the purpose of discovering the truth and achieving the pursuit, capture, prosecution and eventual punishment of all the masterminds and perpetrators of the acts, especially when State agents are or could be implicated.[247] Likewise, impunity must be eliminated by the establishment of both the general (State) and individual responsibilities, of a criminal and any other nature, of its agents or of private individuals.[248] In compliance with this obligation, the State must remove all obstacles, *de facto* and *de jure*, that maintain impunity.[249]

223. In this case, the Court has already established that on July 8, 1991, the Special Prosecutor for Crime Prevention of Huancavelica received complaints from Zósimo Hilario Quispe regarding the detention and disappearance of his family members, and from Nicolás Hilario Morán, president of the Administrative Council of the community of Santa Bárbara, regarding the abduction and disappearance of fourteen community members. Mr. Hilario Morán also requested that a visual inspection be carried out at the site of the events. On July 9 and 12, the Prosecutor's Office received complaints filed by Viviano Hilario Mancha regarding the events that occurred to his family members (*supra* paras. 95 to 98). According to Report No. 17-91-FPEPD-Hvca of August 2, 1991, in response to these complaints, the Special Prosecutor's Office for Crime Prevention of Huancavelica carried out the following actions:[250]

i) on July 8, 1991, it ordered a verification procedure at the Departmental Headquarters of the Technical Police. There is no record as to whether this was carried out. It also sent an official letter to the Headquarters of the Political and Military Command requesting information on the patrols carried out on July 4. This request was reiterated fourteen days later, on July 22, 1991;

ii) it sent an official letter on July 10, 1991 to the Political and Military Chief of Ayacucho, in order to inform him about the complaint and ask if the detainees had been taken to the Lircay Military Base;

iii) it received the complaints and/or statements of six other persons, namely: Teodoro Hilario Quispe, Cecilia Mancha de Cusi, Bertha Lizana widow of Hilario, Gaudencia Quispe de Hilario, Gregorio Hilario Quispe and Alejandro Huamaní. On July 15, 1991, the latter reported the detention and disappearance of his son, Elihoref Huamaní. In addition, complaints were received from Nicolás Hilario Morán, Lorenzo Quispe Huamán and Máximo Pérez Torres, stating that they had been threatened by a Lieutenant of the

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244 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, *supra,* para. 177, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia*, *supra,* para. 475.

245 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, *supra,* para. 177, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 488.

246 *Cf. Case of the Pueblo Bello Massacre v. Colombia.* Judgment of 31 January 2006. Series C No. 140, para. 145, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 488.

247 *Cf. Case of Myrna Mack Chang v. Guatemala, supra,* para. 156, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 488.

248 *Cf. Case of Goiburú et al. v. Paraguay*, *supra,* para. 131, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 488.

249 *Cf. Case of Myrna Mack Chang v. Guatemala, supra,* para. 277, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 488.

250 *Cf.* Report No. 17-91-FPEPD-Hvca issued by the Provincial Office of the Special Prosecutor for Crime Prevention of August 2, 1991 (evidence file, folios 3894 to 3898).

Peruvian Army when they went to the Headquarters of the Political and Military Command to deliver a letter;

iv) it received official letter No. 467-91-FPM-Hvca of July 18, 1991, reporting on the removal of the corpses carried out that day together with the Examining Magistrate.

224. Furthermore, despite the fact that on July 12, 1991, the Administrative Council of Santa Bárbara informed the Mixed Provincial Prosecutor's Office of Huancavelica of the discovery of the victims' remains and requested the removal of their bodies – a request that was reiterated to said Office on July 17, 1991 - it was not until July 18, 1991, that the remains were removed, that is, two weeks after the events occurred, ten days after the complaint was filed and six days after the discovery was reported (*supra* paras. 98 to 101). In addition, this Court has already pointed out that it is not known what happened to the evidence collected on that occasion and that for more than 23 years the State has made no effort to locate the remains (*supra* para. 176).

225. The Court has also established that the Special Attorney's Office of the Human Rights Ombudsman received complaints from Nicolás Hilario Morán, president of the Administrative Council of the community of Santa Bárbara, and Máximo Pérez Torres, treasurer of its municipal agency, on July 17, 1991, and from Alejandro Huamaní Robles on July 23 and August 2 of the same year. The same individuals also filed complaints before the Minister of Defense, the former on July 17, and Mr. Huamaní on August 5, 1991. Finally, Mr. Huamaní also filed a complaint on July 18 with the Office of the Huancavelica Senior Prosecutor (*supra* paras. 100 and 102). There is no record in the case file of the actions taken by these entities in response to the aforementioned complaints.

226. In this regard, the Court recalls that, in cases of alleged forced disappearance, it is essential that the prosecutorial and judicial authorities take immediate action, ordering timely and necessary measures to determine the whereabouts of the victim or the place where he or she is being detained.[251]

227. Likewise, for an investigation into an alleged forced disappearance to be carried out effectively and with due diligence, the authorities in charge must use all necessary means to promptly carry out those actions and inquiries that are essential and timely to clarify the fate of the victims.[252] On several occasions, this Court has ruled on the obligation of the States to conduct a thorough search, using the appropriate judicial or administrative mechanisms, in which every effort is made, systematically and rigorously, with the adequate and appropriate human, technical and scientific resources, to establish the whereabouts of the disappeared persons.[253] In this case, there is no evidence that, once the corresponding authorities were informed of the events that had occurred, they immediately adopted the necessary search measures to find the missing persons. Furthermore, the State has not demonstrated that the authorities who received the reports of the detention and disappearance of fifteen members of the community of Santa Bárbara have carried out basic procedures such as inspecting the place where these villagers lived and where their homes were burned.

228. In addition, in this case, the reports made by various members of the community of Santa Bárbara indicated that the disappeared victims had been detained by military personnel and, subsequently, that their remains were found in the "Misteriosa" or "Vallarón" mine. Therefore, the duty of due diligence in the investigation of these facts included a correct handling of the crime

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[251] *Cf. Case of Anzualdo Castro v. Peru, supra,* para. 134, and *Case of Rochac Hernández et al. v. El Salvador. Merits, reparations and costs.* Judgment of October 14, 2014. Series C No. 285, para. 139.

[252] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 174, and *Case of Osorio Rivera and Family Members v. Peru, supra*, para. 182.

[253] *Cf. Case of Gudiel Álvarez et al. (Diario Militar) v. Guatemala, supra*, para. 334, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia*, *supra,* para. 480.

scene and the removal, recognition and identification of the corpses, in order to clarify what happened. The Court has established that the efficient determination of the truth in the context of the obligation to investigate a possible death must be demonstrated from the outset, with full diligence in the initial procedures.[254] Similarly, this Court has held that, in the management of the crime scene and the handling of the victims' bodies, certain basic and essential procedures must be carried out to preserve the elements of proof and evidence which could contribute to the success of the investigation,[255] such as the autopsy and the removal of the corpses. It has also indicated that due diligence in the investigation of a death implies maintaining the chain of custody for every item of forensic evidence.[256] In this case, it is clear that the loss of the remains collected on July 18, 1991 in the "Misteriosa" or "Vallarón" mine does not meet those standards.

229. In view of the foregoing, the Court considers that the State failed to ensure due diligence in the first investigative actions.

B.2. The effectiveness of the habeas corpus remedy

230. In the instant case, the Commission and the representatives have alleged the lack of effectiveness of the habeas corpus remedy filed on July 18, 1991, by Alejandro Huamaní Robles on behalf of his son, Elihoref Huamaní Vergara, before the Examining Magistrate's Court of Huancavelica (*supra* para. 103). In addition, they alleged that on the same day Mr. Huamaní Robles filed a second writ of habeas corpus before the Lircay Magistrate's Court, but received no response. However, although the file contains a letter dated July 18, 1991, written by Mr. Alejandro Huamaní, it does not appear that it was actually received by the Lircay Magistrate's Court.[257] There is also no record of any response. Therefore, the Court will only rule on the appeal filed before the Examining Magistrate's Court of Huancavelica.

231. The Court recalls that Articles 7(6) and 25 of the Convention encompass different areas of protection. Article 7(6) of the Convention[258] has its own legal content, consisting of the direct protection of personal or physical liberty by means of a judicial order addressed to the corresponding authorities requiring them to bring detainees before a judge so that the latter may examine the legality of the detention and, if appropriate, order his or her release.[259] Given

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254 *Cf. Case of Juan Humberto Sánchez v. Honduras, supra,* para. 127, and *Case of Human Rights Defender et al. v. Guatemala*, *supra,* para. 204. In this regard, the Court has specified the guiding principles that must be observed in an investigation when confronted with a possible violent death. The State authorities who conduct an investigation of this type must attempt, at minimum, *inter alia* to: i) identify the victim; ii) recover and preserve the evidence related to the death in order to assist any potential criminal investigation of those responsible; iii) identify possible witnesses and obtain their statements regarding the death investigated; iv) determine the cause, manner, place and time of death, as well as any pattern or practice that may have caused the death, and v) distinguish between natural death, accidental death, suicide and homicide. Furthermore, it is necessary to exhaustively investigate the crime scene, carry out autopsies and analyses of human remains, in a rigorous manner, by competent professionals and using the most appropriate procedures. *Cf.* United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Minnesota Protocol), Doc. E/ST/CSDHA/.12 (1991).

255 *Cf. Case of González et al. ("Cotton Field") v. Mexico*. *Preliminary objection, merits, reparations and costs.* Judgment of November 16, 2009. Series C No. 205, para. 301, and *Case of Human Rights Defender et al. v. Guatemala, supra,* para. 204.

256 *Cf. Case of González et al. ("Cotton Field") v. Mexico, supra,* paras. 305 and 310, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 489. Citing the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions Doc. E/ST/CSDHA/.12 (1991).

257 *Cf.* Letter of Alejandro Huamaní Robles of July 18, 1991, (evidence file, folio 515).

258 Article 7(6) of the American Convention establishes that: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies".

259 *Cf. Habeas Corpus under Suspension of Guarantees (arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights)*. Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8, paras. 33 and 34, and *Case of Rochac Hernández et al. v. El Salvador*, *supra,* para. 162.

that the principle of effectiveness (*effet utile*) cuts across the protection due to all the rights recognized in the Convention, the Court considers, as it has on other occasions,[260] that in application of the *iura novit curia* principle - which is repeatedly validated by international case law inasmuch as the judge has the authority, and even the obligation, to apply the pertinent legal provisions in a case, even when it is not expressly invoked by the parties -[261] it is appropriate to assess the arguments related to the effectiveness of the habeas corpus actions in relation to the aforementioned provision, and not in relation to Article 25 of the Convention, as argued by the representatives and the Commission.[262]

232. The Court has considered that the habeas corpus remedy, or the presentation of the person, is the ideal measure to ensure liberty, monitor respect for life and personal integrity, and prevent an individual's disappearance or uncertainty about his place of detention.[263] In this regard, the Court's case law has established that these remedies should not only exist formally in law, but should also be effective.[264] The Court has also specified that to be effective, the habeas corpus remedy must fulfill the objective of obtaining, without delay, a decision on the lawfulness of the arrest or the detention.[265]

233. In the instant case, on July 22, 1991, that is, four days after Alejandro Huamaní filed the writ of habeas corpus, the Examining Magistrate's Court of Huancavelica issued a decision declaring the petition inadmissible since, "from the inquiries made and the statements received from the departments of the Security Police, General Police, Technical Police and from the Military Base and the Political-Military Command, the detention of the citizen Elihoref Huamaní Vergara has not been proven to have actually occurred, and therefore the complaint has no factual basis."[266]

234. In this regard, the Court recalls that one of the characteristic elements of forced disappearance is "the refusal to acknowledge the detention and to reveal the fate or whereabouts of the person concerned."[267] Thus, the mere formal verification of the official detainee records, as occurred in this case, or the acceptance as true of the denial of the detention by those presumably responsible, without an objective, impartial and independent verification, is neither reasonable nor diligent and does not constitute an effective remedy.[268] In this case, the aforementioned decision does not include the "verification" that would have been carried out by the Examining Magistrate's Court of Huancavelica, beyond the statements received from members of the army and the police, in order to confirm that the alleged detention took place. Furthermore, the Court notes that the Examining Magistrate who rejected the petition had been present during the removal of the bodies in the "Misteriosa" or "Vallarón" mine four days earlier, on July 18, 1991.[269] Although this removal procedure was carried out on the basis of the complaint filed by the "president and prosecutor of the community of Santa Bárbara before the Public Prosecutor's Office" which referred only to 14 victims, without mentioning Elihoref Huamaní Vergara, it is also

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260 *Cf. Case of Anzualdo Castro v. Peru, supra*, para. 77, and Case of Rochac *Hernández et al. v. El Salvador*, *supra,* para. 162.

261 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits*, *supra*, para. 163, and *Case of Rochac Hernández et al. v. El Salvador*, *supra,* para. 162.

262 *Cf. Case of Rochac Hernández et al. v. El Salvador*, *supra,* para. 162.

263 *Cf. Habeas Corpus under Suspension of Guarantees (arts. 27(2), 25(1) and 7(6) of the American Convention on Human Rights)*. Advisory Opinion OC-8/87, *supra*, para. 35, and *Case of Rochac Hernández et al. v. El Salvador*, *supra,* para. 162.

264 *Cf. Case of Vélez Loor v. Panama*, *supra,* para. 129, and *Case of Rochac Hernández et al. v. El Salvador*, *supra,* para. 162.

265 *Cf. Case of Acosta Calderón v. Ecuador*, *supra*, para. 97, and *Case of Wong Ho Wing v. Peru, supra,* para. 281.

266 *Cf.* Order of the Examining Magistrate's Court of Huancavelica of July 22, 1991 on the *habeas corpus* action filed on July 18, 1991 (evidence file, folio 85).

267 *Cf. Case of Gómez Palomino v. Peru, supra,* para. 97, and *Case of the Río Negro Massacres v. Guatemala, supra*, para. 115

268 *Cf. Case of García and Family Members v. Guatemala*, *supra,* para. 143.

269 *Cf.* Order of the Examining Magistrate's Court of Huancavelica of July 22, 1991, regarding the *habeas corpus* action filed on July 18, 1991 (evidence file, folio 85), and Official letter No. 0462-91-MP-FPM-HVCA of July 23, 1991, submitted by the Huancavelica Mixed Provincial Prosecutor's Office to the Senior Public Prosecutor of Huancavelica (evidence file, folio 56).

true that both the aforementioned complaint and the habeas corpus petition filed referred to the detention and disappearance of persons in the same locality, on the same day, by members of the Peruvian Army.[270]

235. On August 5, 1991, an appeal was filed before the Huancavelica Examining Magistrate against the ruling of July 22, 1991; however, it was not confirmed whether this appeal was resolved.[271] The Court recalls that Article 7(6) of the Convention requires a decision "without delay" and the Court has established violations in this regard for delays of 9, 21 and 31 days in the authorities' responses after the habeas corpus petitions were filed.[272] For this reason, the lack of response to the appeal filed on August 5, 1991 before the Huancavelica Examining Magistrate's Court is, in itself, a violation of this requirement.

236. Therefore, the Court finds that the writ of habeas corpus filed on July 18, 1991, before the Examining Magistrate's Court of Huancavelica was not effective in determining the whereabouts of Elihoref Huamaní, so that the protection afforded by the writ was illusory. Consequently, in application of the *iura novit curia* principle, the Court considers that the State violated Article 7(6) of the American Convention to the detriment of Elihoref Huamaní and his next of kin (*supra* para. 84 and note 57).

B.3. Obstructions in the investigations

237. This Court has indicated that the State authorities are obliged to refrain from acts that obstruct the progress of investigative processes.[273]

238. In particular, the Court recalls that in order to ensure due process of law, the State must take all necessary measures to protect justice operators, investigators, witnesses and the family members of the victims from harassment and threats aimed at hindering the proceedings, preventing the elucidation of the facts and hiding those responsible.[274] Otherwise, those who investigate and those who could be witnesses would feel intimidated and frightened, and this would have a significant impact on the effectiveness of the investigation.[275] Indeed, the threats and intimidation suffered by witnesses in the domestic proceedings cannot be examined in isolation, but should be analyzed in the context of obstructions to the investigation of the case. Consequently, such acts become another means of perpetuating impunity and preventing the truth from being known.[276]

239. In this case, first of all, the Court has already established that on July 11, 1991, the Army denied the detention of nine of the victims in response to a request for information from the Special Provincial Prosecutor for Crime Prevention of Huancavelica (*supra* para. 95); it also denied

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[270] *Cf.* Complaint of Nicolás Hilario Morán, President of the Peasant Community of Santa Bárbara, of July 8, 1991, filed before the Special Prosecutor's Office for Crime Prevention of Huancavelica (evidence file, folio 60), and writ of habeas corpus of July 18, 1991, filed by Alejandro Huamaní Robles before the Examining Magistrate's Court of Huancavelica (evidence file, folio 82).

[271] *Cf.* Appeal filed on August 5, 1991 against the order of the Examining Magistrate's Court of Huancavelica of July 22, 1991 (evidence file, folio 88). It should be pointed out that in a note of February 5, 2015, the Court asked Peru for "information on the response given" to said appeal. The State responded in a letter of March 2 of the same year that "to date it has not been possible to obtain such information", without this having been subsequently forwarded to the Court.

[272] *Cf. Case of Tibi v. Ecuador. Preliminary objections, merits, reparations and costs.* Judgment of September 7, 2004. Series C No. 114, para. 134, and Case *Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra,* para. 135.

[273] *Cf. Case of García Prieto et al. v. El Salvador. Preliminary objections, merits, reparations and costs.* Judgment of November 20, 2007. Series C No. *168, para. 112, and Case of the Río Negro Massacres v. Guatemala*, *supra,* para. 194.

[274] *Cf. Case of Myrna Mack Chang v. Guatemala. Merits, reparations and costs.* Judgment of November 25, 2003. Series C No. 101, para. 199, and *Case of Human Rights Defender et al. v. Guatemala, supra,* para. 227.

[275] *Cf. Case of Kawas Fernández v. Honduras*, *supra,* para. 106, and *Case of the Human Rights Defender et al. v. Guatemala*, *supra,* para. 227.

[276] *Cf. Case of the Dos Erres Massacre v. Guatemala, supra,* para. 234, and *Case of Human Rights Defender et al. v. Guatemala*, *supra,* para. 227.

that its military bases were carrying out operations.[277] Likewise, when the said prosecutor requested on July 10 and 22, 1991, information on the patrols carried out by the military bases of Huancavelica, Lircay, Acobamba and Mantas on July 3 and 4, 1991, the Political and Military Chief of Huancavelica replied:

> […T]he Army, in its fight against terrorist criminals, has a well-defined procedure, which is legally and constitutionally protected, as is well known to the public and […]by all professionals who ethically fulfill their judicial role in all cases. […]In the same way, the alleged disappearance of persons and the consequent logical concern of the relatives or other interested parties is a POLICE MATTER, for which I would be grateful if future cases of this nature were to arise, to have recourse to the [Police Force]. […] The purpose of this is to avoid the manipulation of the protective institutions of the Homeland by immoral elements, at all levels, as well as to safeguard their image from the mockery that these citizens seek to make of the legal institutions and who remain unpunished.[278]

240. In this regard, the Court considers that far from showing concern over the possible acts committed by military personnel and a willingness to collaborate with the investigation, the response of the Political and Military Chief of Huancavelica was aimed at ensuring that the Special Provincial Prosecutor for Crime Prevention of Huancavelica would avoid approaching him on this matter.

241. Secondly, the Court has already established that, on several occasions, State agents interfered with and dynamited the site of the "Misteriosa" or "Vallarón" mine, in order to definitively destroy the evidence and erase all material traces of the crime (*supra* para. 170).

242. Third, the record shows that on July 14, 1991, 18 members of the community of Santa Bárbara who were on their way to the mine to attend the removal of the bodies, were detained by soldiers[279] and held in an abandoned house for more than six hours. [280] The procedure at the mine did not take place until four days later. While the villagers were being detained, several of them heard explosions coming from the direction of the mine.[281] Thus, the detention prevented the community members from arriving for the removal of the bodies scheduled for that date. Furthermore, this action was perceived by at least some of the villagers as a threat[282] and it

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277 Specifically, the Army authority stated that: "no personnel of our institution has detained the persons indicated and our Military Bases do not carry out operations, but rather permanent patrols with the aim of organizing the RONDAS CAMPESINAS, the *Comités de Autodefensa* (Self-defense Committees) and providing them with security." *Cf.* Report 17-91-FPEPD-HVCA of August 2, 1991, sent by the Special Prosecutor for Crime Prevention (evidence file, folios 3896 to 3897).

278 *Cf.* Report No. 17-91-FPEPD-HVCA of August 8, 1991, sent by the Office of the Special Prosecutor for Crime Prevention to the Assistant Supreme Court Criminal Prosecutor in charge of the Office of the Special Attorney of the Ombudsman (evidence file, folio 3891).

279 Although several testimonies indicate that the people who detained them were disguised as community members, the Truth and Reconciliation Commission found that they were "members of the Army who were not wearing their military uniforms" (evidence file, folio 6). See also, Statement of Gregorio Hilario Quispe of October 11, 2011 (evidence file, folio 1678); Statement of Zenón Cirilo Osnayo Tunque before the National Criminal Chamber of November 5, 2010 (evidence file, folio 4403); testimony of Felipe Tunque Lizana of July 18, 1991 (evidence file, folio 544), and testimony of Crisanto Hilario Morán of July 18, 1991 (evidence file, folios 538, 539 and 541).

280 *Cf.* Statement of Zenón Cirilo Osnayo Tunque before the National Criminal Chamber of November 5, 2010 (evidence file, folio, 4403), alleging that "the authorities" had forced them to help in this procedure; Statement of Zenón Cirilo Osnayo Tunque of October 11, 2011 (evidence file, folios 1674 to 1675), which indicates that "they told us that they had gone to meet with the judge and the prosecutor because of an accident, but the prosecutor and the judge never arrived"; testimony of Felipe Tunque Lizana of July 18, 1991 (evidence file, folios 544 to 545), which states that "the judge was going to come […] with full protection and the National Police, that's why we have come"; and testimony of Crisanto Hilario Morán of July 18, 1991, (evidence file, folio 538). Also see Report 0462-91-MP-FEM-HVCA of July 23, 1991 (evidence file, folio 56) and Report No. 158-SE-JDp of August 26, 1991 (evidence file, folio 3902).

281 *Cf.* Final CVR Report of August 28, 2003 (evidence file, folio 6); Statement of Gregorio Hilario Quispe of October 11, 2011 (evidence file, folio 1679); statement of Zenón Cirilo Osnayo Tunque of October 11, 2011 (evidence file, folio 1674); Testimony of Zenón Cirilo Osnayo Tunque before the National Criminal Chamber of November 5, 2010 (evidence file, folio 4404); testimony of Felipe Tunque Lizana of July 18, 1991, (evidence file, folio 545), and testimony of Crisanto Hilario Morán of July 18, 1991 (evidence file, folio 542).

282 It should be emphasized that the testimony of Felipe Tunque Lizana of July 18, 1991, indicates that soldiers made explicit threats (evidence file, folios 546 and 547); in his statement of October 11, 2011, Gregorio Hilario Quispe stated: "I believe that the dynamiting was done to cause us fear" (evidence file, folio 1679); and the testimony and statement of Zenón

possibly caused the destruction of evidence prior to the removal of corpses which finally took place on July 18, July 1991 (*supra* para. 101).

243. Fourth, the Court has already established that, as concluded by the National Criminal Chamber of the Superior Court of Justice of Lima (*supra* para. 173), the military courts "tried to cover up the real ages of the victims [who were minors, ordering], the registration of the death certificates with ages ranging from 19 to 42 years old – ages that would indicate that the deaths were the result of an armed confrontation with subversive elements."[283]

244. Fifth, regarding the role of the military jurisdiction in this case, in a ruling on October 28, 1991, the judge of the Sixth Permanent Military Tribunal of Ayacucho ordered the transfer of the case to the military courts, and in a judgment of October 16, 1992, the Permanent Court Martial of the Second Army Judicial District convicted three soldiers, a decision confirmed by the Review Chamber of Supreme Council of Military Justice on February 10, 1993. Likewise, following requests by CEAPAZ to the Prosecutor General and by Zósimo Hilario Quispe to the Second Army Judicial District that the case be tried in the ordinary courts, as well as the jurisdictional dispute between the judge of the Sixth Permanent Military Tribunal of Ayacucho with the examining magistrate of the ordinary Criminal Court of Huancavelica, on June 17, 1993, the Peruvian Supreme Court decided that the case should be investigated and tried in the ordinary courts. Nevertheless, following the application of Amnesty Laws No. 26.479 and No. 26.492 and despite this Court's judgment in the *Case of Barrios Altos v. Peru* that declared said laws incompatible with the American Convention, on June 28, 2002, the Plenary of the Supreme Council of Military Justice ordered the case to be reopened in the military jurisdiction at the execution of judgment stage (*supra* paras. 106 to 115 and 121 to 123). The Court does not have information regarding subsequent procedures in the military jurisdiction.

245. On this matter, the Court recalls its extensive and consistent case law on the competence of the military jurisdiction to investigate acts that constitute human rights violations and,[284] for the purposes of this case, finds it sufficient to reiterate that, in a democratic State governed by the rule of law, the military criminal jurisdiction must have a restricted and exceptional scope and its aim must be to protect special legal interests related to the intrinsic functions of the military forces. Therefore, as the Court has indicated previously, the military jurisdiction should only try

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Cirilo Osnayo Tunque of November 5, 2010, and October 11, 2011, respectively stated that the soldiers ordered them to appear before the Commando Political Military so that "we declare that nothing has happened" (evidence file, folios 1675 and 4404).

283 *Cf.* Judgment of the National Criminal Chamber of February 9, 2012 (evidence file, folio 4541).

284 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, reparations and costs.* Judgment of May 30, 1999. Series C No. 52, paras. 128 to 130 and 132; *Case Cesti Hurtado v. Peru. Merits.* Judgment of September 29, 1999. Series C No. 56, para. 151; *Case Durand and Ugarte v. Peru. Merits, supra*, paras. 116, 117, 125 and 126; *Case of Cantoral Benavides v. Peru. Merits. Judgment* of August 18, 2000. Series C No. 69, paras. 112 to 114; *Case the Palmeras v. Colombia. Merits, supra*, paras. 51, 52 and 53; *Case of 19 Merchants v. Colombia, supra*, paras. 165 to 167, 173 and 174; *Case of Lori Berenson Mejía v. Peru. Merits, reparations and costs*. Judgment of November 25, 2004. Series C No. 119, paras. 141 to 145; *Case of the "Mapiripán Massacre" v. Colombia, supra*, para. 202; *Case of Palamara Iribarne v. Chile. Merits, reparations and costs*. Judgment of November 22, 2005. Series C No. 135, paras. 139 and 143; *Case of the Pueblo Bello Massacre v. Colombia, supra*, paras. 189 and 193; *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, paras. 53, 54 and 108; *Case of Almonacid Arellano et al. v. Chile. Preliminary objections, merits, reparations and costs*. Judgment of September 26, 2006. Series C No. 154, paras. 131 and 134; *Case of La Cantuta v. Peru, supra*, paras. 142 and 145; *Case of La Rochela Massacre v. Colombia, supra*, paras. 200 and 204; *Case Escué Zapata v. Colombia, supra,* paras. 105; *Case Zambrano Vélez et al. v. Ecuador. Merits, reparations and costs.* Judgment of July 4, 2007. Series C No. 166, para. 66; *Case of Tiu Tojín v. Guatemala, supra*, paras. 118 to 120; *Case of Usón Ramírez v. Venezuela. Preliminary objection, merits, reparations and costs.* Judgment of November 20, 2009. Series C No. 207, paras. 108 to 110; *Case of Radilla Pacheco v. Mexico, supra*, paras. 272 to 275 and 283; *Case of Fernández Ortega et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 30, 2010. Series C No. 215, para. 176; *Case of Rosendo Cantú et al. v. Mexico. Preliminary objection, merits, reparations and costs.* Judgment of August 31, 2010. Series C No. 216, paras. 160 and 163; *Case of Cabrera García and Montiel Flores v. Mexico, supra*, paras. 197 to 201; *Case of Vélez Restrepo and Family v. Colombia. Preliminary objection, merits, reparations and costs.* Judgment of September 3, 2012. Series C No. 248, paras. 240, 241, 243 and 244; *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 158; *Case of Osorio Rivera and Family Members v. Peru, supra*, paras. 187 to 191, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra*, para. 442.

military personnel on active duty for crimes or offenses that, owing to their nature, violate legal rights related to the military system.[285] Furthermore, taking into account the nature of the offense and the legal rights violated, the military criminal jurisdiction is not the competent jurisdiction to investigate and, if appropriate, prosecute and punish the perpetrators of human rights violations; rather, the prosecution of those responsible always corresponds to the ordinary justice system.

246. Furthermore, the Court points out that, at least since the judgment in the case of *Durand and Ugarte v. Peru*, it has been the Court's consistent case law that the military jurisdiction is not the competent jurisdiction to investigate and, if appropriate, prosecute and punish the perpetrators of alleged human rights violations.[286] The factual situation of the *Durand and Ugarte* case refers to facts that occurred in 1986,[287] and therefore this Court considers that this criterion is also applicable in the instant case, where the events occurred in July 1991. Consequently, the involvement of the military jurisdiction in the investigation of the forced disappearance of the fifteen victims in the instant case was an additional element that hindered the investigation.

247. Finally - and sixth - on June 28, 1995, the Peruvian Congress approved Law No. 26.492 which interpreted Article 1 of Law No. 26.479 (*supra* para. 120). On July 4, 1995, the Mixed Chamber of the Superior Court of Huancavelica declared the latter law to be applicable to the accused in the instant case, ordering that the proceedings be discontinued and permanently archived. The application of the amnesty law met with the approval of the Supreme Court Prosecutor for Criminal Matters and was confirmed by the First Transitional Criminal Chamber of the Peruvian Supreme Court of Justice in a ruling dated January 14, 1997 (*supra* para. 121).

248. This Court has already analyzed the content and scope of Amnesty Laws Nos. 26.479 and 26.492 in the judgment on merits in the case of *Barrios Altos v. Peru*, of March 14, 2001, in which it declared that these were incompatible with the American Convention and, consequently, lacked legal effects.[288] The Court interpreted that judgment on the merits in the sense that "[t]he promulgation of a law that is manifestly contrary to the obligations assumed by a State Party to the Convention constitutes *per se* a violation of the latter and gives rise to the international responsibility of the State [and] that, given the nature of the violation constituted by Amnesty Laws No. 26.479 and No. 26.492, the decisions in the judgment on merits in the Barrios Altos case have general effects."[289]

249. In view of the judgment in the case of *Barrios Altos v. Peru*, on June 28, 2002, the Plenary Chamber of the Supreme Council of Military Justice declared null and void the final ruling (*ejecutoría suprema*) of June 16, 1995, which had granted the benefit of an amnesty to Javier Bendezú Vargas and others, and ordered the reopening of the case (*supra* para. 123). Meanwhile, in the ordinary jurisdiction, on July 14, 2005, the Mixed Chamber of the Superior Court of Justice of Huancavelica declared the aforementioned ruling of July 4, 1995 invalid, and ordered the reopening of the proceedings and the joinder of the investigation that had been initiated after the CVR's Final Report on the same facts (*supra* para. 124).

250. Therefore, the Court considers that the application of Amnesty Law No. 26.479, contrary to the Convention, meant that the investigation was archived for 10 years in the ordinary jurisdiction, which affected the continuity of the proceedings and prevented the investigation and punishment of those responsible for the serious human rights violations committed during that

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285 *Cf. Case of Castillo Petruzzi et al. v. Peru*, *supra,* para. 128, and *Case of Osorio Rivera v. Peru, supra,* para. 187.

286 *Cf. Case of Durand and Ugarte v. Peru. Merits, supra,* paras. 117, 118, 125 and 126, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 445.

287 *Cf. Case of Durand and Ugarte v. Peru. Merits. Judgment* of August 16, 2000. Series C No. 68*,* para. 59.

288 *Cf. Case of Barrios Altos v. Peru. Merits, supra*, para. 44 and fourth operative paragraph.

289 *Cf. Case of Barrios Altos v. Peru. Interpretation of the Judgment of Merits,* para. 18 and second operative paragraph.

period. Nevertheless, the Court notes that the application of the amnesty laws is no longer an obstacle to the judicial resolution of this case.

251. In view of the foregoing, the Court concludes that State agents obstructed the proper investigation of this case in at least six different ways.

252. However, the Court does not have sufficient evidence to prove the allegations of the representatives and the Commission that community members suffered detention and other acts of harassment that would have affected the investigation, as well as the Commission's allegations of threats and attacks against judicial operators. In this regard, the only evidence in the file about the alleged detentions of villagers and community leaders on July 18 and November 8, 1991, is a letter sent by the Center of Studies and Action for Peace (CEAPAZ), one of the representative organizations, to the Prosecutor General, which refers to them.[290] As for the alleged arbitrary detention of Zenón Cirilo Osnayo Tunque, Marcelo Hilario Quispe and Gregorio Hilario Quispe, although the representatives cite the former's testimony before the Court and the affidavits of the latter in this regard, there is no other evidence in the file to corroborate these claims, such as the alleged rulings issued in connection with the aforementioned detentions.[291] Likewise, the Court considers that the evidence in the file is insufficient to prove the alleged threats and attacks in connection with this case, against Inés Sinchitullo Barboza, Attorney at law of the Superior Mixed Prosecutor's Office of Huancavelica, Manuel Antonio Cordova Polo, Provincial Prosecutor of Angaraes, and against the daughter of Luz Gladys Roque Montesillo, Provisional Provincial Prosecutor of the Special Prosecutor's Office for Crime Prevention of Huancavelica. Although in a report to the Assistant Supreme Court Criminal Prosecutor of August 2, 1991 on the investigation of the disappeared persons of Santa Bárbara, Prosecutor Luz Gladys Roque Montesillo stated that her daughter received a wound in the mouth from a shot fired by a policeman and that the house of Inés Sinchitullo Barboza was dynamited, a resolution of the Huancavelica Provincial Prosecutor's Office of May 29, 1992, stated that there was no evidence of such acts. The Court also notes that the aforementioned report of August 2, 1991, prepared by Prosecutor Luz Gladys Roque Montesillo, described a general context of violence against prosecutors, not only by the Army but also by "subversive elements"; thus, it is not clear that the possible violence reported was necessarily connected with the facts of the present case.[292] Moreover, there is no evidence in the file regarding the alleged threat against Manuel Antonio Córdova Polo on February 19, 1992.

B.4. Lack of due diligence in the proceedings opened after the reopening of the case

253. Regarding the alleged lack of due diligence in the proceedings reopened after the annulment of the ruling of July 4, 1995, which had applied Amnesty Law No. 26.479 to the defendants for the facts of this case, the Court reiterates that it appreciates the efforts of the State in issuing the judgment of February 9, 2012, of the National Criminal Chamber of the Superior Court of Justice and the final ruling (*ejecutoría suprema*) of May 29, 2013, of the Transitional Criminal Chamber of the Peruvian Supreme Court of Justice (*supra* para. 88). However, in Chapter IX.I of this judgment (paras. 177 to 183), the Court has already established in detail the deficiencies in the excavation, exhumation and analysis of skeletal remains carried out from 2009 to 2011, that is, after the proceedings to investigate the facts of this case were reopened in the ordinary courts. The Court found that these deficiencies in the collection of evidence have contributed to the lack of information regarding the whereabouts of the victims and the uncertainty

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290 *Cf.* Communication from the Center of Studies and Action for Peace (CEAPAZ) to the Office of the Prosecutor General of November 13, 1991 (evidence file, folio 45).

291 *Cf.* Statement of Zenón Cirilo Osnayo Tunque at the public hearing held on January 26, 2015; statement rendered by affidavit on January 9, 2015, by Marcelo Hilario Quispe (evidence file, folios 5053 to 5054); statement rendered on January 9, 2015 by affidavit by Gregario Hilario Quispe (evidence file, folios 5058 to 5059), and statement of Gregorio Hilario Quispe of October 11, 2011, before the Fourth Supra Provincial Criminal Court (evidence file, folio 1679).

292 *Cf.* Petition a the Commission for precautionary measures of March 11, 1992 (evidence file, folios 438 to 443); Report No 17-91-FPEFD-HVCA of the Special Prosecutor for Crime Prevention of August 2, 1991 (evidence file, folios 3898), and Resolution of May 29,1992, of the Office of the Provincial Prosecutor of Huancavelica (evidence file, folio 280).

as to whether the remains found and those that could still be in the mine, belong to the victims in this case (*supra* para. 183).

254. With regard to the alleged lack of due diligence in the capture of Javier Bendezú Vargas and Dennis Wilfredo Pacheco Zambrano, the absent defendants before the National Criminal Chamber of Lima, the Court notes that on December 12, 2006, said Chamber ordered their immediate location and capture.[293] Likewise, on November 9, 2009, it ordered "the re-issuance of national and international warrants for their location and arrest," noting that Mr. Bendezú Vargas registered his domicile in Lima and Mr. Pacheco registered his domicile in Buenos Aires, Argentina (*supra* para. 127). On February 6, 2010, the President of the Chamber was informed that international warrants for the location and arrest of the defendants had been issued.[294] Subsequently, in a ruling on February 9, 2012, the National Criminal Chamber set aside the trial of the absent defendants Javier Bendezú Vargas and Dennis Wilfredo Pacheco Zambrano and, consequently, ordered their immediate location and capture at national and international level (*supra* para. 131).

255. From the evidence it is also clear that the National Criminal Chamber requested the extradition of Dennis Wilfredo Pacheco Zambrano by the judicial authorities of the Republic of Argentina, and that in a decision of September 28, 2011, the Transitional Criminal Chamber of the Supreme Court of Justice declared this request admissible.[295] However, on July 12, 2013, the National Criminal Chamber decided to annul said extradition request.[296] In turn, on October 3, 2012, the National Criminal Chamber requested the extradition of Dennis Wilfredo Pacheco Zambrano from the authorities of the United States of America.[297] In this regard, as reported to the National Criminal Chamber on May 14, 2013, the International Judicial Cooperation and Extraditions Unit of the National Prosecutor's Office submitted a request for his provisional detention for extradition purposes.[298] Likewise, in a letter of July 19, 2013, the National Criminal Chamber asked the Chief of the International Division of Crimes against Life, the Person and Health (DIVIPVCS-OCN–INTERPOL-LIMA) to submit updated and complete information on the current whereabouts of Dennis Wilfredo Pacheco Zambrano.[299] In response, on October 31, 2013, the Head of DIVIPVCS-OCN–INTERPOL–LIMA reported that Dennis Wilfredo Pacheco Zambrano had been living in the United States of America since 2000.[300]

256. Furthermore, in a communication dated July 19, 2013, the National Criminal Chamber asked the Chief of the Judicial Police's Requisition Division to reiterate the order for the immediate location and arrest of Javier Bendezú Vargas.[301] Finally, it is on record that, at least until January 8, 2015, the international arrest warrants for Javier Bendezú Vargas and Dennis Wilfredo Pacheco Zambrano were in effect.[302]

257. In relation to the above, the Court notes that in this case the authorities had the obligation to take all the necessary steps to ensure that Javier Bendezú Vargas and Dennis Wilfredo Pacheco Zambrano could be located and subsequently prosecuted. Although this is an obligation of means and not of result, for a period of nearly nine years - that is, from December 2006, when the order to locate and capture the defendants was issued (*supra* para. 254), to the present date - the State

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293 *Cf.* Brief of June 13, 2007, National Criminal Chamber (evidence file, folio 188).

294 *Cf.* Report of February 13, 2015 of the National Police of Peru (evidence file, folio 5368).

295 *Cf.* Resolution of the Transitional Criminal Chamber of the Supreme Court of Justice of Peru of March 11, 2013 (evidence file, folio 4598).

296 *Cf.* Brief of the National Criminal Chamber of July 19, 2013 (evidence file, folio 4619).

297 *Cf.* Resolution of the Transitional Criminal Chamber of the Supreme Court of Justice of Peru of March 11, 2013 (evidence file, folio 4598).

298 *Cf.* Ruling of the National Criminal Chamber of May 14, 2013 (evidence file, folio 4600).

299 *Cf.* Brief of the National Criminal Chamber of July 19, 2013 (evidence file, folio 4618).

300 *Cf.* Brief of the Head of DIVIPVCS-OCN–INTERPOL–LIMA of October 31, 2013 (evidence file, folio 4621).

301 *Cf.* Official letters of the National Criminal Chamber of July 19, 2013 (evidence file, folio 4617).

302 *Cf.* Report of February 13, 2015, of the National Police of Peru (evidence file, folio 5370).

has only shown that it has carried out eight specific actions for the purpose of apprehending Javier Bendezú Vargas and Dennis Wilfredo Pacheco Zambrano, none after July 2013. It should be noted that on February 5, 2015, the Court asked the State to provide, as helpful evidence, updated information on the steps taken to locate and capture Javier Bendezú Vargas and Dennis Wilfredo Pacheco Zambrano. In the opinion of this Court, the actions reported by Peru have been insufficient and the State has not acted with due diligence to ensure the capture of said persons.

258. In addition, both the Commission and the representatives alleged that other possible perpetrators had not been investigated. The latter also argued that the delay in establishing responsibilities is unjustified and violates the obligation to investigate within a reasonable time. In this regard, the Court recalls that it is not up to this Court to analyze the hypotheses concerning the perpetrators that arose during the investigation of the facts and, consequently, to establish individual responsibilities; the definition of these is the purview of the domestic criminal courts.[303] However, in complex cases such as this, the obligation to investigate entails the duty to direct the efforts of the State apparatus to clarify the structure that allowed these violations to occur, their causes, the beneficiaries, and the consequences. Thus, an investigation can only be effective if it is carried out based on an overall view of the facts that takes into account the background and context in which they occurred and that seeks to reveal the structures involved.[304] The Court notes that, in its judgment of February 9, 2012, the National Criminal Chamber of the Superior Court of Justice of Lima ordered the forwarding of certified copies of the case to the Public Prosecutor's Office for the purpose of investigating Ricardo Caro Díaz, Fernando Lizarzaburu Corte, Alfredo Corzo Fernández, Jesús Rodríguez Franco and Romualdo Segura Pérez (*supra* para. 131). However, the Court has no information regarding possible investigations conducted after that date.

259. Nevertheless, the Court considers that 24 years have elapsed since the events occurred, without a complete clarification of what happened or a reliable determination of the whereabouts of the disappeared persons, which constitutes a prolonged delay due, *inter alia*, to the application of the Amnesty Law and the lack of due diligence identified in this chapter of the judgment.

260. In view of the foregoing, the Court concludes that after the reopening of the investigation of the case in the ordinary courts, the State failed to exercise due diligence in the collection of evidence and in the location and capture of the fugitive defendants. Likewise, there has been a prolonged delay in clarifying all the facts of the case and determining the whereabouts of the disappeared victims.

B.5. Right to know the truth

261. In this case, the representatives alleged the violation of the right of the victims' next of kin to know the truth about the facts.

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[303] *Cf. Case of Cantoral Huamaní and García Santa Cruz v. Peru, supra,* para. 87, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia*, *supra*, para. 500.

[304] *Cf. Case of Manuel Cepeda Vargas v. Colombia. Preliminary objections, merits, reparations and costs*. Judgment of May 26, 2010. Series C No. 213, para. 118, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia***,** *supra,* para. 500.

262. The United Nations has recognized the right to know the truth through the statements of the General Assembly,[305] the Secretary-General,[306] and the Security Council,[307] as well as numerous resolutions and reports of bodies and agencies such as the Working Group on Enforced Disappearances, the Special Rapporteur on States of Emergency, the United Nations High Commissioner for Human Rights, the Human Rights Council and the former Commission on Human Rights.[308] Within the sphere of the UN, the International Convention for the Protection of All Persons from Enforced Disappearance expressly recognizes, in Article 24(2), that "[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person."[309] In addition, the set of principles for the protection and promotion of human rights through action to combat impunity recognize that the next of kin of disappeared victims have the "imprescriptible right to know the truth […] regarding the victim's fate." [310]

263. In the regional sphere, the European Union has ruled on the right to know the truth in resolutions on missing persons,[311] among others.[312] In addition, in several resolutions the General Assembly of the Organization of American States (OAS) has "recognize[d] the importance of

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[305] The United Nations General Assembly, in some of its resolutions, has expressed its deep concern over the anguish and pain of the families affected by forced disappearances. *Cf.* United Nations General Assembly. Resolutions No. 3220 (XXIX) of November 6, 1974, No. 33/173 of December 20, 1978, No. 45/165 of December 18, 1990, and No. 47/132 of February 22, 1993. Likewise, it has ruled on the importance of determining the truth in cases of genocide, war crimes, crimes against humanity and serious violations of human rights. *Cf.* United Nations General Assembly. Resolutions No. 55/118 of March 1, 2001, No. 57/105 of February 13, 2003, No. 57/161 of January 28, 2003, and No. 60/147 of March 21, 2006.

[306] The United Nations Secretary General has recognized the right to know the truth in the bulletin entitled "Observance by United Nations forces of international humanitarian law," which establishes that the United Nations forces shall respect the right of the families to know about the fate of their sick, wounded and deceased relatives. It has also emphasized the importance of truth in the context of transitional justice. *Cf.* UN Secretary General's Bulletin. *Observance by United Nations forces of international humanitarian law.* ST/SGB/1999/13, August 6, 1999, rule 9.8, and Report of the United Nations Secretary General. The *Rule of Law and Transitional Justice in societies that suffer or have suffered conflicts.* S/2011/634, October 12, 2011.

[307] The United Nations Security Council has issued resolutions emphasizing the importance of establishing the truth with respect to crimes against humanity, genocide, war crimes and flagrant violations of human rights. *Cf.* Security Council resolutions No. 1468 (2003) of March 20, 2003, No. 1470 (2003) of March 28, 2003 and No. 1606 (2005) of June 20, 2005.

[308] *Cf.* Report of the Working Group on Enforced or Involuntary Disappearances. E/CN.4/1435. January 22, 1981, para. 187; Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities. *The Administration of Justice and the Human Rights of Detainees: Question of Human Rights and States of Emergency*. E/CN.4/Sub.2/1995/20, June 20, 1995, paras. 39 to 40; United Nations Commission on Human Rights. *Report of the United Nations High Commissioner for Human Rights on the human rights situation in Colombia.* E/CN.4/2005/10. February 28, 2005, para. 5; Report of the Office of the United Nations High Commissioner for Human Rights. *Study on the right to the truth*, U.N. Doc. E/CN.4/2006/91, January 9, 2006, paras. 57 and 59; United Nations Commission on Human Rights. Resolutions No. 1989/62 of March 8, 1989, No. 2002/60, April 25, 2002, No. 2005/35, April 19, 2005 and No. 2005/66, April 20, 2005; United Nations Human Rights Council. Resolutions No. 9/11 of September 24, 2008 and No. 12/12 of October 1, 2009. For its part, the International Committee of the Red Cross (ICRC) has considered that the right to know the truth is a norm of customary international law and each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate. *Cf.* Resolution II of the XXIV International Conference of the Red Cross and Red Crescent (Manila, 1981).

[309] *Cf.* International Convention for the Protection of All Persons from Enforced Disappearance, Article 24. Similarly, Article 32 of Additional Protocol I to the 1949 Geneva Conventions, relating to the Protection of Victims of International Armed Conflicts, recognizes the right to know the whereabouts of missing persons; while the Geneva Conventions of August 12, 1949, incorporate several provisions that impose on the parties to the conflict the obligation to resolve the problem of missing combatants and to establish a central tracing agency. *Cf.* Protocol I Additional to the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, August 12, 1977, and Articles 16 and 17 of the IV Geneva Convention relative to the Protection of Civilian Persons in Time of War, August 12, 1949; Articles 18, 19 and ss. of the II Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, August 12, 1949, and Articles 15 and 16. I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949.

[310] *Cf.* Set of updated principles for the protection and promotion of human rights through action against impunity, a Doc. E/CN.4/2005/102/Add.1, February 8, 2005, Principles 1 to 5.

[311] *Cf.* European Parliament. Resolution on missing persons in Cyprus, January 11, 1983.

[312] *Cf.* Conclusions of the Council of the European Union on Colombia, October 3, 2005, Luxemburg, para. 4.

respecting and ensuring the right to the truth to help end impunity and to promote and protect human rights."[313]

264. For its part, this Court has determined that everyone, including the next of kin of victims of serious human rights violations, has the right to know the truth. Consequently, the next of kin of the victims and society must be informed of everything that occurred with regard to said violations.[314] The Inter-American Court has considered the content of the right to know the truth in its jurisprudence, particularly in cases of forced disappearance. Since the case of *Velásquez Rodríguez,* the Court has affirmed the right of the victims' next of kin "to know their fate and, where possible, the location of their remains."[315] Subsequently, in different cases the Court has considered that the right to know the truth "is subsumed in the right of the victim or his next of kin to obtain from the competent authorities of the State the clarification of the facts, the violations and the corresponding responsibilities, through the investigation and judgment provided for in Articles 8 and 25(1) of the Convention."[316] On the other hand, in some cases, such as *Anzualdo Castro et al. v. Peru* and *Gelman v. Uruguay,* the Court has made additional considerations specifically applicable to cases involving the violation of the right to know the truth.[317] Likewise, in the case *Gudiel Álvarez et al. (Diario Militar) v. Guatemala,* the Court analyzed the violation of the right to know the truth in its assessment of the right to personal integrity of the relatives, since it considered that, by hiding information that prevented the relatives from knowing the truth, the respective State had violated Articles 5(1) and 5(2) of the American Convention.[318] In the case *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, the Court even declared an autonomous violation of the right to know the truth which, given the specific circumstances of that case, constituted - in addition to a violation of the right of access to justice and an effective remedy - a violation of the right to seek and receive information, enshrined in Article 13 of the Convention.[319] Finally, the Court has considered the obligation to investigate as a form of reparation, in light of the need to remedy the violation of the right to know the truth in that specific case.[320]

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313 *Cf.* OAS General Assembly, Resolutions: AG/RES. 2175 (XXXVI-O/06) June 6, 2006, AG/RES. 2267 (XXXVII-O/07) June 5, 2007, AG/RES. 2406 (XXXVIII-O/08) June 3, 2008, AG/RES. 2509 (XXXIX-O/09), June 4, 2009, AG/RES. 2595 (XL-O/10), June 8, 2010, AG/RES. 2662 (XLI-O/11), June 7, 2011, AG/RES. 2725 (XLII-O/12), June 4, 2012, AG/RES. 2800 (XLIII-O/13), June 5, 2013, and AG/RES. 2822 (XLIV-O/14), June 4, 2014.

314 *Cf. Case of 19 Merchants v. Colombia, supra*, para. 261, and *Case Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Preliminary objections, merits, reparations and costs.* Judgment of November 24, 2010. Series C No. 219, para. 200.

315 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 181.

316 *Cf. Case of Chitay Nech et al. v. Guatemala. Preliminary objections, merits, reparations and costs.* Judgment of May 25, 2010. Series C No. 212, para. 206; *Case Gelman v. Uruguay*. *Merits and Reparations.* Judgment of 24 February 24, 2011. Series C No. 221, paras. 243 and 244; *Case of Uzcátegui et al. v. Venezuela. Merits and Reparations.* Judgment of September 3, 2012. Series C No. 249, para. 240; *Case of Osorio Rivera and Family Members v. Peru, supra*, para. 220; *Case of La Rochela Massacre v. Colombia, supra*, para. 147; *Case of Anzualdo Castro v. Peru, supra*, paras. 119 and 120, and *Case of the Massacres of El Mozote and Nearby Places v. El Salvador, supra*, para. 298. In one case, such consideration was made within the obligation to investigate ordered as a measure of reparation. Cf. *Case of Almonacid Arellano et al. v. Chile*, *supra*, para. 148. Furthermore, in other cases it has been established that it is subsumed in Articles 8(1), 25 and 1(1) of the Convention, but this consideration was not included in the reasoning of the respective operative paragraph. *Cf. Case of Barrios Family v. Venezuela, supra*, para. 291; *Case of González Medina and Family v. Dominican Republic, supra*, para. 263, and *Case of Contreras et al. v. El Salvador. Merits, reparations and costs.* Judgment of August 31, 2011. Series C No. 232, para. 173.

317 *Cf. Case of Anzualdo Castro v. Peru, supra*, paras. 118 to 119, and *Case Gelman v. Uruguay, supra*, paras. 192, 226 and 243 to 246.

318 *Cf. Case of Gudiel Álvarez et al. (Diario Militar) v. Guatemala, supra*, para. 202.

319 In this regard, in the *Case of Gomes Lund et al.*, the Court noted that, in accordance with the facts, the right to know the truth se related to an action filed by the family members to access certain information, linked with access to justice and with the right to seek and receive information recognized in Article 13 of the American Convention, for which it analyzed that right under this norm. *Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, supra,* para. 201.

320 *Cf. Case of Velásquez Rodríguez*. *Merits, supra,* para. 181, and *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, supra,* para. 201.

265. Based on the above considerations, it is clear that, although the right to know the truth has been fundamentally framed within the right of access to justice,[321] it has a broad nature and its violation can affect different rights recognized in the American Convention,[322] depending on the particular context and circumstances of the case. In the case of Peru, the Constitutional Court has recognized that "the right to the truth, although not expressly recognized in the constitutional text, is a fully protected right […]."[323]It has also stated that "the nation has the right to know the truth about the unjust and painful facts or events caused by the multiple forms of State and non-State violence. This right translates into the possibility of knowing the circumstances of time, manner and place in which they occurred, as well as the motives of the perpetrators. The right to the truth is, in this sense, an inalienable collective legal right."[324] It should also be noted that on September 26, 2012, Peru ratified the International Convention for the Protection of All Persons against Enforced Disappearance, which expressly recognizes the right to know the truth.

266. In this regard, the Inter-American Court recalls that, pursuant to Article 29(b) of the American Convention, no provision of this Convention shall be interpreted as "restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party." Moreover, Article 29(c) of the Convention establishes that "no provision of this Convention shall be interpreted as: precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government." The Court also recalls that Article 4 of the Inter-American Democratic Charter establishes that "transparency in government activities" is an essential component of the exercise of democracy.

267. In the instant case, approximately 24 years after the forced disappearance of the 15 victims, the State has still not clarified everything that happened, or determined all the corresponding responsibilities; and there is still uncertainty as to whether the remains found - and those that may still remain in the mine – belong to the victims in this case. The Court has noted the negligence with which the remains collected in the "Misteriosa" or "Vallarón" mine were handled, both in 1991 and between 2009, 2010 and 2011 (*supra* para. 185), which has not helped to clarify the facts. Furthermore, the State's own agents attempted to erase all traces of the crime and to conceal what happened by destroying evidence (*supra* paras. 184 and 185). In this regard, the Court emphasizes that in the context of a forced disappearance, the right to know the whereabouts of the missing victim constitutes an essential component of the right to know the truth. For the relatives of disappeared victims, uncertainty about the fate of their loved ones is one of the main sources of psychological and moral suffering. Therefore, the Court declares the violation of the right to know the truth, to the detriment of the next of kin of the fifteen victims of forced disappearance. In this case, as in others, said violation is part of the right of access to justice.

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321 *Cf.* See *inter alia*, *Case of Velásquez Rodríguez v. Honduras, supra*, para. 181; *Case of Bámaca Velásquez v. Guatemala. Merits. Judgment* of November 25, 2000. Series C No. 70, para. 201; *Case of Barrios Altos v. Peru. Merits, supra*, para. 48; *Case of Almonacid Arellano et al. v. Chile, supra*, para. 148; *Case of La Cantuta v. Peru, supra*, para. 222; *Case of Heliodoro Portugal v. Panama, supra*, paras. 243 and 244, and *Case of Kawas Fernández v. Honduras, supra*, para. 117.

322 In its study on the right to know the truth, the United Nations High Commissioner for Human Rights stated that various international declarations and instruments have recognized the right to know the truth linked to the right to obtain and request information, the right to justice, the duty to combat impunity for human rights violations, the right to an effective judicial remedy, and the right to private and family life. Also, in relation to the victims' relatives, it has been linked to the right to integrity of the victim's relatives (mental health), the right to obtain reparation in cases of serious human rights violations, the right not to be subjected to torture or ill-treatment and, in certain circumstances, the right of children to receive special protection. *Cf.* Report of the Office of the United Nations High Commissioner for Human Rights. *Study on the right to the truth*, U.N. Doc. E/CN.4/2006/91 of January 9, 2006.

323 *Cf.* Constitutional Court of Peru. *Case of Genaro Villegas Namuche.* Judgment of March 18, 2004. File No. 2488-2002-HC/TC, para. 13.

324 *Cf.* Constitutional Court of Peru. *Case of Genaro Villegas Namuche.* Judgment of March 18, 2004. File No. 2488-2002-HC/TC, para. 8.

B.6. General conclusion

268. Based on all the foregoing considerations, this Court finds that the State: i) failed to exercise due diligence in the initial investigative procedures; ii) obstructed the investigation of the case in at least six different ways; iii) failed to exercise due diligence in the collection of evidence, the location and capture of the fugitive defendants, and regarding the prolonged delay in clarifying all the facts and determining the whereabouts of the disappeared victims after the reopening of the investigation of the case in the ordinary jurisdiction, and iv) violated the right to know the truth of the next of kin of the fifteen disappeared victims in this case.

269. Therefore, the Court concludes that the State violated, to the detriment of the forcibly disappeared victims and their next of kin, the rights to judicial guarantees and judicial protection recognized in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) thereof, as well as in relation to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, and Article I.b of the Inter-American Convention on Forced Disappearance of Persons from March 15, 2002, the date of its entry into force in Peru. In addition, Peru violated the right to know the truth of the next of kin of the disappeared victims.

270. Lastly, the Court considers that the remedy filed by Alejandro Huamaní on behalf of his son Elihoref Huamaní was not effective, and therefore the State violated Article 7(6) of the American Convention to the detriment of Elihoref Huamaní and his next of kin.

IX.IV
RIGHT TO PERSONAL INTEGRITY OF THE NEXT OF KIN OF THE DISAPPEARED PERSONS

A. Arguments of the Commission and of the parties

271. The ***Commission*** argued that, in accordance with the Court's case law, in cases involving the forced disappearance of persons it is possible to understand that the violation of the right to psychological and moral integrity of the victims' next of kin is a direct consequence, precisely, of that phenomenon. Consequently, given the alleged forced disappearances in this case, the State had the obligation to ensure the right to personal integrity of the next of kin also through effective investigations; thus, the absence of effective remedies constituted a source of additional suffering and anguish for the victims' families. In this regard, the Commission noted the steps taken by the next of kin after the disappearance of the 15 victims before different State institutions and agencies, in order to determine their whereabouts and investigate and punish the alleged perpetrators. In this regard, it recalled that the Court has considered that the continuous denial of the truth about the fate of a disappeared person constitutes a form of cruel and inhuman treatment for the next of kin. Therefore, it concluded that the right to personal integrity of the victims' next of kin enshrined in Article 5 of the American Convention, in connection with Article 1(1) of the same instrument, was violated to the detriment of Zósimo Hilario Quispe, Marcelo Hilario Quispe, Gregorio Hilario Quispe, Zenón Cirilo Osnayo Tunque, Víctor Carhuapoma de la Cruz, Ana de la Cruz Carhuapoma, Viviano Hilario Mancha, Dolores Morán Paucar, Justiniano Guillén Ccanto, Abilio Hilario Quispe, Victoria Riveros Valencia, Marino Huamaní Vergara and Alejandro Huamaní Robles.

272. The ***representatives*** pointed out that, in accordance with the Court's case law, in the instant case it is appropriate to apply the presumption of a violation of the right to personal integrity to the detriment of the next of kin of the victims of forced disappearance. They emphasized that these family members have "experienced deep suffering as a result of the forced disappearance of their loved ones," which was greatly intensified by the disappearance of the seven children. They alleged that the forced disappearance of the victims "caused a rupture within their family units that is still being experienced today." Furthermore, the victims' families have allegedly suffered from the lack of justice in the investigations into the forced disappearance of

their loved ones and the failure to clarify the truth that still characterizes the facts of this case, "which has made it impossible for them to identify and receive the mortal remains of their loved ones and, thus, to give them a proper burial." In this sense, they considered that the State is responsible for the violation of the right to personal integrity to the detriment of Zósimo Hilario Quispe, Marcelo Hilario Quispe, Gregorio Hilario Quispe, Zenón Cirilo Osnayo Tunque, Ana de la Cruz Carhuapoma, Víctor Carhuapoma de la Cruz, Viviano Hilario Mancha, Dolores Morán Paucar, Justiniano Guillén Ccanto, Victoria Riveros Valencia, Marcelina Guillén Riveros, Marino Huamaní Vergara and Alejandro Huamaní Robles.

273. The ***State*** argued that it could not be held responsible for the violation of the right to integrity of the alleged victims' next of kin. In this regard, it argued that it is probable that some of the suffering of the next of kin is similar to that of the victims' relatives in comparable cases; however, in the instant case, significant progress was achieved in determining those responsible for the death of the fifteen members of the Santa Bárbara peasant community. It also indicated that it would be making all the necessary efforts to clarify the facts and to determine those responsible, as well as to ensure the capture of the two fugitive defendants. It pointed out that, given that the perpetrator of the crimes had been convicted by the competent national judicial authorities, and had been ordered to pay compensation, this would indicate the State's willingness to make reparations. In its final written arguments, the State rejected claims that this case involved alleged forced disappearance, insisting that it constituted extrajudicial execution. It also expressed its surprise at "the attempt to claim the violation of the next of kin's right to the truth by arguing that that they did not obtain access to justice," thereby ignoring the results of the investigation that was reopened in 2005 and the determination of the proven facts by the National Criminal Chamber, confirmed by the Supreme Court of Justice.

A. Considerations of the Court

274. The Court has repeatedly affirmed that the next of kin of victims of human rights violations may, in turn, be victims.[325] The Court has also considered that in cases involving the forced disappearance of persons, it is possible to understand that the violation of the right to psychological and moral integrity of the victim's next of kin is a direct consequence of this situation. This causes them severe suffering due to the act itself, which is intensified, among other factors, by the constant refusal of the State authorities to provide information about the whereabouts of the victim or to conduct an effective investigation to clarify what happened.[326] These effects lead to a presumption of harm to the psychological and moral integrity of the next of kin in cases of forced disappearance.[327] In previous cases, this Court has established that a *iuris tantum* presumption is applied with respect to mothers and fathers, sons and daughters, spouses and permanent partners of the disappeared victims, unless proven otherwise by the specific circumstances of the case.[328] Also, it its most recent case law, the Court has considered that, in the context of forced disappearance, this presumption is also applicable to the siblings of the disappeared victims, unless the contrary is demonstrated by the specific circumstances of the case.[329]

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[325] *Cf. Case of Castillo Páez v. Peru. Merits. Judgment* of November 3, 1997. Series C No. 34, fourth operative paragraph, and Case of Cruz *Sánchez et al. v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of April 17, 2015. Series C No. 292, para. 443.

[326] *Cf. Case of Blake v. Guatemala. Merits. Judgment* of January 24, 1998. Series C No. 36, para. 114, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia*, *supra,* para. 533.

[327] *Cf. Case of Valle Jaramillo et al. v. Colombia. Merits, reparations and costs*. Judgment of November 27, 2008. Series C No. 192, para. 119 and *Case of Osorio Rivera and Family Members v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 26, 2013. Series C No. 274, para. 227.

[328] *Cf. Case of the "Mapiripán Massacre" v. Colombia. Merits, reparations and costs*. Judgment of September 15, 2005. Series C No. 134, para. 146, and Case of Cruz *Sánchez et al. v. Peru, supra*, para. 444.

[329] *Cf. Case of Gudiel Álvarez et al. (Diario Militar) v. Guatemala. Merits, reparations and costs*. Judgment of November 20, 2012 Series C No. 253, para. 286, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra*, para. 533.

275. The Commission and the representatives have presented arguments on the rupture caused within the families, the lack of effective remedies, the lack of justice in the investigation of the facts and the failure to clarify the truth, which has made it impossible for the next of kin to identify and receive the mortal remains of their loved ones and to give them a proper burial. For its part, the State has referred to the progress made in determining those responsible for the death of the fifteen victims in this case, the capture of the fugitive defendants and its willingness to make reparations. It has also questioned whether the relatives' right to know the truth had been violated, and reiterated its argument that this case concerns an extrajudicial execution (*supra* para. 155). These arguments were analyzed and decided by the Court in Chapters IX.I and IX.III of this judgment. Therefore, the Court considers that in the instant case it is not necessary to analyze them in relation to the possible violation of the personal integrity of the next of kin.

276. The Court recalls that in Chapter IX.I of this judgment it declared the international responsibility of Peru for the forced disappearance of the fifteen victims in this case. Beyond the arguments presented above (*supra* para. 273), the State did not provide evidence to refute the *iuris tantum* presumption regarding the severe suffering cased to the next of kin in the particular circumstances of this case, nor did it disprove their status as family members of the disappeared victims. Therefore, the Court considers that the presumption of harm to their psychological and moral integrity is sufficiently justified.

277. In view of the foregoing, the Court deems it pertinent to consider the harm suffered by these persons in order to establish and assess the scope of the damage caused. To this end, the Court will take into account the facts established in this judgment, the statements of Zósimo Hilario Quispe, Marcelo Hilario Quispe, Gregorio Hilario Quispe, Víctor Carhuapoma de la Cruz, Abilio Hilario Quispe and Marcelina Guillen Riveros and Zenón Cirilo Osnayo Tunque, as well as the expert opinion of Miryam Rivera Holguín.

278. In particular, the Court highlights the traumatic experience caused to the families of the fifteen victims of forced disappearance by the news of what happened after the military operation, and the uncertainty of not knowing the whereabouts of their loved ones or whether or not the remains found - and those that might still be in the mine - belong to them. Regarding Zenón Cirilo Osnayo Tunque, Marcelo Hilario Quispe, Gregorio Hilario Quispe and Viviano Hilario Mancha,[330] it is important to consider the suffering, anguish and desperation they felt when they saw the remains of human bodies in the mine, recognized some of their family members and identified some of their belongings; and also, the subsequent impact of knowing that this evidence was destroyed, and that only various body parts and organs were found scattered around the place, without being able to identify any of the victims' bodies or belongings (*supra* paras. 93 and 94). The Court also recognizes the pain caused to Zósimo Hilario Quispe, Viviano Hilario Mancha[331] and Alejandro Huamaní Robles, who filed several complaints with the State authorities in the first days after the events occurred and, in response, were confronted with the Army authorities' refusal to acknowledge the facts (*supra* paras. 95 to 103).

279. Víctor Carhuapoma de la Cruz, the brother of Mercedes Carhuapoma de la Cruz, told the Court that the events "have affected me emotionally and financially because we have also lost many things we had […]. I am always sad, depressed and very afraid. I do not live a normal or peaceful life. Sometimes I feel desperate because I want things to be resolved quickly, so I feel

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330 *Cf.* Statement of Zenón Cirilo Osnayo Tunque at the public hearing held on January 26, 2015; Statement rendered on January 9, 2015 by affidavit by Marcelo Hilario Quispe (evidence file, folios 5203 to 5207); Statement rendered by affidavit on January 9, 2015, by Gregorio Hilario Quispe (evidence file, folios 5209 to 5211), and expert opinion rendered by affidavit on January 12, 2015, by Miryam Rivera Holguín (evidence file, folios 5255 to 5272, 5284 to 5289 and 5314 to 5315).

331 *Cf.* Statement rendered by affidavit on January 9, 2015, by Zósimo Hilario Quispe (evidence file, folios 5200 to 5202), and expert opinion rendered by affidavit on January 12, 2015, by Miryam Rivera Holguín (evidence file, folios 5289 to 5293 and 5314 to 5315).

bad emotionally. My mother [Ana Carhuapoma de la Cruz] also feels bad emotionally."[332] In the case of Abilio Hilario Quispe, he stated that he did not know or remember his father and his two brothers, Ramón Hilario Morán, Raúl and Héctor Hilario Guillén, since the events occurred when he was only two years old. In his statement before the Court he said, "[m]y life would have been better if this had not happened. I would have finished my studies, because I was totally abandoned since my father was the one who provided me with food. Because my mother was left alone, I could only study up to fourth grade of elementary school and, then she died [when he was 12 years old], so I've had to work since I was very young to survive. My family was separated and I've never been able to talk, laugh, play or express my love for my father and my brothers."[333]

280. For her part, Marcelina Guillen Riveros explained in her statement before this Court that "[t]he death of my sister [Dionicia Guillén Riveros] made me very sad […] I never thought I would lose her like that; it's not until now that I think I will find her because she has no grave. My mother Victoria Riveros Valencia died of a stroke because she was sad all the time about not finding my sister. Our family is no longer the same, we miss my sister, and my parents died without knowing where she was buried." "I never reported what happened out of fear, because I was told that we would never be safe. Honestly, when I heard about all this, I felt like I was in a dream. We still haven't found her remains and we haven't been able to bury anything [,] so far they haven't let us. I was so scared."[334]

281. In view of the foregoing, the Court concludes that the State violated the right to personal integrity established in Article 5(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Zósimo Hilario Quispe, Marcelo Hilario Quispe, Gregorio Hilario Quispe, Zenón Cirilo Osnayo Tunque, Víctor Carhuapoma de la Cruz, Abilio Hilario Quispe, Marcelina Guillen Riveros and Marino Huamaní Vergara, as well as to the detriment of those who died after 2000, namely, Ana de la Cruz Carhuapoma, Viviano Hilario Mancha, Dolores Morán Paucar, Justiniano Guillén Ccanto, Victoria Riveros Valencia and Alejandro Huamaní Robles. All these victims are, according to the family group to which they belong, mothers, fathers, children, spouses, permanent partners, sisters and brothers, of the fifteen victims of forced disappearance.

X
REPARATIONS
(Application of Article 63(1) of the American Convention)

282. Article 63(1) of the Convention establishes 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." In this regard, the Court has indicated that any violation of an international obligation that has produced harm entails the obligation to make adequate reparation, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[335]

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[332] *Cf.* Statement rendered by affidavit on January 9, 2015, by Víctor Carhuapoma de la Cruz (evidence file, folios 5213 to 5214).

[333] *Cf.* Statement rendered on January 9, 2015 by affidavit by Abilio Hilario Quispe (evidence file, folios 5217).

[334] *Cf.* Statement rendered on January 9, 2015 by affidavit by Marcelina Guillen Riveros (evidence file, folios 5220 and 5221).

[335] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Wong Ho Wing v. Peru, supra*, para. 296.

283. The Court has established that reparations must have a causal nexus with the facts of the case, the violations declared, the damage proven, as well as the measures requested to repair the respective harm.[336]

284. In consideration of the violations of the Convention declared in the preceding chapters, the Court will analyze the claims presented by the Commission and the representatives, as well as the arguments of the State, in light of the criteria established in its case law regarding the nature and scope of the obligation to make reparations, for the purpose of ordering measures aimed at repairing the damage caused to the victims.[337]

A. Injured party

285. According to Article 63(1) of the Convention, the Court considers as injured party anyone who has been declared a victim of the violation of any right recognized in the Convention. Therefore, the Court considers as "injured party" the fifteen victims of forced disappearance, namely: Yesenia Osnayo Hilario, Miriam Osnayo Hilario, Edith Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Hilario, Raúl Hilario Guillén, Héctor Hilario Guillén, Francisco Hilario Torres, Mercedes Carhuapoma de la Cruz, Dionicia Quispe Mallqui, Antonia Hilario Quispe, Magdalena Hilario Quispe, Dionicia Guillén Riveros, Ramón Hilario Morán and Elihoref Huamaní Vergara. In addition, the Court also considers their surviving next of kin as "injured party," namely: Zósimo Hilario Quispe, Marcelo Hilario Quispe, Gregorio Hilario Quispe, Zenón Cirilo Osnayo Tunque, Víctor Carhuapoma de la Cruz, Abilio Hilario Quispe, Marcelina Guillen Riveros and Marino Huamaní Vergara, as well as their deceased family members, Ana de la Cruz Carhuapoma, Viviano Hilario Mancha, Dolores Morán Paucar, Justiniano Guillén Ccanto, Victoria Riveros Valencia and Alejandro Huamaní Robles.

B. Obligation to investigate the facts and identify, prosecute and, where appropriate, punish those responsible, as well as the determination of the whereabouts of the disappeared victims and their identification

B.1. Investigation, determination, prosecution and, where appropriate, punishment of all those responsible

Arguments of the Commission and the parties

286. The ***Commission*** asked the Court to order the State to carry out and complete, as appropriate, "the domestic proceedings related to the human rights violations declared in the Report [on Admissibility and Merits] and to conduct the investigations impartially, effectively and within a reasonable time in order to fully clarify the facts, identify all the masterminds and perpetrators and impose the corresponding sanctions." Likewise, it requested that the State "make every possible effort to ensure the appearance of the alleged perpetrators who are fugitives from justice, and to design and promote lines of investigation in order to determine the different levels of responsibility for the facts, including the responsibilities of the Army's High Command." It also requested that the Court order Peru to adopt administrative measures against any public officials found to be responsible for committing the violations declared in the Report on Admissibility and Merits, including the judges or magistrates who did not properly fulfill their obligations to protect fundamental rights. It also requested that the historical truth of the facts be established and disseminated.

287. The ***representatives*** requested that the Court order Peru to "carry out and complete thorough, impartial and effective investigations in order to prosecute and punish, within a

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[336] *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, reparations and costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, *and Case of Wong Ho Wing v. Peru, supra,* para. 298**.**

[337] *Cf. Case of Velásquez Rodríguez. Reparations and costs*, *supra*, paras. 25 to 27, and *Case of Wong Ho Wing v. Peru, supra,* para. 299.

reasonable time, all the masterminds and perpetrators of the human rights violations committed against the victims in this case." In addition, they requested that the facts be investigated by impartial, independent and competent institutions, that the investigation be initiated in the ordinary jurisdiction and conducted with due diligence, that the authorities in charge of the investigation be provided with all the means necessary to carry it out promptly, and that the results of the investigations be widely and publicly disseminated so that Peruvian society is aware of them. Similarly, they requested that the State be ordered, "if appropriate, and based on the results of the investigation, to punish any possible operational failings on the part of the public officials in charge of the investigation." They also requested that the State be ordered to "immediately take the necessary and appropriate steps to identify, prosecute, and punish all officials responsible for obstructing the investigation, within a reasonable time and through a serious, independent, and impartial investigation."

288. The ***State*** indicated that "in its judgment of February 9, 2012, the National Criminal Chamber ordered that certified copies be sent to the Supra Provincial Criminal Prosecutor's Office, so that, in exercise of its powers and jurisdiction, it may take the necessary actions to establish the alleged responsibility of members of the Peruvian Army, since new evidence and indicia have come to light in the case." It also expressed its complete willingness to continue with the investigations and eventual prosecution and punishment of those found responsible for the facts of this case, and expressed its intention to carry out promptly and efficiently any procedural actions that may arise. Similarly, the State affirmed that it complied with its obligation to investigate and punish the person who was declared individually criminally responsible, through the judgment issued by the National Criminal Chamber of February 9, 2012, and the final judgment (*ejecutoría suprema*) of the Supreme Court of Peru on May 29, 2013. The foregoing, without prejudice to any investigations that may be ongoing. Furthermore, in its final arguments it held that the judgments handed down by the domestic courts, in accordance with the Court's jurisprudence, constitute a form of reparation for the alleged victims and their next of kin and, at the same time, serve to prevent the repetition of similar acts, inasmuch as they also contribute to the reconstruction of the historical memory of the events that occurred during those years, leaving a record of the proven facts.

Considerations of the Court

289. This Court appreciates the actions carried out by the State in order to clarify the facts. Specifically, it reiterates that the judgments of February 9, 2012 and May 29, 2013, issued respectively by the National Criminal Chamber and the Transitional Criminal Chamber of the Supreme Court of Justice, are an important and positive landmark in the actions of the State's Judiciary. Nevertheless, taking into account the conclusions of Chapters IX.I and IX.III of this Judgment, the Court requires the State to carry out the comprehensive, systematic and thorough investigations necessary to determine, prosecute and, if appropriate, punish those responsible for what happened to the fifteen victims indicated in paragraph 194 of this judgment. This obligation must be fulfilled within a reasonable time through the mechanisms existing in domestic law.

290. In accordance with its constant case law,[338] the Court considers that the State must ensure full access to justice and legal standing to the victims or their next of kin at all stages of the investigation and prosecution of those responsible, in accordance with domestic law and the provisions of the American Convention. In addition, the results of the corresponding proceedings must be publicized so that Peruvian society may know the facts that are the subject of this case, as well as those responsible for them.

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[338] *Cf. Case of El Caracazo v. Venezuela. Reparations and costs.* Judgment of August 29, 2002. Series C No. 95, para. 118, and *Case of Rodríguez Vera et al. (Disappeared of the Palace of Justice) v. Colombia, supra,* para. 559.

B.2. Determination of the whereabouts, recovery and identification of the disappeared victims

Arguments of the Commission and the parties

291. The ***Commission*** requested the establishment of a mechanism that would allow, to the greatest extent possible, the complete identification of the disappeared victims and the return of their mortal remains to their next of kin. In addition, it stressed the importance that, to put an end to the forced disappearances and clarify what happened, the Court order the State to deploy all necessary measures to correct the deficiencies that have occurred so far in the forensic procedures and ensure the fullest possible identification of the victims in this case, using all the technical and scientific mechanisms at its disposal.

292. The ***representatives*** also asked the Court to order the State to establish a mechanism that allows, to the greatest extent possible, the complete identification of the disappeared victims and the return of their mortal remains to their next of kin. They pointed out that any activity aimed at locating the whereabouts of the disappeared victims must be carried out with the consent and participation of their next of kin or their legal representatives. Specifically, they asked the Court to order the State to take the necessary steps to identify the remains that have already been found but have not been identified. In addition, they requested that a third exhumation be ordered to ensure a thorough exploration of the "Misteriosa" or "Vallarón" mine, and to exhaust all investigations to find the remains of the 15 victims. Finally, in the event that the mortal remains are found, they should be delivered to their relatives after genetic verification of filiation, as soon as possible and free of charge. They also requested that the State cover the funeral expenses, in accordance with the families' beliefs and in agreement with them, and provide an adequate space so that the relatives of the victims who wish to do so can deposit their remains in the Tambillo Cemetery or in the place agreed with the victims.

293. The ***State*** indicated that it is fully prepared to carry out the necessary actions for the identification of the alleged victims in the instant case, as it has demonstrated with the latest procedures carried out by the Specialized Forensic Team (EFE) of the Institute of Legal Medicine and Forensic Sciences of the Public Prosecutor's Office. However, it maintained that it is undeniable that to date there are serious objective limitations that make it impossible for the State to comply with the Commission's requirements. In this regard, it asked the Court to take into account that the Institute of Legal Medicine reported that "the possibilities of identification of the human skeletal remains are limited, due to the fact that there are no samples from family members with which to compare the DNA profiles obtained from the skeletal remains. Likewise, the sample of bone remains obtained at the scene of the facts is small, and it was in a poor state of preservation due to the conditions of the area where it was obtained and the passage of time." According to the State, "[i]t is these objective limitations (and not apathy or inaction on the part of the Peruvian State) that would make it impossible to achieve this objective even if the maximum efforts and forensic work were carried out." On the other hand, and as a general framework to be assessed by the Court, it referred to "the mechanisms for the identification of victims through DNA sampling from family members and from the skeletal remains exhumed to date by the competent State bodies," as well as to the work of the Specialized Forensic Team (EFE) of the Institute of Legal Medicine and Forensic Sciences of the Public Prosecutor's Office.

Considerations of the Court

294. In the instant case, there is still a lack of clear evidence regarding the whereabouts of the fifteen victims who were forcibly disappeared and uncertainty as to whether the remains found and recovered in 2009, 2010 and 2011 in the "Misteriosa" or "Vallarón" mine belong to them. Moreover, it is not possible to rule out that skeletal remains may still be found at the site, since there is no certainty as to whether the site was fully excavated. To date, there are only the genetic profiles of seven relatives (*supra* para. 144) and there is information on the death of at least six

family members of the disappeared victims (*supra* para. 285). Also, as indicated by the State, the Institute of Legal Medicine reported on the "limited […] possibilities of identifying the human skeletal remains," due to the lack of samples from family members with whom to compare the four DNA profiles obtained from the skeletal remains, the small sample of skeletal remains obtained at the scene of the events and their poor state of preservation (*supra* para. 293).

295. It is a just expectation of the next of kin of the victims of forced disappearances that their whereabouts should be identified or their remains found so that their identity can be determined with certainty. This constitutes a measure of reparation and, therefore, generates a correlative duty for the State to satisfy it.[339] In turn, this allows the next of kin to alleviate the anguish and suffering caused by such uncertainty.[340] Receiving the body of a person who has been forcibly disappeared is of the utmost importance for their next of kin, because it allows them to bury him or her according to their beliefs, and to close the mourning process that they have experienced throughout these years.[341] In addition, the Court considers that the remains provide evidence of what happened and, together with the place where they are found, can provide valuable information about the perpetrators of the violations and the institution to which they belonged,[342] particularly when they are State agents.[343]

296. The Court appreciates the willingness expressed by Peru to carry out the necessary actions for the identification of the victims and considers this an important step toward reparation in this case. In the specific circumstances surrounding the facts of this case, the Court considers that the State must initiate, in a systematic, rigorous and serious manner, and with adequate human and financial resources, the necessary actions for the exhumation and the identification of the human remains located in the "Misteriosa" or "Vallarón" mine, a site that must be protected for their preservation. To this end, the State must use all necessary technical and scientific means available, taking into account the relevant national and international standards on the matter,[344] and must endeavor to conclude all the necessary exhumations within one year of notification of this judgment. For the purposes of these procedures, the State must establish a communication strategy with the next of kin to agree on a framework for coordinated action to ensure their participation, knowledge and presence.

297. Should the mortal remains be found, they must be delivered to the next of kin, after genetic verification of blood relationship, as soon as possible and at no cost. In addition, the State must cover funeral expenses, if applicable, by mutual agreement with the next of kin.[345] As for the possibilities of identifying the human skeletal remains being limited (*supra* para. 293), the Court recalls that international standards require that the remains be handed over when the victim is clearly identified, that is, once a positive identification has been obtained.[346] On this point, the Minnesota Protocol of 1991 states that "the body must be identified by reliable

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339 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and costs*. Judgment of September 19, 1996. Series C No. 29, para. 69, and *Case of Rochac Hernández et al. v. El Salvador, supra*, para. 196.

340 *Cf. Case of Ticona Estrada et al. v. Bolivia, supra*, para. 155, and *Case of Rochac Hernández et al. v. El Salvador, supra*, para. 196.

341 *Cf. Case of the Dos Erres Massacre v. Guatemala*, para. 245, and *Case of Osorio Rivera and Family Members v. Peru*, *supra,* para. 250.

342 *Cf. Case of the Dos Erres Massacre v. Guatemala, supra*, para. 245, and *Case of Osorio Rivera and Family Members v. Peru*, *supra* para. 250.

343 *Cf. Case of Río Negro Massacres v. Guatemala. Preliminary objection, merits, reparations and costs*. Judgment of 4 September 2012. Series C No. 250, para. 266, and *Case Gudiel Álvarez et al. ("Diario Militar") v. Guatemala, supra,* para. 333.

344 As established in the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.

345 *Cf. Case of Anzualdo Castro v. Peru, supra*, para. 185, and *Case of Rochac Hernández et al. v. El Salvador, supra*, para. 199.

346 *Cf. Case of González et al. ("Cotton Field") v. Mexico, supra*, para. 318, and *Case Nadege Dorzema et al. v. Dominican Republic. Merits, reparations and costs.* Judgment of October 24, 2012. Series C No. 251, para. 116.

witnesses and other objective methods."[347] The Court recognizes that, due to the specific circumstances of a case, it is possible that the identification and delivery of mortal remains cannot be supported by at least one scientific method[348] and that the only practical option in such cases is identification through the recognition of the remains by relatives or acquaintances of the missing person, as well as a comparison of data from their biological profile (sex, age, height), their individual characteristics (old injuries, congenital defects, tattoos and dental features), and their personal items and documents. In this regard, the International Committee of the Red Cross has considered that visual or customary methods "should be used as the sole means of identification only when the bodies are not decomposed or mutilated, and when there is a well-founded idea of the victim's identity, such as when the killing and burial of an individual has been witnessed."[349]

298. Thus, for example, in the context of monitoring compliance with judgment in the case *Gómez Palomino v. Peru,* which also concerned a forced disappearance, the Court considered that, despite the fact that a DNA test–or, as the case may be, its result- the location and identification of the remains occurred based on the statements of an effective witness, the recognition of the clothes the victims was wearing at the time of his detention, as well as a bone malformation in one of the lower limbs. The next of kin and their representatives also considered that the identification made by traditional methods was "valid and sufficient."[350]

299. In order to make the eventual location, identification and delivery of the remains to the next of kin effective and viable, this Court orders the State, as it has done in other cases,[351] to communicate in writing with the representatives of the victims about the process of identification and delivery of the victims' remains and, if necessary, request their collaboration for the pertinent purposes. Copies of said communications shall be submitted to the Court so that they may be considered at the stage of monitoring compliance with this judgment. Should a dispute arise between the parties as to the manner in which this measure should be implemented by the State, the Court considers, as it has done previously,[352] that the proper implementation of the reparation measures will be assessed during the stage of monitoring compliance with the judgment. Thus, the Court will evaluate in due course any information and observations that the parties may submit in this regard during this stage.

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[347] United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (Minnesota Protocol). DOC E/ST/CSDHA/.12 (1991).

[348] The International Committee of the Red Cross has recognized the following as scientific or objective means: a) matching post-mortem and ante-mortem dental radiographs; b) matching post-mortem and ante-mortem fingerprints; c) matching DNA samples from human remains with reference samples, and d) matching other unique identifiers, such as unique physical or medical traits, including skeletal radiographs, and numbered surgical implants or prostheses. It has also stated that these means, "which are part of ante-mortem and postmortem data collection, can conclude an identification with a high degree of confidence that would be considered beyond reasonable doubt in most legal contexts." *Cf.* ICRC. Missing People: DNA Analysis and Identification of Human Remains: A guide to best practice in armed conflicts and other situations of armed violence. 2009, p. 12. Available at: http://www.icrc.org/spa/assets/files/other/icrc_003_4010.pdf

[349] *Cf.* ICRC. Missing People: DNA Analysis and Identification of Human Remains: A guide to best practice in armed conflicts and other situations of armed violence. 2009, p. 10.

[350] *Cf. Case of Gómez Palomino v. Peru. Monitoring compliance with judgment*. Order of the Inter-American Court of Human Rights, February 13, 2013, twelfth considering paragraph**.**

[351] *Cf. Mutatis mutandi, Case of the Dos Erres Massacre v. Guatemala, supra*, para. 249, and *Case of the Massacres of El Mozote and Nearby Places v. El Salvador***.** Merits, reparations and costs. Judgment of October 25, 2012 Series C No. 252, para. 334.

[352] *Cf. Case of Ticona Estrada et al. v. Bolivia. Interpretation of the Judgment of Merits, reparations and costs.* Judgment of July 1, 2009. Series C No. 199, para. 26, and *Case of the Massacres of El Mozote and Nearby Places v. El Salvador. Interpretation of the Judgment of Merits, reparations and costs.* Judgment of 19 August 2013. Series C No. 264, para. 38.

C. Measures of restitution, rehabilitation, satisfaction and guarantees of non-repetition

C.1. Restitution

C.1(1) Assistance with livestock and house building

Arguments of the parties

300. The ***Commission*** did not submit any request in this regard. The ***representatives*** pointed out that the forced disappearance of the victims seriously affected the subsistence prospects of their families, since as a result of the events they lost their livestock (including alpacas, sheep, llamas and some cows and horses) which was their means of subsistence, as well as their homes, which were burned down by members of the Army who detained them. Therefore, they requested that the State provide the victims' next of kin who wish to continue raising livestock with financing for 10 alpaca breeders each, which would cost approximately USD $20,000.00 per person, for a total cost of USD $80,000.00. According to the representatives, these alpaca breeders will make it possible to revive the activity and increase the amount of livestock, contributing to improve their living conditions. They also requested that the State restore to the victims' families the homes that were burned down as a result of the events, since to date several of them do not have a decent home. In this regard, they specifically referred to the case of Zenón Cirilo Osnayo Tunque, who "does not have a place to live", as well as Zósimo Hilario Quispe, Marcelo Hilario Quispe, Gregorio Hilario Quispe, Víctor Carhuapoma de la Cruz, Abilio Hilario Quispe, Marcelina Guillen Riveros and Marino Huamaní Vergara, whose homes are made of rustic materials and do not provide the conditions for a decent standard of living. In view of this, they asked the Court to order the State to provide the victims with financing for the construction of adequate housing of solid materials, of 120 square meters, which would have an approximate cost of USD $70,000.00 each. In the case of Mr. Zenón Cirilo Osnayo Tunque, this financing should also include the provision of a 120 square meter plot of land, at an approximate cost of USD $7,000.00, since as a result of the loss of the place where he lived, he has no place to build.

301. The ***State*** argued that "[the] international responsibility of the Peruvian State has not been proven with respect to the facts related to alleged violation of the right to property." Likewise, it pointed out that the Court should consider that the community of Santa Bárbara benefited from collective reparations for the sum of S/. 100,000.00 new soles, for the implementation of a livestock development project (camelids) in said community. It explained that the project was implemented by the Provincial Municipality of Huancavelica in 2008, and that the overall execution of the project was supervised by representatives of the High-Level Multisectoral Commission (CMAN) of the office in the Department of Junín.

Considerations of the Court

302. In Chapter IX.II of the judgment, the Court considered it proven that soldiers who participated in Operation "Apolonia" burned the homes of the Hilario Quispe and Hilario Guillén families and took away their livestock, in violation of their right to property, private life and a home. This Court has confirmed that, at the time of the facts, Zenón Cirilo Osnayo Tunque and Marcelo Hilario Quispe lived on a ranch located in the Rodeo Pampa annex of the Miguel Pata sector in Santa Bárbara with their disappeared family members, and that they are the surviving victims. As for the other victims mentioned by the representatives, there is no evidence that they lived on said ranch nor that their right to property had been violated (*supra* paras. 84 and 204). On the other hand, the Court appreciates that, as the State indicated, the population of Santa Barbara was the subject of Collective Reparations in 2007 financed by the High Level Multisectoral Commission, responsible for monitoring the actions and policies of the State in the areas of Peace, Collective Reparations and National Reconciliation, for the sum of S/. 100,000.00 new soles, for a

"project involving the installation of livestock modules in response to the political violence in the community of Santa Bárbara."[353]

303. However, the Court does not have information as to which individuals or families constitute the collectivity of "the population of Santa Bárbara" who were the recipients of this reparation, and specifically, whether the next of kin of the victims of forced disappearance in the instant case are part of said collective. Nor does it have information on the effective implementation of said reparation. Furthermore, the State did not explain how the collective reparation took into account, in specific terms, the property losses suffered by the two aforementioned victims in this case as a result of the facts, in order to provide them with specific compensation for the differentiated harm they suffered. On this point, the expert witness Miryam Rebeca Rivera Holguín explained to the Court that, "by losing their herds and their domestic animals [, these persons] lost their means of subsistence. Returning to the community and having a house without their animals being replaced would not make sense from the point of view of Andean life, so it is essential to ensure that the reparation includes animals that allow for a decent livelihood and covers the needs of the families."[354]

304. In view of the foregoing, the Court orders the State to deliver to Zenón Cirilo Osnayo Tunque and Marcelo Hilario Quispe, within one year of notification of this judgment, ten alpacas each or their equivalent market value. In relation to the houses that were burned down as a result of the facts of this case, the Court considers that the State must, through its existing housing programs, provide adequate housing to Zenón Cirilo Osnayo Tunque and Marcelo Hilario Quispe, respectively, within one year. If at the end of this period the State has not delivered the aforementioned housing, Peru shall provide, in equity, the amount of USD $25,000.00 (twenty-five thousand United States dollars) to each of them. Said measure of reparation must be implemented with the participation of the victims and in agreement with them.

C.2. Rehabilitation

C.2.1. Medical and psychological or psychiatric treatment

Arguments of the Commission and the parties

305. The ***Commission*** requested the implementation of an adequate psychosocial care program for the next of kin of the disappeared victims. The ***representatives*** asked the Court to order the State to provide free medical and psychological assistance to the victims' next of kin, and to allow them access to a State medical center where they can receive adequate and personalized attention to help them heal their physical and psychological wounds, including the cost of any medication prescribed. The medical center in which physical and psychological care is provided to the victims' next of kin shall be chosen by mutual agreement with them and efforts shall be made to ensure that it is in the vicinity of their residence. Such treatment should consider the particular circumstances and needs of each of the victims, so that collective, family, and individual treatment is provided. In addition, a treatment plan should be developed after a comprehensive assessment that reflects the agreement with each of the victims.

306. The ***State*** explained that the Comprehensive Reparations Plan includes health care reparations, and that several of the alleged victims 'next of kin are currently covered by the Comprehensive Health Insurance (*Seguro Integral de Salud* - SIS), which seeks to protect the health of Peruvians who do not have health insurance, prioritizing vulnerable populations living in

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353 *Cf.* Brief of the Executive Secretary of the High Level Multisectoral Commission in charge of the actions and State policies regarding peace, collective reparations and national reconciliation (evidence file, folios 4714 and 4715).

354 *Cf.* Psychological assessment rendered by affidavit on January 12, 2015 by Miryam Rivera Holguín (evidence file, folio 5304).

poverty and extreme poverty, with the system providing both medical and psychological care. The SIS coverage includes the diagnosis, treatment and follow-up of illnesses such as depression, anxiety, schizophrenia and alcoholism, among others. Regarding family members who do not have this insurance, the State indicated that it would take the necessary steps to ensure that such persons can be enrolled in the SIS and enjoy the coverage currently provided by the insurance.

Considerations of the Court

307. In Chapter IX.IV of this judgment, the Court concluded that the forced disappearance of the fifteen victims caused harm to the psychological and moral integrity of their next of kin. Regarding the State's argument on the health care services provided by the Integral Health System (SIS),[355] the Court finds it necessary to clarify that the reparation measures that the Court may order are directly related to the human rights violations declared in this case.[356]

308. Therefore, as it has done in other cases,[357] the Court deems it necessary to order a measure of reparation that provides appropriate treatment for the psychological and physical suffering of the victims resulting from the violations established in this judgment. In order to contribute to the reparation of the harm caused, the Court establishes the obligation of the State to provide free of charge, through its specialized health institutions, and in an immediate, adequate, comprehensive and effective manner, medical and psychological or psychiatric treatment to the victims who so request it, with their prior informed consent, including the free supply of any medications that may be required, taking into consideration their specific ailments. This means that the victims should receive a preferential treatment in relation to the formalities and procedures that should be carried out in order to obtain assistance in public institutions.[358] Likewise, the respective treatment should be provided, as far as possible, at the health centers closest to their places of residence[359] in Peru, and for as long as necessary. In providing psychological or psychiatric treatment, the particular circumstances and needs of each victim should also be taken into account, so that collective, family and individual treatment is provided, in agreement with each of them and after an individual evaluation.[360] The victims who request this measure of reparation, or their legal representatives, have six months from the date of notification of this judgment to inform the State of their intention to receive medical, psychological or psychiatric care.[361]

C.3. Satisfaction

C.3.1. Publication and dissemination of this judgment

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[355] In this regard, the State provided evidence showing that Zósimo Hilario Quispe, Víctor Carhuapoma de la Cruz and Abilio Hilario Quispe were affiliated to the Integrated Health System (SIS) since they were registered in the Single Registry of Victims (RUV). Gregorio Hilario Quispe, Zenón Cirilo Osnayo Tunque and Marcelo Hilario Quispe were beneficiaries of the SIS but the first two had their inscription in the RUV suspended and the latter's registration is pending. Marino Huamaní Vergara no era beneficiary of the SIS and was not registered in the RUV. *Cf.* Certificates of Accreditation del Council of Reparations, Single Registry of Victims of September 8, 2008 (evidence file, folios 3869 a 3875 and 3877), and Brief of the Executive Secretary of the High Level Multisectoral Commission in charge of the actions and State policies regarding peace, collective reparations and national reconciliation (evidence file, folios 4714 and 4715).

[356] *Cf. Case of Espinoza Gonzáles v. Peru. Preliminary objections, merits, reparations and costs*. Judgment of November 20, 2014. para. 313

[357] *Cf. Case of Barrios Altos v. Peru. Reparations and costs, supra*, paras. 42 and 45, and *Case of Rochac Hernández et al. v. El Salvador, supra,* para. 219.

[358] *Cf. Case of Heliodoro Portugal v. Panama. Monitoring compliance with judgment.* Order of the Inter-American Court of May 28, 2010, considering paragraph 28, and *Case of Osorio Rivera and Family Members v. Peru, supra*, para. 256.

[359] *Cf. Case of the Dos Erres Massacre v. Guatemala, supra*, para. 270, and *Case of Osorio Rivera and Family Members v. Peru, supra*, para. 256.

[360] *Cf. Case of the Dos Erres Massacre v. Guatemala, supra*, para. 270, and *Case of Osorio Rivera and Family Members v. Peru, supra*, para. 256.

[361] *Cf. Case of Rosendo Cantú et al. v. Mexico, supra*, para. 253, and *Osorio Rivera and Family Members v. Peru, supra*, para. 256.

309. Although the publication of this judgment has not been requested, the Court deems it appropriate to order, as it has done in other cases,[362] that within six months of notification of this judgment the State publish the following: a) the official summary of this judgment prepared by the Court, once, in the Official Gazette and in a newspaper with wide national circulation in Peru, and b) this judgment in its entirety, available for at least one year, on an official website of the State.

C.4. Guarantees of non-repetition

C.4 (1). Continuous training of the members of the Specialized Forensic Team (EFE) of the Institute of Legal Medicine and Forensic Sciences of the Public Prosecutor's Office

Arguments of the Commission and the parties

310. The ***Commission*** requested that the Court order the State to strengthen the judiciary's capacity to adequately and efficiently investigate facts and punish those responsible, including the provision of the material and technical resources necessary to ensure the proper conduct of the relevant procedures.

311. The ***representatives*** asked the Court to order the State to strengthen the criminal subsystem for the investigation and prosecution of serious human rights violations. On this point, they specifically requested that the State be ordered to: a) strategically strengthen the relevant public entities for the purpose of locating and capturing military fugitives from Peruvian justice in cases of human rights violations, as well as expediting extradition proceedings aimed at bringing the defendants to trial; b) provide the Institute of Legal Medicine with the necessary human and logistical resources in order to expedite the procedures of investigation, examination, identification and delivery of the remains of the victims of human rights violations, so that events such as those in this case "are not repeated"; c) implement urgent actions to foster an effective and adequate process of prosecutorial investigation, equipping, adapting and implementing new prosecutors' offices to form part of the national subsystem in Huancavelica; d) guarantee access to information and the collaboration of Ministries that are part of the Executive Branch in order to provide the necessary information for the advancement and continuation of the investigations, such as lists of military personnel assigned to the military bases that carried out the military operations, and e) appoint public defenders from the Ministry of Justice for the families of the victims who do not have legal representation.

312. The ***State*** reported that to date it has taken concrete steps to strengthen the investigation system in relation to forced disappearances. In this regard, the Ministry of Justice and Human Rights, together with the Institute of Legal Medicine and representatives of civil society, are preparing a draft bill which aims to comprehensively regulate the national policy for the search for persons who disappeared during the period of violence from 1980 to 2000, "and thereby achieve their identification, so that they can be subsequently handed over to their families." On the other hand, the State indicated that it has been making improvements within the Specialized Forensic Team (EFE) of the Institute of Legal Medicine and Forensic Sciences of the Public Prosecutor's Office, "the group in charge of carrying out searches and investigations aimed at locating missing persons." In this sense, the number of professionals in the EFE has increased and their specialization was achieved through the gradual adoption of the phases of forensic intervention and its procedures. According to the State, "[a]ll of this has facilitated the forensic investigations carried out in recent years in emblematic cases with very good results." In this regard, it cited the "Oreja de Perro" and "Cabitos" cases.

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[362] *Cf. Case of Mémoli v. Argentina. Preliminary objections, merits, reparations and costs.* Judgment of August 22, 2013. Series C No. 265, para. 207, and Case *Espinoza Gonzáles v. Peru, supra*, para. 318.

313. The State also referred to the "improvements that help to strengthen" the work of the Specialized Forensic Team (EFE), "in charge of investigating human rights violations in Peru during the years of the internal conflict, 1980-2000." It explained that the EFE "has sought to align its work with international norms and standards". In particular, it mentioned the following: i) the standards established by the United Nations "Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions" (1991), known as the Minnesota Protocol; ii) the ICRC Report*:* The Missing and Their Families (2003), prepared by the International Conference of Governmental and Non-Governmental Experts sponsored by the International Committee of the Red Cross in Geneva from February 19 to 21, 2003; iii) the scientific recommendations contained in the "Guidelines for International Forensic Bio-archaeology Monitors of Mass Grave Exhumations" published by Skinner, Alempijevic and Djuric-Srejic in Forensic Science International (2003). In addition, it indicated that another reference for consultation would be the "Manual for the effective investigation of graves containing human remains in Peru" (2002), prepared by the Ombudsman's Office and the Peruvian Forensic Anthropology Team. It also pointed out that the EFE has begun to apply the recommendations of the "International Consensus on Principles and Minimum Standards for Psychosocial Work in Search Processes and Forensic Investigations in Cases of Enforced Disappearances, Arbitrary or Extrajudicial Executions." Moreover, the EFE is currently participating in the Working Group on the Search for Disappeared Persons (BDP) sponsored in Peru by the International Committee of the Red Cross, Regional Delegation for Bolivia, Ecuador and Peru (ICRC), one of its purposes being to reach a consensus protocol on appropriate procedures for this type of work.

Considerations of the Court

314. The Court appreciates the efforts made by the State to strengthen its investigation system in relation to forced disappearances, as well as the improvements made in the Specialized Forensic Team (EFE) of the Institute of Legal Medicine and Forensic Sciences of the Public Prosecutor's Office. In this regard, the Court has assessed the evidence provided by the State, which shows that it initiated and continued with the training and education of members of the EFE.[363] In addition to various working groups and studies carried out, the EFE has specifically incorporated international norms and standards in this area into its work.[364] The Court notes that the aforementioned efforts are aimed at properly processing the work carried out by the EFE.

315. The Court recalls that the training component is a way of providing public officials with new knowledge, developing their skills, enabling them to specialize in certain new areas, preparing them to take on different roles and adapting their skills to better perform their assigned tasks.[365] Thus, training, as a system of continuous education, must be extended over a significant period of

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[363] The State presented evidence of the training courses and programs for members of the EFE as follows: a) from June to September 2003, members of the EFE received a first training course in Forensic Anthropology; b) five professionals of the EFE who worked both in the Lima and Ayacucho offices studied for a Master's Degree in Forensic Anthropology and Bio-archaeology from 2008 to 2010; c) two anthropologists of the EFE in Ayacucho studied between 2009 and 2010 for a second professional specialty in Physical Anthropology and Forensic Sciences; d) with the support of the International Committee of the Red Cross annual training courses were gradually added for the forensic experts in Ayacucho. *Cf.* Document prepared by the Specialized Forensic Team (EFE) of the Institute of Legal Medicine and Forensic Sciences, March 2014 (evidence file, folios 4643 and 4644).

[364] In this regard, the State presented information on: a) the consultation and use of the Manual for Effective Investigation of Graves with Human Remains in Peru, May 2002, prepared by the Ombudsman's Office and the Peruvian Forensic Anthropology Team, and b) the implementation of an Internal Directive of the Public Prosecutor's Office of September 8, 2001, which regulates the prosecutorial investigation of the discovery of graves with human remains related to serious human rights violations, which has as its legal basis, among others, the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary or Summary Executions, of 1991. *Cf.* Document prepared by the Specialized Forensic Team (EFE) of the Institute of Legal Medicine and Forensic Sciences, March 2014 (evidence file, folio 4639), and Directive No. 011-2001-MP-FN which regulates the prosecutorial investigation of the discovery of graves with human remains related to serious human rights violations, Internal Directive of the Public Prosecutor's Office of September 8, 200 (evidence file, folio 4654).

[365] *Cf. Case of Claude Reyes et al. v. Chile, and Case of Gutiérrez and Family v. Argentina, supra,* para. 167.

time to accomplish its objectives.[366] The Court urges the State to continue with its current efforts and emphasizes the importance of implementing a system of continuous training, which will not be supervised by this Court.

C.4.2. Adoption of a national strategy to search for and determine the whereabouts of persons who disappeared during the armed conflict in Peru

Arguments of the parties

316. The ***Commission*** did not refer to this point. The ***representatives*** asked the Court to order the State to employ all available means to establish the fate or whereabouts of all the victims who disappeared during the Peruvian conflict, or to find their mortal remains, as the case may be. They also recalled that "[the] tracing of disappeared persons and the identification of their remains continues to be a pressing need in Peru." In this sense, they requested that the Court reiterate to the State the obligation to adopt measures in this regard, as it did in the case of *Anzualdo Castro*. They also requested that, in the event that the victims' mortal remains are found, the State be ordered to deliver them to their families as soon as possible and at no cost, as well as to cover funeral expenses. The ***State*** reported that to date, concrete measures have been taken to strengthen the investigation system in relation to forced disappearances. In this regard, the Ministry of Justice and Human Rights, together with the Institute of Legal Medicine and representatives of civil society, are currently preparing a draft bill aimed at comprehensively regulating the national policy for the search for persons who disappeared during the period of violence from 1980 to 2000, "and thus ensure their identification, so that they can later be handed over to their families." Furthermore, the State indicated that it has been making improvements within the Specialized Forensic Team (EFE) of the Institute of Legal Medicine and Forensic Sciences of the Public Prosecution Service, "the group in charge of carrying out searches and investigations aimed at locating disappeared persons" and "investigating human rights violations in Peru during the years of the internal conflict 1980-2000." In this regard, it referred in detail to these improvements**,** as indicated in paragraphs 312 and 313 of this judgment.

Considerations of the Court

317. In this case, the Court has concluded that the forensic investigation in the search, recovery, analysis and identification of human remains has been characterized by a clear lack of thoroughness and due diligence, which is particularly serious, and has continued to the present day (*supra* para. 183). In this regard, the Court notes that the facts of this case took place in the context of Peru's armed conflict, that there is a lack of agreement regarding the number of forced disappearances that occurred during this period, and that the percentage of victims identified to date is very low, in comparison with the total figures provided by entities such as the CVR.[367] On this point, the Court recalls that criminal investigation and prosecution is not incompatible with the adoption of different adequate and effective mechanisms to locate the whereabouts of disappeared persons or find their remains, so that their identity can be determined with certainty, and so that both measures can complement each other.[368]

318. The Court appreciates the efforts made by the State, in particular, through the work carried out by the Specialized Forensic Team (EFE) of the Institute of Legal Medicine and Forensic Sciences of the Public Prosecutor's Office (*supra* para. 314). Nevertheless, bearing in mind that Peru has recognized the need to comprehensively regulate the national policy for the search for persons who disappeared during the period of violence from 1980 to 2000, and that a draft bill is currently

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366 *Cf. Case of Escher et al. v. Brazil, supra,* para. 251, and *Case Espinoza Gonzales v. Peru, supra,* para. 326.

367 *Cf.* Final Report of the CVR, 2003, Volume VI, Chapter 1.2 *Forced disappearance of persons by State agents*, pages 73-81, Available at http://www.cverdad.org.pe/ifinal/index.php; and statement of expert witness José Pablo Baraybar do Carmo at the public hearing on January 26, 2015. See also *Case of Anzualdo v. Peru, supra,* para. 188.

368 See *Case of Gómez Palomino v. Peru.* Monitoring compliance with judgment. Order of the Inter-American Court of Human rights of July 5, 2011, fifteenth considering paragraph.

being prepared for that purpose, the Court considers it pertinent to urge the State to adopt a national strategy to search for and determine the whereabouts of those who disappeared during the armed conflict in Peru, in parallel and complementary to the judicial proceedings. The aim is to ensure that the available information on possible burial or burial sites is gathered and that their identification and protection is assured for their preservation. The actions necessary for the exhumation of remains at such sites should be systematically and rigorously initiated and/or continued, and the use of the different means of forensic identification should be ensured. These actions will not be supervised by the Court.

C.5. Other measures requested

319. The ***Commission*** requested the adoption of the necessary measures to prevent similar events from occurring in the future, in accordance with the duty to guarantee human rights recognized in the American Convention. In particular, it requested the implementation of permanent programs on human rights and international humanitarian in the training schools of the Armed Forces. The ***representatives*** did not refer to this point. The ***State*** explained that for several years, it has been implementing continuous and multiple training programs on international human rights law and international humanitarian law for various State officials, especially in the armed forces, as well as on the State's duties with respect to the American Convention and other international instruments, both regional and universal. It held that the purpose of these programs is to train State agents in order to prevent future acts similar to those that occurred in the present case, which is fully consistent with the duty of prevention and guarantee recognize in the American Convention. Specifically, the State reported that the Center for International Humanitarian Law and Human Rights of the Peruvian Ministry of Defense is the academic body in charge of training armed forces personnel on these issues and presented detailed information on the training programs that are being developed. Finally, the State indicated that neither the Commission nor the representatives provided information showing that the measures it had taken were insufficient, and asked the Court not to consider the request for said measure of reparation.

320. The Court recalls that in the cases of *La Cantuta,*[369] *Anzualdo Castro*[370] and more recently in the case of *Osorio Rivera,*[371] of November 26, 2013, the Court ordered the Peruvian State to implement permanent human rights training courses for members of the armed forces and the police. Therefore, the Court does not consider it pertinent to order this measure of reparation again, since it will continue to assess its implementation at the stage of monitoring compliance in the aforementioned cases.

321. The ***representatives*** asked the Court to order the State to provide the victims' next of kin who require it with a scholarship to study at university level, so that they can pursue the career of their choice. They argued that the forced disappearance of the victims and the destruction of their homes and property seriously affected their opportunities for subsistence, a situation that in some cases has prevented them from having the resources to provide their descendants with an adequate education. In this regard, they referred to the specific cases of the families of Gregorio Hilario Quispe, Zenón Cirilo Osnayo Tunque and Marino Huamaní Vergara. The ***Commission*** did not refer to this point. The ***State*** agreed to convene the relevant sectors and entities, in order to discuss the possibility of effectively delivering the requested scholarships to the alleged victims' next of kin. At the public hearing, it explained that in the context of monitoring compliance with the recommendations made by the Commission in its Admissibility and Merits Report, conversations were held with the representatives at the domestic level in order to channel this request for reparation in an efficient manner; however, "no information was provided, there was a disagreement about the names [and] about some of the people who had been involved."

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369 *Cf. Case of La Cantuta v. Peru, supra,* para. 240.
370 *Cf. Case of Anzualdo Castro v. Peru, supra,* para. 193.
371 *Cf. Case of Osorio Rivera v. Peru*, *supra,* para. 274.

322. The ***Court*** appreciates the efforts made by the State to assess the possibility of effectively delivering the requested scholarships to the next of kin of the victims in this case. It also notes that the representatives referred - at least before this Court - to the specific cases of the relatives of Gregorio Hilario Quispe, Zenón Cirilo Osnayo Tunque and Marino Huamaní Vergara, and that with the information available, these requests can be effectively channeled by the State. The Court takes note of this request, and of the efforts and good faith expressed by Peru, aimed at repairing the harm caused to the families of the disappeared victims. However, it considers that it is not necessary to order said measure.

323. The ***Commission*** requested measures to keep alive the memory of the disappeared victims. The ***representatives*** requested, in their final written arguments, that a monument be erected in the community of Santa Bárbara as a measure to keep alive the memory of the disappeared victims. The ***State*** did not make any comment in this regard.

324. The ***Court*** considers that the request to erect a monument is time-barred since it was presented only in the final arguments of the representatives; furthermore, it is not necessary to order this measure since, in accordance with paragraph 309 *supra,* the publication of this judgment is sufficient to keep alive the memory of the disappeared victims in this case.

325. The ***representatives*** requested that the Court reiterate to the State its obligation to bring the criminal definition of forced disappearance into line with international standards. In particular, they pointed out that "the adaptation of Article 320 of the Criminal Code ("forced disappearance") to Article II of the Inter-American Convention on Forced Disappearances, would be crucial to the present case, "given that said reform constitutes an essential measure to obtain justice." The ***State*** argued that although the facts of this case do not fall within the framework of acts that constitute a disappearance, to date there are draft laws whose purpose is to modify the criminal regulations in force regarding this and other crimes against human rights regulated in national legislation. In this regard, it reported that the Justice and Human Rights Commission of the Peruvian Congress has been discussing several bills that propose to reform the definition of the crime of forced disappearance, in line with the provisions of international human rights law, international humanitarian law and international criminal law. The ***Commission*** did not refer to this point.

326. In the instant case, the ***Court*** did not declare a violation of Article 2 of the American Convention or of Article III of the Inter-American Convention on Forced Disappearance of Persons in relation to the alleged application of Article 320 of the Criminal Code; thus, there is no causal link between the violations declared in this judgment and the measure of reparation requested. Nevertheless, the Court recalls that in the judgments issued in the cases of *Gómez Palomino,*[372] *Anzualdo Castro*[373] *and Osorio Rivera,*[374] the State was ordered to adapt its domestic legislation, and that these cases are at the stage of monitoring compliance with their respective judgments. Therefore, the Court urges the State to continue with the legislative process and to adopt, within a reasonable time and in accordance with its obligation under Article 2 of the American Convention, the measures necessary to define the crime of forced disappearance of persons in accordance with inter-American standards.

D. Compensation

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372 *Cf. Case of Gómez Palomino v. Peru. Merits, reparations and costs.* Judgment of November 22, 2005, para. 149 and operative paragraph 12.

373 *Cf. Case of Anzualdo Castro v. Peru. Preliminary objection, merits, reparations and costs.* Judgment of September 22, 2009, para. 191 and operative paragraph 8.

374 *Cf. Case of Osorio Rivera and Family Members v. Peru, supra*, para. 271 and operative paragraph 12.

Arguments of the Commission and the parties

327. The ***Commission*** requested that the Court order the State to make adequate material and moral reparation to the victims, taking into account the special condition of the seven children, including fair compensation.

328. The ***representatives*** asked the Court to order the State to pay each of the fifteen forcibly disappeared victims the sum of USD $80,000.00 as compensation for moral damage caused by the violations committed against them, an amount based on the Court's jurisprudence regarding forced disappearance in the Peruvian State. Likewise, given the serious nature of this crime to the detriment of the children who were victims, they requested that the State be ordered to pay the additional sum of USD $5,000.00 in favor of Yesenia, Miriam and Edith Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Hilario and Raúl and Héctor Hilario Guillén. According to the representatives, these amounts should be delivered to the corresponding next of kin in accordance with domestic law on the line of succession. They also requested that the Court order the State to pay the direct next of kin of the disappeared victims the sum of USD $45,000.00 each, for the moral damage caused by the violations committed against their loved ones, as well as to pay the siblings and other indirect relatives of the disappeared victims the sum of USD $15,000.00 each. In the case of family members who are now deceased, these amounts would be delivered to the appropriate persons based on the line of succession.

329. Regarding pecuniary damage, the representatives requested also payment for consequential damage and lost profits. In relation to consequential damage, they pointed out that members of the Hilario Quispe and Hilario Guillén families lost their respective houses, together with 450 alpacas, 300 head of sheep, 15 horses and 19 cows, as well as foodstuffs consisting of corn, barley, potatoes and others, all of which were stolen by Army personnel. On this point, since the victims did not have documents proving the value of their properties or the expenses incurred, they requested that the Court set an amount in equity. Regarding loss of earnings, they argued that, owing to the interruption of the daily activities of the victims and their families, as a result of what happened, there was loss of income. Therefore, they requested that the State pay a total sum of USD $1,042,072.90. This amount takes into account the age of the victims at the time of their death, the minimum working age in Peru (14 years, historically), average life expectancy in Peru at the time of the victims' death (67 years), minimum wage series in Peru from the year of the first death to the present, series of the variation of the exchange rate between soles and dollars, and the capitalization of previous periods and discounting of future values.

330. The ***State*** expressed its disagreement since it considered that the amounts requested for pecuniary and non-pecuniary damage to be excessive. It pointed out that the purpose of the inter-American system is to protect human rights and not to profit from them. With regard to consequential damages, it argued that "international responsibility on the part of the Peruvian State has not been proven with respect to the facts denounced in the present case, in terms of the impairment of property and the expenses that this may have entailed." In its final arguments, the State asked the Court not to order the payment of additional reparations in accordance with the principle of complementarity of the inter-American system, since reparations were already ordered both through the domestic courts and through the Comprehensive Reparations Plan (PIR), - and in some cases were granted - in favor of the relatives (legal heirs) of the victims of the events in the community of Santa Bárbara on July 4, 1991.

331. In this regard, the State explained that, by virtue of the procedures established by Law No. 28592, the regulatory framework of the Comprehensive Reparations Plan (PIR) for victims of violence during the period from 1980 to 2000, was based on the conclusions and recommendations of the CVR Report. Under these provisions, the 15 persons presented as alleged victims of forced disappearance have been officially recognized as victims by the Peruvian Reparations Council (CR) and are therefore registered in the respective Single Registry of Victims (RUV). Likewise, several

of the alleged victims' next of kin have also been recognized as victims and included as beneficiaries of the PIR; in other cases, their registration is still under review by the CR. According to Peru, the following amounts were paid to the next of kin who benefited from financial reparations under the PIR: to Zósimo Hilario Quispe the sum of S/. 5,000 new soles; to Zenón Cirilo Osnayo Tunque the sum of S/. 10,000 new soles, and to Abilio Hilario Quispe the sum of S/. 10,000 new soles; in the latter case this sum of money is reportedly available in a bank account in his name.

332. On the other hand, the State argued that the judgment of the National Criminal Chamber of February 9, 2012, in addition to convicting those declared individually criminally responsible for the events that took place in the community of Santa Bárbara, determined the payment of S/. 25,000 new soles as civil reparations in favor of each of the legal heirs of the injured parties, jointly and severally with those responsible for the crime, "without prejudice to the right of the relatives of the injured parties to request compensation against the civilly responsible third party." Subsequently, in a ruling of December 16, 2013, the Second National Criminal Court ordered the convicted party Oscar Carrera Gonzáles to pay compensation; thus, to date, the latter has made eleven deposits totaling the sum of S/. 555 new soles. Finally, the State requested that consideration be given to the fact that the representatives (lawyers of the civil party) had the possibility of taking the corresponding action at the domestic level to demand payment from the civilly liable third party, which did not occur. It also referred in detail to this point, as well as to the criminal and civil regulations applicable at the domestic level.

Considerations of the Court

333. The evidence shows that at least on April 3, 2014, the following persons were registered in the Single Registry of Victims (RUV) of the Reparations Council as beneficiaries of the Comprehensive Reparations Plan (PIR): Dionicia Quispe Mallqui, Francisco Hilario Torres, Mercedes Carhuapoma de la Cruz and Antonia Hilario Quispe, as well as Zenón Cirilo Osnayo Tunque, Zósimo Hilario Quispe, Abilio Hilario Quispe, Víctor Carhuapoma de la Cruz, Viviano Hilario Mancha (deceased) and Alejandro Huamaní Robles (deceased). On the other hand, Marcelo Hilario Quispe, Ana Carhuapoma de la Cruz (deceased), Dolores Morán Paucar (deceased) and Justiniano Guillén Ccanto (deceased) had their registration pending in the RUV and were not beneficiaries of the Economic Reparations Program (PRE). Finally, Victoria Riveros Valencia (deceased) and Marino Huamaní Vergara did not have a file and were not beneficiaries of the PRE. For his part, Gregorio Hilario Quispe's registration in the RUV was suspended and his incorporation in the PRE was pending. Finally, Victoria Riveros Valencia (deceased) and Marino Huamaní Vergara had no record and were not PRE beneficiaries. In addition, the following persons had benefited from the Economic Reparations Program (PRE) of the PIR, as beneficiaries linked to the case of the Santa Bárbara peasant community: a) Zósimo Hilario Quispe, with the sum of S/. 5,000 as reparation for the death of his father Francisco Hilario Torres, pending the award of reparations for the death of his mother Dionicia Quispe Mallqui, and b) Zenón Cirilo Osnayo Tunque, with the sum of S/. 10,000 as reparation. With respect to Víctor Carhuapoma de la Cruz and Abilio Hilario Quispe, the award of their reparations was pending, owing to budgetary constraints and, under Law No. 29.979, from January 2013, priority was given to beneficiaries by the date of the damages caused. Therefore, the damage suffered by the beneficiaries in 1991 would be addressed in the next lists.[375]

334. To summarize, from the information provided so far, the Court finds that only four of the 15 victims of forced disappearance and six out of 14 of their next of kin had been registered in the RUV and two of the latter had received an amount of compensation. Although the State has had an opportunity to provide domestic reparations for the violations declared in this judgment, the information provided does not show a definitive result to date. Furthermore, the State did not

[375] *Cf.* Certificates of Accreditation of the Reparations Council, Single Registry of Victims, of September 8, 2008 (evidence file, folios 3869 to 3875 and 3877), and Brief of the Executive Secretary of the High Level Multisectoral Commission in charge of the actions and State policies regarding peace, collective reparations and national reconciliation(evidence file, folios 4714 and 4715).

provide information on the damages covered by the reparations established by the Comprehensive Reparations Plan (PIR), the items included in the Economic Reparations Program (PRE), the program's compensation ceilings and the current status of the registration of victims in the instant case in the Single Registry of Victims (RUV). Therefore, the Court does not have sufficient information to reach a decision on the effectiveness of the reparations contemplated in the PIR in this case.

335. As for the civil reparations established by the National Criminal Chamber in the judgment of February 9, 2012, for the sum of S/. 25,000 new soles in favor of each of the legal heirs of the injured parties, according to the evidence presented by the State in the context of the execution of that judgment, the convicted defendant Oscar Alberto Carrera Gonzales made 11 deposits for the sum of S/. 50 new soles in judicial certificates of deposit as payment for civil reparations during the period from December 2013 to September of 2014.[376] In this regard, there is no evidence that any payment has been made in favor of the relatives of the disappeared victims. Finally, regarding the State's argument on the possibility that the representatives could have taken action at the domestic level, through the appropriate channels, in order to demand payment from the civilly liable third party, the Court considers that this argument is time-barred since was only presented in its final arguments.

336. In view of the foregoing, it is incumbent upon the Court to award non-pecuniary and pecuniary reparations based on its own jurisprudence.

D.1. Non-pecuniary damage

337. International jurisprudence has repeatedly established that the judgment may constitute *per se a* form of reparation.[377] However, in its case law the Court has developed the concept of non-pecuniary damage and has established that this "may include both the suffering and afflictions caused to the direct victim and his family, the impairment of values of great significance for the individual, as well as changes of a non-pecuniary nature in the living conditions of the victim or his family."[378]

338. In consideration of the circumstances of this case, the violations committed, the suffering caused and experienced to different degrees, the time elapsed, the denial of justice, as well as the change in the living conditions of some of the next of kin, the harm caused to the personal integrity of the victims' families and other consequences of a non-pecuniary nature, the Court establishes in equity the following compensation for non-pecuniary damage in favor of each of the victims:

a) USD $80,000.00 (eighty thousand United States dollars) to each of the adults who were forcibly disappeared: Francisco Hilario Torres, Dionicia Quispe Mallqui, Antonia Hilario Quispe, Magdalena Hilario Quispe, Mercedes Carhuapoma de la Cruz, Ramón Hilario Morán, Dionicia Guillén Riveros and Elihoref Huamaní Vergara.

b) USD $80,000.00 (eighty thousand United States dollars) to each of the children who were forcibly disappeared: Yessenia Osnayo Hilario, Miriam Osnayo Hilario, Edith Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Hilario, Raúl Hilario Guillén and Héctor Hilario Guillen.

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376 *Cf.* Brief of January 7, 2015, of the Second National Criminal Court (evidence file, folio 5524), and Brief of the Executive Secretary of the High Level Multisectoral Commission in charge of State actions and policies regarding peace, collective reparations and national reconciliation (evidence file, folios 4714 and 4715).

377 *Cf. Case of El Amparo v. Venezuela. Reparations and costs*. Judgment of September 14, 1996. Series C No. 28, para. 35, and *Case of Osorio Rivera and Family Members v. Peru, supra*, para. 286.

378 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and costs*. Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Osorio Rivera and Family Members v. Peru, supra*, para. 286.

c) USD $45,000.00 (forty-five thousand United States dollars) to the following family members: Zenón Cirilo Osnayo Tunque, Zósimo Hilario Quispe, Marcelo Hilario Quispe, Gregorio Hilario Quispe and Abilio Hilario Quispe who, according to the family group to which they belong, are parents, children and permanent partners of the victims of forced disappearance.

d) USD $45,000.00 (forty-five thousand United States dollars) to the family members who are now deceased: Ana de la Cruz Carhuapoma, Viviano Hilario Mancha, Dolores Morán Paucar, Justiniano Guillén Ccanto, Victoria Riveros Valencia and Alejandro Huamaní Robles who, according to the family group to which they belong, are mothers, fathers, children and permanent partners of the victims of forced disappearance.

e) USD $10,000.00 (ten thousand United States dollars) to Víctor Carhuapoma de la Cruz (brother of Mercedes Carhuapoma de la Cruz), Marcelina Guillen Riveros (sister of Dionicia Guillén Riveros) and Marino Huamaní Vergara (brother of Elihoref Huamaní Vergara).

339. In the case of the victims of forced disappearance and of the family members who are deceased as of this date, the amounts awarded in the preceding paragraph must be paid to their relatives, within one year and in accordance with the following criteria:

> a) fifty per cent (50%) of the compensation corresponding to each victim shall be divided equally among the victim's children. If one or more of the victim's children are deceased, the part that corresponds to them shall be added to those of other children of the same victim;
>
> b) the other fifty per cent (50%) of the compensation shall be paid to the person who was the spouse or permanent partner of the victim at the time when the victim's forced disappearance began or at the time of the victim's death, as the case may be;
>
> c) in the event that the victim had no children or spouse or permanent companion, the amount that would have corresponded to the relatives in that category shall be added to the part corresponding to those in the other category;
>
> d) in the event that the victim had no children, spouse or permanent companion, the compensation shall be paid to his or her parents or, failing that, to his or her brothers or sisters in equal parts; and
>
> e) in the event that the victim had no children, spouse, partner, parents, brothers or sisters, the compensation shall be paid to the heirs in accordance with domestic inheritance law.

340. The next of kin of victims who were not petitioners, who have not been represented in the proceedings before the Commission and the Court, or who have not been included as victims or injured parties in this judgment and who consider that they are beneficiaries of the provisions of the preceding paragraph, must appear before the corresponding state authorities no later than three months from the date of notification of this judgment.

341. The amounts that have been delivered to Zósimo Hilario Quispe and Zenón Cirilo Osnayo Tunque (*supra* para. 333), as well as those that may eventually be paid to the victims in this case in the context of the Economic Reparations Program (PRE) of the PIR and as civil reparations, should be deducted from the amount that corresponds to them at the time of payment, a matter that will be addressed at the stage of monitoring compliance with this judgment.

D.2. Pecuniary damage

342. In its case law, the Court has developed the concept of pecuniary damage and the circumstances in which it must be compensated. The Court has established that pecuniary damage supposes "the loss of or detriment to the victims' income, the expenses incurred as a result of the facts and the pecuniary consequences that have a causal nexus with the facts of the case."[379] In paragraph 304 of this judgment, the Court has already made a decision on the reparations

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[379] *Cf. Case of Bámaca Velásquez v. Guatemala. Reparations and costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of the Human Rights Defender et al. v. Guatemala, supra*, para. 266.

corresponding to the violation of the right to property, private and family life and home, and has established a measure of restitution in that regard. Therefore, the Court considers that it is not appropriate to make any determination on this point beyond what has already been established.

343. The Court considers, as it has done in other cases of forced disappearances,[380] that in this case, in which the whereabouts of the victims are unknown, it is possible to apply the criteria of compensation for the victims' loss of income, which includes the income that they would have received during their probable lifetime. In this regard, given that seven of the victims of forced disappearance were between 8 months and 6 years of age, the Court does not have elements to measure the loss of income or the damage to a life project. However, taking into account the victims' ages at the time of their disappearance, the evidence in the case file and the principle of equity, the Court decides to establish the following amounts:

a) US$ 50,000.00 (fifty thousand United States dollars) for loss of income for each of the victims of forced disappearance who were adults at the time of the events: Antonia Hilario Quispe, Magdalena Hilario Quispe, Mercedes Carhuapoma de la Cruz, Dionicia Guillén Riveros, Ramón Hilario Morán and Elihoref Huamaní Vergara.

b) US$ 20,000.00 (twenty thousand United States dollars) for loss of income for each of the victims of forced disappearance who were adults aged 59 to 60 at the time of the events: Francisco Hilario Torres and Dionicia Quispe Mallqui.

c) US$ 20,000.00 (twenty thousand United States dollars) for loss of income for each of the victims of forced disappearance who were children at the time of the events: Yesenia Osnayo Hilario, Miriam Osnayo Hilario, Edith Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Hilario, Raúl Hilario Guillén, Héctor Hilario Guillén.

344. The amounts ordered in favor of the persons indicated in the preceding paragraph must be paid to their next of kin within one year, in accordance with the criteria established in paragraph 339 of this judgment.

E. Costs and expenses

Arguments of the parties and the Commission

345. The ***Commission*** did not present arguments in this regard. The ***representatives*** requested, with respect to the *Asociación Paz y Esperanza*, that the State be ordered to pay the sum of USD $160,507.00 for the expenses incurred in the legal representation of the next of kin during the domestic and international judicial proceedings over the course of 22 years. Said expenses would include investigation and evidence gathering, notarization of documents, preparation of legal briefs, and travel expenses to various government agencies in the country in order to conduct the litigation of the case before that international body. Likewise, for expenses related to attendance at the public hearing of the case in Costa Rica, they requested the sum of USD $2,021.77. In the case of the Center for Justice and International Law (CEJIL), they indicated that said organization had joined the litigation of the case in the international proceedings and had acted as a representative since the processing of the case before the Commission. They indicated that in order to carry out this work, CEJIL had incurred expenses that included travel, hotel accommodation, communications, photocopies, stationery and mailing expenses, as well as time dedicated to legal work specifically related to the case and the investigation, such as the compilation and presentation of evidence, including interviews and preparation of briefs. They asked the Court to set in equity the sum of USD $4,095.56, as well as the reimbursement of USD

[380] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and costs, supra*, paras. 46 and 47, and *Case of Chitay Nech et al. v. Guatemala, supra,* para. 269.

$6,178.00 for expenses related to attendance at the public hearing of the case. They requested that said amounts be reimbursed directly by the State to the representatives.

346. The ***State*** indicated that it considers unacceptable the request by CEJIL and the *Asociación Paz y Esperanza* for reimbursement of costs and expenses without the presentation of receipts and other documents that justify their validity. It also pointed out that the expenses requested by the *Paz y Esperanza* organization include the amounts disbursed during the domestic criminal proceedings, which would not be considered as part of the costs and expenses within the international proceeding. In this regard, it recalled that between 1995 and 2005 the domestic criminal proceeding was paralyzed, so it would not be correct to say that there has been a 22-year litigation, as if it had been continuous and uninterrupted. Finally, it noted that *Paz y Esperanza* "has included an item of operational expenditure related to the 'judicialization' of human rights, legal defense, dissemination of emblematic cases and others," without explaining how those amounts are related to this case. Specifically, it objected to the travel expenses related to Miryam Rebeca Rivera Holguín's attendance at the public hearing in this case, as well as to the additional night spent by Zenón Cirilo Osnayo Tunque in Costa Rica derived from his participation in the public hearing, considering that it was not necessary, indispensable or reasonable. It also presented detailed observations regarding the vouchers submitted by the representatives and the conversion of the expenses paid in soles and colones into dollars. Furthermore, it recalled that the expenses must be directly related to the case and the proceeding itself, excluding any amounts that do not correspond and/or are not strictly linked to the specific case.

Considerations of the Court

347. The Court reiterates that, based on its case law, costs and expenses form part of the concept of reparation, because the activities carried out by the victims in order to obtain justice, at both the national and the international level, imply expenditures that must be compensated when the international responsibility of the State is declared in a judgment. Regarding the reimbursement of costs and expenses, it is for the Court to prudently assess their scope, including the expenses generated before the authorities of the domestic jurisdiction and those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment may be made based on the equity principle and taking into account the expenses indicated by the parties, provided that their *quantum* is reasonable.[381] The Court also reiterates that it is not sufficient merely to forward probative documents; rather, the parties are required to include arguments that relate the evidence to the facts that they represent and, in the case of alleged financial disbursements, clearly specify the items and their justification.[382]

348. Regarding the evidence related to the financial disbursements made, the Court confirms the following: a) some payment vouchers show items of expenditure that are not clearly and precisely related to the present case; b) some vouchers do not refer to a specific item of expenditure, and c) some payment receipts are illegible, have items crossed out, or else do not show the date, the item of expenditure or the financial amount intended to be proved. Such items have been fairly deducted from the calculation established by this Court. On the other hand, some receipts refer to payment for accommodation, food and transportation expenses of Miryam Rebeca Rivera Holguín to attend the public hearing in this case, without the representatives having presented any argument regarding the reasons for her attendance, bearing in mind that her expert opinion was received by affidavit. Regarding the additional day for Mr. Zenón Cirilo Osnayo Tunque to attend the hearing before the Court, the representatives did not explain why it was necessary to incur such expenses beyond those covered by the Victims'

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381 *Cf. Case of Garrido and Baigorria v. Argentina, supra*, para. 82, and *Case of Canales Huapaya et al. v. Peru, supra,* para. 200.

382 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez*, *supra,* para. 275, and *Case of Canales Huapaya et al. v. Peru, supra,* para. 200.

Legal Assistance Fund (*infra* paras. 351 to 356). In addition, the representatives submitted some of CEJIL's internal documents containing details of expenses, without attaching proof of payment in this regard. The aforementioned receipts and documents have not been considered by the Court.

349. The Court confirms that the *Asociación Paz y Esperanza* did not submit receipts related to costs and expenses beyond those that refer to their attendance at the public hearing held at the seat of the Court. In addition, they included vouchers related to expenses additional to those covered by the Victims' Legal Assistance Fund of the Inter-American Court for lodging, food and transportation in Lima and Huancavelica for the preparation of Miryam Rebeca Rivera Holguín's expert opinion, which were taken into account to be included in the calculation, since they entailed expenses related to the litigation of the instant case. For its part, CEJIL submitted receipts for the purchase of airline tickets, hotel accommodation, transportation, food, communication and other expenses incurred for work meetings held in Peru and at the Commission's headquarters in Washington, as well as for attending the public hearing held at the seat of the Court. In addition to the foregoing, the Court considers it reasonable to presume that there were other expenses during the years in which CEJIL acted in the litigation of the case at the international level, and the *Asociación Paz y Esperanza* in the litigation of the case at the domestic and international levels, even though this Court is aware that the domestic criminal proceedings were paralyzed during several periods.

350. Accordingly, the Court orders the State to pay a reasonable sum of USD $10,000.00 (ten thousand United States dollars) to the *Asociación Paz y Esperanza* as reimbursement of costs and expenses for the work carried out in the litigation of the case at the national and international level. Likewise, the Court decides to award, in equity, the sum of USD $12,000.00 (twelve thousand United States dollars) to the Center for Justice and International Law (CEJIL) for the reimbursement of costs and expenses for the work carried out in the litigation of the case at the international level. These amounts shall be delivered directly to the aforementioned organizations. During the stage of monitoring compliance with this judgment, the Court may order the State to reimburse the victims or their representatives for any subsequent reasonable and duly proven expenses incurred during this procedural stage.

F. Reimbursement of expenses to the Victims' Legal Assistance Fund

351. In the pleadings and motions brief, the alleged victims requested, through their representatives, to have access to the Victims' Legal Assistance Fund of the Inter-American Court (hereinafter the "Court's Assistance Fund" or the "Fund"). In the order of June 9, 2014, the President of the Court established that the Fund would provide the financial assistance necessary for the presentation of a maximum of three statements and an expert opinion, either at a hearing or by affidavit.[383] In an order of December 4, 2014, the President of the Court also ordered financial assistance to cover travel and accommodation expenses to enable Zenón Cirilo Osnayo Tunque and José Pablo Baraybar, the alleged victim and the expert witness, respectively, to appear at the public hearing before the Court. Likewise, financial assistance was ordered to cover the costs of formalizing and sending two statements submitted by affidavit, as determined by the alleged victims. In this regard, the representatives were asked to provide the Court with the names of the two declarants whose affidavits would be covered by the Assistance Fund, as well as to confirm the cost of formalizing an affidavit in their country of residence and sending it to them.[384]

352. In a letter dated December 17, 2014, the representatives confirmed the estimate of the cost of formalizing an affidavit in the country of residence of the declarants. In a note of December 19, 2014, the Secretariat pointed out that the representatives did not indicate the names of the

[383] *Cf. Case of the Peasant Community of Santa Bárbara v. Peru*. Order of the acting President of the Inter-American Court of June 9, 2014. Available at: http://www.corteidh.or.cr/docs/asuntos/santabarbara_fv_14.pdf

[384] *Cf. Case of the Peasant Community of Santa Bárbara v. Peru*. Order of the acting President of the Inter-American Court of December 4, 2014. Available at: http://www.corteidh.or.cr/docs/asuntos/comunidadcampesina_04_12_14.pdf

declarants whose affidavits would be covered by the Assistance Fund and requested that this information be provided as soon as possible. In a communication of December 24, 2014, the representatives requested that the Assistance Fund cover the costs of the affidavits of Zósimo Hilario Quispe, Marcelo Hilario Quispe and Gregorio Hilario Quispe, as well as the expert opinion of Miryam Rebeca Rivera Holguín. In a note dated January 9, 2015, the Secretariat reminded the representatives that that the necessary financial assistance would be granted for the formalization and sending of two statements rendered by affidavit. Therefore, following instructions of the President, it was decided that the financial assistance from the Assistance Fund would be used for the formalization of the affidavits of Zósimo Hilario Quispe and Marcelo Hilario Quispe. In a letter dated January 26, 2015, the representatives indicated that the affidavits of said persons were obtained free of charge; therefore, they requested that the amount set aside for their statements be assigned for the expert opinion provided by Miryam Rebeca Rivera Holguín. Through a note dated January 26, 2015, the Secretariat, following the instructions of the President of the Court, accepted said request.

353. On May 25, 2015, a report was sent to the State on the disbursements made in application of the Victims' Legal Assistance Fund in the instant case, which amounted to USD $3,457.40 (three thousand, four hundred and fifty-seven United States dollars and forty cents) and,[385] in accordance with Article 5 of the Rules for the Operation of said Fund, a period was granted for Peru to submit any observations deemed pertinent. The State submitted its observations on June 1, 2015.

354. Peru argued that no document was presented to support the expenses of USD $697.00 and USD $687.00 for "per diem and transportation expenses" in favor of Mr. Zenón Cirilo Osnayo Tunque and Mr. José Pablo Baraybar Do Carmo, respectively, based on the per diem table of the Organization of American States (OAS) applicable to the city of San José, Costa Rica, in force as of January 2015, and that the mere presentation of Receipts No. 0008005 and No. 0008006 dated January 26, 2015 was not sufficient. It also emphasized that it is necessary to know the details of the expenses and their evidentiary support. With regard to Receipt No. 0008023 for transportation, lodging and food expenses in Peru for the transfer of Zenón Cirilo Osnayo Tunque from Lima to Huancavelica, totaling USD $ 41.78, the State held that said amount had no supporting documents to accredit it, and therefore it should not be included. The State also recalled that, before ordering a State to reimburse the Fund for the expenses incurred, the Court must determine that there were violations of the American Convention in the particular case which, in its opinion, did not occur in the instant case.

355. As for the State's objections regarding the lack of documentation supporting the amounts paid for per diem and transportation expenses, the Court recalls that, in accordance with Article 6 of the Rules for the Operation of the Victims' Legal Assistance Fund, "[t]he Court shall decide matters not governed by these Rules and questions regarding their interpretation." On this point, since the Fund began operating,[386] the Court has established the policy of providing the persons covered by the Fund with a fixed per diem amount, which includes lodging and meals, based on the OAS per diem table in force and applicable to the city of San José, Costa Rica, without the need to present invoices to prove the expenses incurred. According to the OAS, this table reflects the amount that a person would reasonably spend on lodging and meals in that city. Furthermore, the procedure of requesting invoices from the beneficiaries of the Assistance Fund for the per diems received would present serious obstacles to the proper and expeditious administration of the Assistance Fund. It is also for this reason that, as far as terminal expenses are concerned, i.e., transportation expenses for travel to and from the point of origin and other incidental expenses, the Court only requires proof of expenses incurred from the point of origin to the seat of the Court

[385] Report on the Application of the Victims' Legal Assistance Fund of May 25, 2015 (merits file, folios 1584 to 1628)

[386] The Victims' Legal Assistance Fund was applied for the first time in the judgment in the case of *Contreras et al. v. El Salvador*, issued on August 31, 2011.

in San José, it being reasonable that the same amount be disbursed on the return trip of the person concerned. Therefore, the Court dismisses the State's objections.

356. Accordingly, in view of the violations declared in this judgment and the fact that the requirements to access the Victims' Legal Assistance Fund were met, the Court orders the State to reimburse said Fund in the amount of USD $3,457.40 (three thousand, four hundred and fifty-seven United States dollars and forty cents) for expenses incurred for the appearance of a witness and an expert witness at the public hearing in this case and the formalization and submission of an affidavit. Said amount must be reimbursed within ninety days from the date of notification of this judgment.

G. Method of compliance with the payments ordered

357. The State shall make the payments of compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses, as established in this judgment, directly to the persons indicated herein, within one year of notification of this judgment, in accordance with the following paragraphs.

358. In the case of the victims of forced disappearance and their next of kin who are now deceased, the amounts ordered shall be paid in accordance with paragraphs 339 and 344 of this judgment. In the event that the beneficiaries not contemplated in paragraphs 339 and 344 of this judgment die before they receive the respective compensation, this shall be delivered directly to their heirs, in accordance with the applicable domestic law.

359. The State shall comply with its monetary obligations by payment in United States dollars, or the equivalent in national currency, using the exchange rate in force on the New York Stock Exchange (United States of America), on the day prior to payment.

360. If, for reasons that can be attributed to the beneficiaries of the compensation or their heirs, it is not possible to pay the amounts established within the period indicated, the State shall deposit said amounts in their favor, in an account or certificate of deposit in a solvent Peruvian financial institution, in United States dollars, and on the most favorable financial terms permitted by banking law and practice. If the corresponding compensation is not claimed within ten years, the amounts shall be returned to the State with the accrued interest.

361. The amounts awarded in this judgment as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses shall be paid in full directly to the persons indicated, without any deductions arising from possible taxes or charges.

362. If the State should fall into arrears, including in the reimbursement of expenses to the Victims' Legal Assistance Fund, it shall pay interest on the amount owed corresponding to banking interest on arrears in the Republic of Peru.

XI
OPERATIVE PARAGRAPHS

363. Therefore,

THE COURT

DECIDES,

By five votes in favor and one against,

1. To accept the partial acknowledgement of international responsibility made by the State, pursuant to paragraphs 23 to 33 of this judgment.

Dissenting, Judge Vio Grossi.

By five votes in favor and one against,

2. To dismiss the preliminary objection regarding the alleged failure to exhaust domestic remedies filed by the State, pursuant to paragraphs 43 to 46 of this judgment.

Dissenting, Judge Vio Grossi.

By five votes in favor and one against,

3. To dismiss the preliminary objection regarding the alleged lack of jurisdiction *ratione materiae* with respect to the Inter-American Convention on Forced Disappearance of Persons, pursuant to paragraphs 49 to 52 of this judgment.

Dissenting, Judge Vio Grossi.

DECLARES,

By four votes in favor and two against, that:

4. The State violated the rights recognized in Articles 7, 5(1), 5(2), 4(1) and 3 of the American Convention, in relation to Article 1(1) thereof, to the detriment of Yesenia Osnayo Hilario, Miriam Osnayo Hilario, Edith Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Hilario, Raúl Hilario Guillén, Héctor Hilario Guillén, Francisco Hilario Torres, Mercedes Carhuapoma de la Cruz, Dionicia Quispe Mallqui, Antonia Hilario Quispe, Magdalena Hilario Quispe, Dionicia Guillén Riveros, Ramón Hilario Morán and Elihoref Huamaní Vergara. These violations also occur in relation to Article 19 of the American Convention with respect to Yesenia, Miriam and Edith Osnayo Hilario, Wilmer Hilario Carhuapoma, Alex Jorge Hilario, and Raúl and Héctor Hilario Guillén, who were children at the time when their forced disappearance began. Finally, all the violations indicated in this operative paragraph also occur in relation to Articles I.a) and II of the Inter-American Convention on Forced Disappearance of Persons, as of March 15, 2002, the date of its entry into force in Peru. All of the above pursuant to paragraphs 157 to 195 of this judgment.

Dissenting, Judges Pérez Pérez and Vio Grossi.

By five votes in favor and one against, that:

5. The State violated the right to property and the right not to suffer arbitrary or abusive interference in a person's private life and home, recognized in Articles 21 and 11(2) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Francisco Hilario Torres, Dionicia Quispe Mallqui, Antonia Hilario Quispe, Zenón Cirilo Osnayo Tunque, Yesenia Osnayo Hilario, Miriam Osnayo Hilario, Edith Osnayo Hilario, Magdalena Hilario Quispe, Alex Jorge Hilario, Marcelo Hilario Quispe, Mercedes Carhuapoma de la Cruz, Wilmer Hilario Carhuapoma, Ramón Hilario Morán, Dionicia Guillén Riveros, Raúl Hilario Guillén and Héctor Hilario Guillén. All the above pursuant to paragraphs 199 to 205 of this judgment.

Dissenting, Judge Vio Grossi.

By four votes in favor and two against, that:

6. The State violated, to the detriment of the forcibly disappeared victims and their next of kin, the rights to judicial guarantees and judicial protection recognized in Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) thereof, as well as in relation to Articles 1, 6 and 8 of the Inter-American Convention to Prevent and Punish Torture, and Article I(b) of the Inter-American Convention on Forced Disappearance of Persons, from March 15, 2002, the date of its entry into force in Peru. In addition, Peru violated the right to know the truth of the relatives of the disappeared victims. All this, pursuant to paragraphs 215 to 229 and 237 to 270 of this judgment. Likewise, the State violated Article 7(6) of the American Convention, to the detriment of Elihoref Huamaní Vergara and his next of kin, pursuant to paragraphs 230 to 236 of this judgment.

Dissenting, Judges Pérez Pérez and Vio Grossi.

By five votes in favor and one against, that:

7. The State violated the right to personal integrity established in Article 5(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Zósimo Hilario Quispe, Marcelo Hilario Quispe, Gregorio Hilario Quispe, Zenón Cirilo Osnayo Tunque, Víctor Carhuapoma de la Cruz, Abilio Hilario Quispe, Marcelina Guillen Riveros, Marino Huamaní Vergara, Ana de la Cruz Carhuapoma, Viviano Hilario Mancha, Dolores Morán Paucar, Justiniano Guillén Ccanto, Victoria Riveros Valencia and Alejandro Huamaní Robles. All of the above pursuant to paragraphs 274 to 281 of this judgment.

Dissenting, Judge Vio Grossi.

By five votes in favor and one against, that:

8. The Court does not have sufficient evidence to establish the alleged violation of Articles 11 and 17 of the American Convention, pursuant to paragraph 193 of this judgment.

Dissenting, Judge Vio Grossi.

AND ESTABLISHES,

By five votes in favor and one against, that:

9. This judgment constitutes *per se* a form of reparation.

Dissenting, Judge Vio Grossi.

By five votes in favor and one against, that:

10. The State shall carry out comprehensive, systematic and thorough investigations that are necessary to identify, determine, prosecute and, if appropriate, punish those responsible for the violations declared in this judgment, pursuant to paragraphs 289 to 290 herein.

Dissenting, Judge Vio Grossi.

By five votes in favor and one against, that:

11. The State shall initiate, in a systematic, rigorous and serious manner, and with adequate human and financial resources, the actions necessary for the exhumation and identification of the

human remains located in the “Misteriosa” or “Vallarón” mine, and shall protect this site to ensure its preservation, pursuant to paragraphs 294 to 299 of this judgment.

Dissenting, Judge Vio Grossi.

By five votes in favor and one against, that:

12. The State shall deliver to Zenón Cirilo Osnayo Tunque and Marcelo Hilario Quispe, within one year of notification of this judgment, ten alpacas each, or their equivalent market value. In addition, the State shall, through its existing housing programs, provide each of them with adequate housing within one year. If at the end of this period the State has not provided the aforementioned housing, it shall provide, in equity, the sum of USD $25,000.00 (twenty-five thousand United States dollars) to each of them. This reparation measure must be implemented with the participation of the victims and in agreement with them. All of the above, in the terms of paragraphs 302 to 304 of this judgment.

Dissenting, Judge Vio Grossi.

By five votes in favor and one against, that:

13. The State shall provide free of charge, through its specialized health institutions, immediate, adequate, integral and effective medical and psychological or psychiatric treatment to the victims who request it, with their prior informed consent, including the free supply of any medications that may be required, taking into consideration their individual ailments, pursuant to paragraphs 307 to 308 of this judgment.

Dissenting, Judge Vio Grossi.

By five votes in favor and one against, that:

14. The State shall issue, within six months of notification of this judgment, the publications stipulated in paragraph 309, in the terms established therein.

Dissenting, Judge Vio Grossi.

By five votes in favor and one against, that:

15. The State shall pay, within one year of notification of this judgment, the amounts established as compensation for pecuniary and non-pecuniary damage and to reimburse costs and expenses, pursuant to paragraphs 333 to 344, 347 to 350, and 357 to 362 of this judgment.

Dissenting, Judge Vio Grossi.

Unanimously:

16. The State shall reimburse the Victims’ Legal Assistance Fund of the Inter-American Court of Human Rights for the amount disbursed during the processing of the instant case, pursuant to paragraphs 351 to 356 and 362 of this judgment.

Unanimously:

17. The State shall submit a report to the Court, within one year from notification of this judgment, on the measures adopted to comply with its provisions.

Unanimously:

18. The Court will monitor full compliance with this judgment, in exercise of its powers and in compliance with its obligations under the American Convention on Human Rights, and will close this case once the State has complied fully with its provisions.

Judges Alberto Pérez Pérez and Eduardo Vio Grossi advised the Court of their dissenting opinions.

DONE at San José, Costa Rica, on September 1, 2015, in the Spanish language

DISSENTING OPINION OF JUDGE ALBERTO PÉREZ PÉREZ IN THE CASE OF THE PEASANT COMMUNITY OF SANTA BÁRBARA V. PERU

1. I have voted against the part of the judgment in which the brutal acts to which it refers are characterized as "forced disappearance" and not as an extrajudicial execution or massacre that constitutes a crime against humanity. The reasons for my opinion, which are set out below, include both a description of the facts and their legal classification from the standpoint of international human rights law.

I. DESCRIPTION OF THE FACTS

Context and background

2. The situation that existed during the period in which the facts of the case took place is described clearly and concisely in the Report of the Truth and Reconciliation Commission (*Comisión de la Verdad y Reconciliación*, hereinafter, "CVR"), under the heading "Context" (page 531):[1]

> "In June 1991, the extension of the State of Emergency was decreed in the Department of Huancavelica, suspending the exercise of the rights of inviolability of the home, free movement, assembly and the right not to be detained except by judicial order or in *flagrante delicto*. In addition, a curfew from 7:00 p.m. to 6:a.m was imposed in the city of Huancavelica. During those hours, the residents were forbidden to leave their homes or move around the city. However, on the pretext of maintaining order at night, members of the army or military patrols would enter the homes of villagers, steal their belongings and animals, and in some cases even committed murder and rape. In addition, in the Santa Bárbara area, there were continuous incursions by *Sendero Luminoso* (the Shining Path), who committed murders, theft of food, tools and cattle, rapes and caused considerable destruction, so that the inhabitants found themselves between two fronts, forcing many of them to move to the cities and abandon their homes and crop fields.[2]"

3. On July 2, 1991, two military patrols set off from the military base of Lircay. One of them was the "Escorpio" patrol, commanded by Infantry Lieutenant Javier Bendezú Vargas. This patrol arrived at the Rodeo Pampa annex, in the rural community of Santa Bárbara. According to the relatives of two of the victims, the patrol members:

> "After detaining members of the Hilario family, and accusing them of belonging to the insurgency, they [the soldiers] set fire to their homes to force them to

[1] This description coincides with the one contained in the judgment, with one exception that is indicated below in para. 8.

[2] Final Report of the Truth and Reconciliation Commission of Peru, volume VII, Section Four: Crimes and Human Rights Violations, Chapter 2, Cases investigated by the CVR, 2.50 Extrajudicial Executions in Santa Bárbara (1881), page 531.

leave, after which they were detained for the rest of the night totally naked in spite of the inclement weather."

Detentions and removal

4. According to Sergeant Pacheco Zambrano, at one point shots were heard, and, according to him:

> "These shots would have alerted the insurgents who were in the highest parts of the area, causing them to flee, but [he] managed to detain a man, an adult woman and a girl of approximately 3 years of age." He said that another soldier arrested a man who was traveling in the direction of the village and that Sergeant Carrera Gonzáles managed to detain seven people, then went down to the center of the village where he found that the rest of the troops had mistreated the villagers after taking them out of their houses.
>
> "The soldiers remained in the village until after midday, at which time they began to prepare a meal, slaughtering some sheep and killing several chickens belonging to the Hilario family."[3]

5. From there they continued their march to the "Misteriosa" mine, and on the way:

> "The patrol encountered Elihoref Huamaní Vergara whom they added to the group of detainees. A witness told the Truth and Reconciliation Commission that Elihoref's father[4] did not seem worried about his son's detention, since as an Army veteran he assumed that he would not be harmed in any way. However, Elihoref Huamaní disappeared without trace and it is reasonably presumed that he was killed along with the other villagers."[5]

6. It has also been proven from the statements of the military personnel involved that they committed acts of mistreatment and theft of livestock and money from the villagers:

> "Sergeant, Third Class, Duilio Chipana Tarqui admitted that during the operation the soldiers mistreated the villagers of Rodeo Pampa and that all the detainees were previously tied by the neck to be taken to the abandoned mine.
>
> "The accused soldiers also admitted taking money belonging to the victims, and also that they set fire to some houses, rounded up dozens of head of cattle and received S/. 20.00 new soles each from Lieutenant Bendezú, allegedly as proceeds from the sale of the animals. The soldiers who testified in the proceedings held in the Military Court maintained that the cattle they seized in the hamlet of Rodeo Pampa were finally taken to the Military Base of Lircay, and presumably sold by Lieutenant Bendezú to distribute the aforementioned S/ 20 new soles among his men."[6]

Extrajudicial executions

7. All versions of these events agree that on July 4, 1991, the 15 individuals detained and taken away in the inhumane conditions described above died. These versions (with the sole exception mentioned in the following paragraph) coincide in

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[3] Report of the CVR, volume VII, page 532.
[4] Who accompanied him.
[5] Report of the CVR, volume VII, page 533.
[6] Report of the CVR, volume VII, page 534.

stating that all the victims were killed by shots fired by FAL submachine guns, and that later dynamite charges were detonated, scattering the remains of those murdered:

> "When they reached their destination, the 15 villagers were forced inside the mineshaft; then the soldiers fired FAL rounds at them and proceeded to install explosive charges (dynamite) causing an explosion that ended up scattering the remains of the bullet-ridden bodies. According to the account given by a resident of Santa Bárbara, whose son had been very close to the place where the events took place, there were two successive explosions.
>
> "These facts have been confirmed in the statements made during the proceedings in the military jurisdiction. Sergeant, Second Class, Carlos Prado Chinchay, testified that the detainees were eliminated by Corporal Simón Breña Palante, presumably on the orders of Lieutenant Bendezú, leader of the military patrol, since the declarant did not hear directly the order to kill them. For his part, the Auditor General of the Army stated in Report N° 2820-91 that the person in charge of killing the victims was Sergeant Carlos Prado Chinchay.
>
> "It should be noted that all the military witnesses agree that the Santa Barbara community members were indeed eliminated with FAL rounds inside an abandoned mine and then dynamited using explosive charges found inside the mine.
>
> "Sergeants Oscar Carrera Gonzáles and Duilio Chipana Tarqui maintain that it was Lieutenant Bendezú Vargas who gave the order to kill the detainees and then to dynamite the entrance to the abandoned mine. For their part, Sergeants Dennis Pacheco Zambrano and Carlos Prado Chinchay, as well as NCO Fidel Eusebio Huaytalla, said that they learned of the death of the detainees from comments made later by other members of the patrol who mentioned that their elimination was ordered directly by Lieutenant Bendezú Vargas."[7]

8. Faced with this unanimous assertion that the order to kill the detainees and explode the dynamite was given by Lieutenant Bendezú Vargas, the latter tried to distance himself from any responsibility by means of a totally outlandish explanation (which is not mentioned in the judgment):

> "Lt. Javier Bendezú Vargas, when giving his preliminary statement, said that he did not order the killing of the villagers in the manner and circumstances described by his co-defendants and the numerous soldiers who gave their testimonies, maintaining that it was the detainees themselves who committed mass suicide in a single act, throwing themselves into a very deep ravine as they made their way to the Lircay military base. The military judge in charge of the investigation, and subsequently the Court Martial, dismissed this version, considering it implausible and untenable.[8]

In any case, even this far-fetched version of the events confirms the death of the 15 detainees on the same day, July 4, 1991.

Discovery of some of the bodies

9. Despite the dynamite explosion (or explosions) and its devastating effects, family members of the victims, and to some extent the judicial authorities or Public Prosecutor's Office, managed to identify some of the remains:

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[7] Report of the CVR, volume VII, page 533.
[8] Report of the CVR, volume VII, pages 533-534.

"On July 6, while on a business trip in Huancavelica, Zósimo Hilario Quispe learned that his relatives had disappeared and that his house had been burned down. The following day, Hilario traveled from Huancavelica to the ranch at Rodeo Pampa in the company of a number of representatives of the community of Santa Bárbara and, upon reaching the spot, they found a desolate scene: burned-out houses, food, clothing and other property strewn on the ground, and a lot of blood in the area around the houses.

"Later, Hilario Quispe went to the "Misteriosa" mine, arriving there on July 18 with authorities from the Public Prosecutor's Office and some journalists. He said that when they arrived at the site they found braids, fragments of scalp, keys, a piece of tongue and a heel. Another witness, Zenón Cirilo Osnayo Tunque, said he was desperate when he saw the macabre scene at the massacre site: "I found my wife dead, tied up with my own rope, and one of my daughters - I saw half of her little head, I recognized her by her braid, and by the *pili mili* (hair bobble) she was wearing."

"This witness said that on July 4, villagers who lived near the site of the "Misteriosa" mine saw a group of soldiers trying to erase the evidence and added that 23 community members were detained by the military who were trying to prevent them from entering the mine. He said that thanks to the intervention of the Deputy Prefect of Angaraes the Army released them.

"Shortly thereafter, on July 11, 1991, Viviano Hilario Mancha, father and grandfather of the disappeared Ramón Hilario Morán and Héctor Hilario Guillén, respectively, found the half-buried body of his grandson Héctor Hilario at the entrance of the "Misteriosa" mine, along with other bodies he could not recognize. The next day, he reported the discovery to the Huancavelica Provincial Prosecutor's Office and to the Examining Magistrate's Court of that province."[9]

Attempts to erase the evidence of the massacre

"The process of removing the bodies was initially thwarted because the group of community members who went to assist the magistrate's court was stopped and prevented from reaching the mine by members of the Army, who initially were not wearing their military uniforms. The witnesses Marcelino Chahuayo Arroyo and Zenón Cirilo Osnayo Tunque have consistently maintained that the soldiers held them in an abandoned house very close to the mine from 10:00 in the morning until 5:30 in the afternoon, but that at approximately 3:30 they felt an explosion, due - according to them - to the fact that the soldiers were dynamiting the entrance to the mine in order to erase the traces of the massacre, and then threw the human remains that were left over into a very deep ravine.

"It should be noted that this group of people went to the mine on foot and used a different route than the one used by the authorities who were traveling in vans and were accompanied by journalists.

"According to the testimonies of the victims' relatives, the vehicles of the official delegation strangely ran out of fuel and were therefore unable to arrive at the location of the events on the date initially planned. This circumstance would have allowed members of the Army to take advantage of this inconvenient delay of the authorities, gaining time to try to erase traces of the massacre committed.

[9] Report of the CVR, volume VII, pages 534-535.

"According to the account given by Sergeant Duilio Chipana Tarqui in his preliminary statement before the Military Court, Lieutenant Bendezú Vargas ordered him and three other soldiers to return to the abandoned mine and proceed to seal the entrance; they arrived there in the early morning of July 6, that is, two days after the massacre of the villagers.

"It was not until July 18, 1991, that the authorities of the Public Prosecutor's Office and the Judiciary were able to reach the "Misteriosa" mine and carry out the removal of the corpses. However, they only found a braid of hair with particles of scalp, a medium-length braid, a strand of hair, a segment of a terminal region, a segment of vulva, a particle of skull bone, a large segment of tongue, a segment of bone, two articular surfaces of bone, a segment of distal forearm and a human hand, a segment of lung parenchyma, three segments of bone tissue, a segment of tissue attached to unidentified bone tissue, a portion of unidentifiable soft tissue and a portion of hair attached to a segment of scalp which, according to the record, were "apparently human body remains." The preliminary report of the medical examiner of Huancavelica states that the remains are from human bodies."[10]

Identification of the victims

10. According to the Truth and Reconciliation Commission,

"The following persons have been identified as victims of the massacre:

- Francisco Hilario Torres, peasant, aged 60
- Dionisia Quispe Mallqui, peasant, aged 57
- Antonia Hilario Quispe, peasant farmer, aged 31
- Magdalena Hilario Quispe, peasant, aged 26
- Mercedes Carhuapoma de la Cruz, peasant farmer, aged 20
- Ramón Hilario Morán, cattle farmer, aged 26. He was also a community leader.
- Dionisia Guillén de Morán, peasant, aged 24.
- Alex Jorge Hilario, child, 6 years old
- Yesenia Osnayo Hilario, child, 6 years old
- Héctor Hilario Guillén, child, 6 years old
- Miriam Osnayo Hilario, child, 3 years old
- Wilmer Hilario Guillén (or Carhuapoma), child, 3 years old
- Raúl Hilario Guillén, child, 8 months old
- Roxana Osnayo Hilario, child, 8 months old
- Elihoref Huamaní Vergara. Cattle farmer, aged 21, a former soldier.[11]"

[10] Report of the CVR, volume VII, pages 535-536.
[11] Report of the CVR, volume VII, page 536.

11. Although it was not possible to identify the remains of all the persons executed in the "Misteriosa" mine, it is reasonable to conclude that they were the 15 individuals detained (14 in the village and one on the road) who were forced to enter the mine and were then massacred with FAL submachine guns. The dynamite explosions that followed were the first attempts to erase the traces of the massacre. All this is undoubtedly macabre, as one of the family members stated, but it is the sad reality.

12. *Conclusion.* The main factual conclusion relevant to this opinion is that the 15 detainees died on July 4, 1991. The judgment discusses the failures and delays in the procedures aimed at identifying the remains though DNA testing and other contemporary techniques, but – apart from the fact the condition and dispersion of these remains make identification extremely difficult – this factor does not alter the actual and legal situation of the 15 persons who lost their lives on July 4, 1991.

II. LEGAL CHARACTERIZATION: MASS EXTRAJUDICIAL EXECUTION (MASSACRE), NOT FORCED DISAPPEARANCE

13. The judgment, in agreement with the Inter-American Commission on Human Rights and with the position of the victims' representatives, has characterized the facts of this case as forced disappearance of persons, and consequently has understood that the Inter-American Convention on the matter is applicable to the case, which did not even exist on the date on which the 14 detainees of the Santa Bárbara peasant community were killed. In fact, said Convention was adopted in Belém do Pará on June 9, 1994, and was ratified by Peru on February 8, 2002 (instrument of ratification deposited on February 13, 2002).

14. However, the characterization made in the judgment differs from that given by the next of kin of the executed persons,[12] after the first few days (judgment, paras. 95 and 96) when they had not yet received complete information about the massacre (a word that the CVR Report includes in the title of the corresponding chapter and reiterates nine other times in its text), as well as by the Peruvian authorities, both in the criminal jurisdiction[13] and in the ordinary justice system.[14] It also differs from that made by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, "whose report on two cases involving judgments handed down by the military courts

[12] CVR Report, volume VII, Section Four: Crimes and violations of human rights, Chapter 2, p.538 (Zósimo Hilario Quispe, November 29, 1991, "crimes against life, the person and health (Homicide);" Judgment, paras. 97 and 98, (Viviano Hilario Mancha, July 12, 1991, "crime of homicide"), and Judgment, para. 100 (Nicolás Hilario Morán, President of the administrative council of the peasant community of Santa Bárbara, and Máximo Pérez Torres, treasurer of the municipal agency of the same community, July 17, 1991, "homicide").

[13] CVR Report, volume VII, p. 538 (Provincial Prosecutor's Office of Huancavelica, "crimes against life, the person and health in the category of Genocide," as well as crimes against property, the public administration and the administration of justice, and in one case of a crime against freedom– violation of sexual freedom); p. 539 (Auditor of the Army's Second Judicial District, which argues that there was "aggravated homicide, abuse of authority, negligence, extortion and theft, offenses against the duty and dignity of the service and rape." It also states that "it is admitted that the massacre of the villagers took place at the hands of soldiers under the command of Infantry Lieutenant Javier Bendezú Vargas and classifying the crime committed by said officer as aggravated homicide"); page 541 (Prosecutor's Office of Huancavelica, extension of the complaint to include several military personnel as "intellectual co-authors of the massacre," being the "commanders responsible for the counterinsurgency battalions" involved), and page 542 (report of the Provisional Criminal Judge of Huancavelica to the Criminal Chamber, which concludes that the crimes of abuse of authority, extortion, genocide, theft and sexual offenses-rape have been proven).

[14] Public Prosecutor's Office, substitution of the classification of genocide for that of "aggravated homicide with the aggravating factors of ferocity and great cruelty with reference to the death of the fifteen villagers of Rodeo Pampa;" National Criminal Chamber of the Superior Court of Justice of Lima, classification as a crime against humanity and consequently not subject to the statute of limitations, and conviction for aggravated homicide by ferocity and premeditation.

(one of them is from the Santa Bárbara case) [states] that 'the disproportion between the seriousness of the crimes and the sentences imposed has become evident.'[15]"

15. The classification as forced disappearance of the situation of people who are already known to be dead is incompatible with the acceptance of the State's partial acknowledgment of responsibility and is manifestly groundless and unnecessary for the proper legal consideration of such terrible and macabre facts as those in this case.

Characterization incompatible with the acceptance of the State's partial acknowledgement of responsibility

16. In paragraphs 24 and 25 of the judgment, the Court states:

"*This Court understands that Peru admitted the following facts*:

i. the Plan known as Operation "Apolonia" was designed as part of the State's policy to combat subversion in the Province and Department of Huancavelica, and was devised by the Political and Military Command of Huancavelica, with the specific objective of raiding the village of Rodeo Pampa, in the community of Santa Bárbara;

ii. the mission of Plan "Apolonia" was to capture and/or destroy "terrorist criminals";

iii. in the execution of Plan Apolonia, two military patrols were ordered to participate: one from the counterinsurgency base of Lircay and, the other from the counterinsurgency base of Huancavelica;

iv. the only people found in Rodeo Pampa were unarmed villagers who belonged to two family groups, most of them women and children;

v. the route taken by the 'Escorpio' patrol with the 14 detainees is the one that leads to the "Misteriosa" or "Vallarón" mine, which is located on the road from Rodeo Pampa to the Lircay military base;

vi. "*the commander of the 'Escorpio' patrol, Lt. Bendezú Vargas, upon receiving information of the discovery of dynamite, gave the order to take all the detainees* without exception up to the mine shaft, including a 65 year-old man, women, and children;"

vii. "*the treatment and elimination of the victims and the circumstances in which this took place, whereby they were tied up and previously forced into the mine shaft, constitutes a serious violation of their human condition, and therefore their dignity;*"

viii. "the detention and execution of the victims was indiscriminate, since no consideration was given to the fact that they were members of the civilian population, who were unarmed and defenseless in the face of the superiority of

[15] United Nations document E/CN.4/1994/7/Add.2, November 15, 1993. Report of the UN Special Rapporteur on extrajudicial, summary or arbitrary executions on his Mission to Peru from May 24 to June 2, 1993, para. 53. This report does not appear to have been considered in the judgment. The report, according to United Nations terminology, refers to "the massacre of Santa Bárbara" (para. 23) and makes numerous references to forced disappearances, clearly distinguishing them from extrajudicial executions but pointing out that sometimes what begins as a forced disappearance ends as an extrajudicial execution. This last observation does not apply to the massacre of Santa Bárbara.

the armed military patrol. And […] seven of the victims were very young children, who enjoy special legal protection;"

ix. the *names and ages of the 14 victims mentioned*;

x. "*the former soldier Elihoref Huamaní Vergara was also killed with the other victims;*"

xi. "the purpose of taking the detainees up to the mine, tied up, clearly evidenced that the intention was to kill them;"

xii. *the detainees "were killed by shots from FAL rifles, a weapon used by the Army*. […] Almost immediately, *one or two dynamite charges were detonated in in the mine where the victims had been killed in order to eliminate the evidence*. *Most of the victims' bodies were destroyed, and only human remains were found during the judicial inspection*, and

xiii. the detainees "were dynamited for the purpose of concealing all traces of the crime committed."

Therefore, the dispute with respect to these facts has ceased." (Cursive added)

17. In paragraph 25, the Court listed the issues on which "the dispute continues." None of them refers to the legal classification of the facts,[16] most notably the fact that "***the detainees "were killed*** *by shots from FAL rifles, weapons used by the Army" and* that "*one or two dynamite charges were detonated in the mine where the victims had been killed in order to eliminate the evidence,"* so that "*most of the victims' bodies were destroyed, and only human remains were found during the judicial inspection."*

18. In paragraph 32, after indicating that the State has acknowledged its responsibility for "the violation of the rights to life, personal integrity and personal liberty, established in Articles 4, 5 and 7 of the Convention" and of Article 19 in relation to the minors, the Court categorically declares: "The Court decides to accept the partial acknowledgement of responsibility made by the State." However, contradictorily, in the following paragraph (33) it states: "Without prejudice to the foregoing, the Court notes that the dispute continues regarding the legal classification of the facts of the case as extrajudicial execution or forced disappearance […]."

Unsubstantiated classification

19. The legal classification for which the majority of the Court has opted is manifestly groundless. Obviously, it cannot be argued that the murder of 15 people who were shot with FAL rifles and the subsequent destruction of their bodies with dynamite explosions is not an extrajudicial execution. Likewise, it cannot be affirmed that these human remains belong to the disappeared persons.

[16] The text of paragraph 25 states the following: "Therefore, the dispute with respect to these facts has ceased. However, the dispute continues with respect to: i) the alleged theft of property and burning of the victims' homes; ii) the complaints filed after the events and the response of the State authorities thereto; iii) the manner in which the investigations of the facts were conducted, the recovery and identification of the remains and the forensic procedures; iv) the alleged existence of a series of cover-up mechanisms that were clearly deliberate and that included, at least, the denial of the detentions, the use of dynamite on several occasions and during the first ten days after the events in the abandoned "Misteriosa" or "Vallarón" mine as a means to destroy the evidence of what happened, as well as the harassment and detention of villagers who reported the facts, and threats to justice operators, and v) the alleged lack of due diligence and irregularities in the capture of the fugitive defendants".

20. Of the constituent elements of forced disappearance, the first two have undoubtedly been proven, since deprivation of liberty and the direct intervention of State agents or their acquiescence were present. Moreover, the existence of these two elements was public and well-known from the very beginning, when the patrol, *"[a]fter detaining the members of the Hilario family, accusing them of belonging to the subversion, set fire to their homes to force them to leave, after which they were detained for the rest of the night totally naked in spite of the inclement weather."*[17]" These events continued to be public and well-known all the way to the mine and up to the entrance to it, where they were killed.

21. It cannot be said, then, that there was a "refusal to acknowledge the detention and to reveal the fate and whereabouts of the persons concerned." The "fate" and "whereabouts" of the 15 individuals detained was also public and well-known. Everyone knew that they were mistreated and taken away in inhumane conditions to the mine (judgment, para. 24, vi. and vii), and that they were killed there *en masse* (judgment, para. 24, xii). Everyone knows who the victims were (judgment, para. 24, ix and x). Therefore, it cannot be said that there was any concealment of the deprivation of liberty, from the time it began until it culminated with the massacre, or any refusal to provide information on the fate and whereabouts of the victims. What did occur was that there were some crude and unsuccessful attempts to conceal the crimes committed.

22. However, the element that *was* lacking - at least as soon as information began to spread about the macabre events that had occurred - was the typical uncertainty as to whether the persons were alive or dead, which is an enduring characteristic of forced disappearance.

23. Also absent was the element of clandestine detention and denial of the very fact of detention which, according to the CVR, was an essential part of the *modus operandi* in forced disappearances:

> "1.2.6. *Modus operandi* of the perpetrators of forced disappearance
>
> Forced disappearance was a complex practice that generally involved a series of acts or stages carried out by different groups of people. Forced disappearance generally ended with the execution of the victim and the disappearance of his or her remains. The following stages, not necessarily consecutive, can be identified: selection of the victim, detention of the person, transfer to a place of confinement, eventual removal to another place of confinement, interrogation, torture, processing of the information obtained, decision to eliminate, physical elimination, disappearance of the victim's remains, and use of State resources. Throughout the process, the common denominator was the denial of the very fact of detention and the refusal to provide any information about what was happening to the detainee. In other words, the person entered an established circuit of clandestine detention, from which, if he was very lucky, he would emerge alive."[18]

24. Of course, what remains to be done - and given the characteristics of the case, perhaps it will forever remain pending - is the clear and complete DNA identification of the scattered remains. However, there is certainty that those remains correspond to at least fifteen individuals who were murdered in that place. This is not what happens in

[17] CVR Report, volume VII, page 532.
[18] CVR Report, volume VI, Section Four: Crimes and violations of human rights, Chapter 1: Patterns in the perpetration of crimes and human rights violations, page 84.

cases of forced disappearance of persons who are not yet known to be alive or dead; thus, only identification via DNA testing allows us to say that the whereabouts of the disappeared person have been established. In the case of Santa Bárbara, the whereabouts and sad fate of the fifteen victims is known.

Unnecessary classification

25. Finally, the classification of the crime as forced disappearance is unnecessary. Perhaps it was done in the belief that this was the only way to achieve certain results linked to the permanent nature of the disappearance, particularly with regard to the statute of limitations and the ongoing duty to continue making every possible effort to identify the remains found. In reality, this is not so.

26. In the first place, the events that occurred at the "Misteriosa" mine have already been classified domestically as a crime against humanity and, consequently, it has been determined that they are not subject to any statute of limitations.

27. Secondly, there is still an obligation to carry out, with due diligence and with the best technical means, the effort to identify the remains found.

III. CONCLUSION

28. Based on the foregoing considerations, it may be concluded that the description of the facts of the case naturally leads us to characterize them as a massacre or mass extrajudicial execution, and in no way allows us to classify them as forced disappearance. The classification made by the Court is incompatible with the acceptance of the State's partial acknowledgement of responsibility and is manifestly unfounded and unnecessary for the proper legal consideration of such terrible and macabre facts as those of this case.

Alberto Pérez Pérez

Pablo Saavedra Alessandri
Registrar

DISSENTING OPINION OF JUDGE EDUARDO VIO GROSSI,
INTER-AMERICAN COURT OF HUMAN RIGHTS,
CASE OF THE PEASANT COMMUNITY OF SANTA BÁRBARA *V.* PERU
JUDGMENT OF SEPTEMBER 1, 2015
(Preliminary Objections, Merits, Reparations and Costs)

INTRODUCTION

This separate dissenting opinion[1] to the judgment indicated in the title,[2] is issued because the judgment rejected the preliminary objection regarding failure to comply with the rule of prior exhaustion of domestic remedies, contained in Article 46 of the American Convention on Human Rights,[3] filed by the Republic of Peru.[4] The grounds for this dissent are as follows: on the one hand, while the judgment considers that the objection raised by the State should be rejected on the grounds that it "*would not be compatible with the partial acknowledgement of responsibility made in the instant case*"[5] and, on the other hand, that in the remedies mentioned by the State in its briefs, "*it does not specify why […] they would be, in its opinion, adequate, suitable and effective,"*[6] in this document the view is that the petitioner did not comply with the requirement to exhaust domestic remedies prior to lodging the petition and that the judgment, endorsing the work done by the Inter-American Commission on Human Rights,[7] bases its decision on facts subsequent to this submission and the State's corresponding response to it.

The reasons for my disagreement with the judgment are explained below in relation to the preliminary considerations, based on which such reasons are formulated, to the applicable conventional rule, to the facts of the case relating to said rule and, finally, to the judgment, in relation to that objection.

I. PRELIMINARY CONSIDERATIONS

The preliminary considerations are first related to the meaning and scope of this opinion and, secondly, to the procedural aspects within which it is formulated.

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[1] Art. 66(2) of the American Convention on Human Rights: "*If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment*"; Art. 24(3) of the Statute of the Court: "*The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate*", and Art. 65(2) of the Court's Rules of Procedure: "*Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting. These opinions shall be submitted within a time limit to be fixed by the Presidency so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment*."

[2] Hereinafter the judgment.

[3] Hereinafter the Convention.

[4] Hereinafter the State.

[5] Para. 45 of the judgment. Hereinafter, each time "para" is indicated, it shall be understood to refer to the judgment.

[6] Para. 46.

[7] Hereinafter the Commission.

A. Meaning and scope of the individual opinion

With regard to the first aspect, it should be noted that, under the provisions of Article 65(2) of the Court's Rules of Procedure,[8] this opinion refers solely and exclusively to the reasons why I consider that the judgment should have admitted the preliminary objection concerning the lack of prior exhaustion of domestic remedies filed by the State and, consequently, must refrain from commenting on the merits of the case. Therefore, this opinion essentially refers to the second operative paragraph of the judgment.

Obviously, and for the same reason mentioned above, it is not appropriate to consider in this opinion the acts subsequent to the petition and the State's response thereto, that is, what is alleged during the admissibility stage and even more so, before the Court. This is because the purpose of this document is to point out the legal reasons why I disagree with the judgment regarding the obligation to comply with the rule of prior exhaustion of domestic remedies and the time at which this must occur. Thus, any reference in this opinion to subsequent acts is only for the purpose of clarifying the argument that is put forward and in no way implies entering into the merits of the case or making an appraisal of those acts.

Nevertheless, I wish to state for the record that, as in other cases[9], I have participated in both the deliberation and the voting by the Court on each operative paragraph of the judgment, but have done so without issuing a separate opinion on them.

Indeed, under the provisions of the Court's Rules of Procedure, a judge is only obliged to explain the reasons for an opinion in the event that he exercises the right to join such opinion to the judgment. Consequently, this obligation does not cover situations in which the judge decides not to attach his dissenting opinion to the judgment. In the instant case, therefore, I exercise my right to join my dissenting opinion to the judgment, exclusively with regard to the aforementioned second operative paragraph.

Now, without prejudice to the foregoing, I wish to state for the record that I have voted against all the other operative paragraphs of the judgment, except for three, because I respectfully consider that the Court's refusal to accept the objection filed by the State constitutes, in itself and from now on, a comment on the merits of the case. Furthermore, I consider that, had I voted in favor of the aforementioned operative paragraphs, this would have been inconsistent with the position I adopted in accepting the preliminary objection concerning failure to comply with the rule of prior exhaustion of domestic remedies and that, therefore, it was not appropriate to comment on the merits of the case.

With regard to the last three operative paragraphs of the judgment, i.e. paragraphs 16, 17 and 18, which I voted in favor of, I did so because they relate to procedural aspects of compliance with the judgment, namely, the reimbursement of a sum of money to the Victims' Legal

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[8] See footnote No. 1.

[9] Dissenting Opinion of Judge Eduardo Vio Grossi, *Case of Wong Ho Wing v. Peru*, Judgment of June 30, 2015 (Preliminary objection, merits, reparations and costs); Dissenting Opinion of Judge Eduardo Vio Grossi, *Case of Cruz Sánchez et al. v. Peru*, Judgment of April 17, 2015 (Preliminary objections, merits, reparations and costs); Dissenting Opinion of Judge Eduardo Vio Grossi, *Case of Liakat Ali Alibux v. Suriname*, Judgment of January 30, 2014 (Preliminary objections, merits, reparations and costs), and Dissenting Opinion of Judge Eduardo Vio Grossi, *Case of Díaz Peña v. Venezuela,* Judgment of June 26, 2012 (Preliminary objection, merits, reparations and costs).

Assistance Fund, the State's report on compliance with the judgment and the corresponding monitoring process.

Obviously, by adopting this course of action, I have acted in accordance with the principles of liberty and independence that should govern the actions of a judge, guaranteed by the Convention and the Court's Statute and Rules of Procedure, which impose no restriction as regard the reason he considers it appropriate to vote according to his conscience or, in particular, by not prohibiting him from explaining, if he so wishes, why he has proceeded in in way.[10]

B. General procedural aspects within which the opinion is framed

With regard to the general procedural aspects within which this opinion is formulated, there are basically two: one, related to the role of the Court and the other, related to the nature of its own jurisprudence.

i. Role of the Court.

With respect to the role of the Court, it should be recalled that the Convention, after indicating the organs competent to hear matters related to compliance with the commitments established therein,[11] establishes that the Court is responsible for applying and interpreting the Convention in the cases submitted to it,[12] a function different from that of the Commission, which is responsible for the promotion and defense of human rights.[13] Thus, while the role of the Commission is more diplomatic or political, the role of the Court is purely judicial.

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[10] Similarly, Art. 95(2) of the Rules of the International Court of Justice: "*Any judge may, if he so desires, attach his individual opinion to the judgment, whether he dissents from the majority or not; a judge who wishes to record his concurrence or dissent without stating his reasons may do so in the form of a declaration. The same shall also apply to orders made by the Court.*"

Likewise, Art. 74(2) of the Rules of the European Court of Human Rights: "*Any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent.*"

[11] Art 33: "*The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention:*
a) the Inter-American Commission on Human Rights, referred to as the Commission, and
b) the Inter-American Court of Human Rights, referred to as the Court."

[12] Art. 62(3) of the Convention: "*The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement*."

[13] Art. 41 of the Convention: "*The main function of the Commission shall be to promote respect for and defense of human rights. In the exercise of its mandate, it shall have the following functions and powers:*
a) to develop an awareness of human rights among the peoples of America;
b) to make recommendations to the governments of the member states, when it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions as well as appropriate measures to further the observance of those rights;
c) to prepare such studies or reports as it considers advisable in the performance of its duties;
d) to request the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;

e) to respond, through the General Secretariat of the Organization of American States, to inquiries made by the member states on matters related to human rights and, within the limits of its possibilities, to provide those states with the advisory services they request;
f) to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention; and

Accordingly, when performing its role, the Court must do so considering that it must apply and interpret a treaty in accordance with the corresponding rules of interpretation. This implies determining the will of the States Parties thereto, based on good faith, the ordinary meaning of its terms, their context and the object and purpose of the treaty,[14] all for the purpose of effectively resolving the conflict in question, that is, according to the characteristics or circumstances that it presents at the time it is submitted to the Court. In this sense, it is not a matter of what the interpreter wishes, but rather of determining the will of the States Parties to the Convention in a given situation - or what it would be, if this has not been fully addressed in the rule. A treaty should be seen as a living instrument, something that is useful and adaptable to the ever-changing social circumstances, an evolving interpretation or progressive development of international law that is achieved by applying the provisions of Article 31(3) of the Vienna Convention on the Law of Treaties.[15]

Undoubtedly, as a judicial institution, the Court, in fulfilling its mission, "*must maintain a reasonable balance between the protection of human rights, the ultimate purpose of the system, and the legal certainty and procedural equilibrium that ensure the stability and reliability of international protection.*"[16] Similarly, "*tolerance of* 'evident *violations of the procedural rules established in the Convention (*and, also, in the Rules of Procedure of the Court and of the Commission*), would entail the loss of the essential authority and credibility of the organs responsible for administering the system for the protection of human rights.*"[17]

On the other hand, it should not be overlooked that the Court, in exercising its judicial function, should not encroach on the executive[18] or regulatory functions,[19] both of which are reserved for

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g) to submit an annual report to the General Assembly of the Organization of American States."

[14] Art. 31 of the Vienna Convention on the Law of Treaties: "*General rule of interpretation.*
1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty;
3. There shall be taken into account, together with the context:
a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended."

[15] See preceding footnote.

[16] *Case of Cruz Sánchez et al. v. Peru*, cit., para. 37.

[17] *Case of Díaz Peña v. Venezuela*, cit., para. 43.

[18] American Convention, Art. 68: "*1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.*
2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."
Art. 65: "*To each regular session of the General Assembly of the Organization of American States the Court shall submit, for the Assembly's consideration, a report on its work during the previous year. It shall specify, in particular, the cases in which a state has not complied with its judgments, making any pertinent recommendations*."

[19] Convention, Art. 31: "*Recognition of Other Rights. Other rights and freedoms recognized in accordance with the procedures established in Articles 76 and 77 may be included in the system of protection of this Convention;*"

the States.[20] In this regard, the Court, as an institution of public law, can only do what the law allows it to do.

Finally, it is pertinent to emphasize that the Court's role is conditioned not only by the principles that should inspire any court, such as impartiality, independence, objectivity and procedural equality of the parties, but also and more fundamentally by the imperative of acting with full awareness that, as an autonomous and independent entity, there is no superior authority that controls it. This means that, true to the important role assigned to it, it must strictly respect the limits of this role, and remain and evolve within the sphere inherent to a jurisdictional entity.

ii. Nature of the Court's jurisprudence

Since the Court is a judicial body created by the Convention precisely to apply and interpret it in the cases submitted to it, the binding force of its judgments is determined by the provisions of said treaty.

And to this effect, the only provision of the Convention in this regard is the commitment of the States to comply with the judgments issued by the Court in cases to which they are parties.[21]

It must be concluded, therefore, that the Convention has not strayed from the general rule of international law that the Court's judgments are binding only on such States[22] and that it is an

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Art. 76: "*1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General.*
2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification", and
Art. 77: "*1. In accordance with Article 31, any State Party and the Commission may submit proposed protocols to this Convention for consideration by the States Parties at the General Assembly with a view to gradually including other rights and freedoms within its system of protection.*
2. Each protocol shall determine the manner of its entry into force and shall be applied only among the States Parties to it."

[20] Vienna Convention on the Law on Treaties, Art. 39: "*General rule regarding the amendment of treaties. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide."*
Art 40: "*Amendment of multilateral treaties. 1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.*
2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:
a) the decision as to the action to be taken in regard to such proposal;
b) the negotiation and conclusion of any agreement for the amendment of the treaty.
3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.
4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4 (b), applies in relation to such State.
5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:
a) be considered as a party to the treaty as amended; and
b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement."

[21] Art. 68 of the Convention, already cited.

[22] Art. 59 of the Statute of the International Court of Justice: "*The decision of the Court has no binding force except between the parties and in respect of that particular case."*

auxiliary source of international public law, i.e., an "*auxiliary means for the determination of the rules of law.*"[23]

This means, on the one hand, that the Court's jurisprudence is not an autonomous source of international law, i.e., it must necessarily refer to the relevant conventional norms in order to apply and interpret them and, therefore, it is not sufficient on its own to resolve a dispute. On the other hand, it is obviously not immutable, and thus it can be changed by the Court itself, even when it is constant or sufficiently consolidated, especially in consideration of the peculiarities of the case in question and the progressive development of international law.

II. CONVENTIONAL RULE CONCERNING THE PRIOR EXHAUSTION OF DOMESTIC REMEDIES

In the first part of this opinion, I will reiterate and complement, with certain modifications, some general comments made above[24] on the rule in question and the procedure that should be followed in this regard; in other words, with regard to the petition, its study and initial processing by the Commission, the State's response to the petition, its admissibility and the ruling that corresponds to the Court. To conclude, I will address the consequences of considering the rule of prior exhaustion of domestic remedies as a requirement of admissibility rather than of the petition. All of which leads me to consider that this rule must be complied with by the petitioner prior to the petition or else the petition must indicate that it is inadmissible.

A. General observations

Article 46 of the Convention establishes the rule of prior exhaustion of domestic remedies by stating that:

> *"1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:*
>
> *a) that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;*
>
> *b) that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;*
>
> *c) that the subject of the petition or communication is not pending in another international proceeding for settlement; and*
>
> *d) that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.*

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[23] Art. 38 of the same Statute: "*1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto."

[24] See footnote Nº 9.

2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:

a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;

b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or

c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."

As a preliminary observation, it should be noted that this provision is *sui generis,* specific or exclusive to the Convention. For example, it does not appear in the same terms in the Convention for the Protection of Human Rights and Fundamental Freedoms or in the European Convention on Human Rights,[25] Article 35 of which refers to the requirement of prior exhaustion of domestic remedies in more generally and, also, does not include the specific exceptions established in Article 46(2) of the Convention.[26]

Furthermore, it should also be emphasized that the European Convention establishes that this requirement must be met prior to litigating before the European Court of Human Rights – a judicial body – while, in the case of the American Convention it must be fulfilled prior to lodging the petition before the Commission - a non-judicial entity. And this is relevant insofar as the latter has the power to bring cases before the Court.[27] In other words, the Commission may act as a plaintiff before the Court and, accordingly, does not necessarily share the impartiality that must characterize a judicial body.

As a second general comment, it is worth calling attention to the reference made in Article 46(1)(a) of the Convention to the circumstance that "*the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."* The allusion to the such principles recalls that the rule of prior exhaustion of domestic remedies is established by principles of international law, even prior to or irrespective of the provisions of any treaty, in this case, the Convention, which is why the third preamble of the

[25] Nor is it established in the Statute or the Rules of Procedure of the International Court of Justice. Hence, in that sphere, it is only of a jurisprudential nature.

[26] "*Admissibility criteria. 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken. 2. The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill-founded, or an abuse of the right of individual application; or (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal. 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.*"

[27] Art. 61(1) of the Convention: *"Only the States Parties and the Commission shall have the right to submit a case to the Court."*

Convention defines as "*principles*" matters concerning "*respect for essential rights,"* based upon the "*attributes of the human personality.*"[28]

As a third observation, it should be emphasized that Article 46(2) of the Convention establishes in detail the cases in which the rule of prior exhaustion of domestic remedies does not apply, i.e., the exceptions to it, namely, the lack of due process of law to assert domestic remedies, the impossibility of exercising them and the delay in resolving them. These exceptions must therefore be applied and interpreted restrictively. Consequently, it is not appropriate to invoke or even accept an exception to the rule in question that is not provided for in said article, because if it were, this could deprive it of any meaning or *effet utile* and, moreover, would leave its application subject to discretion and perhaps to arbitrariness. All of which does not mean that other preliminary objections, such as, for example, the Court's lack of jurisdiction, cannot be raised.

Finally, it is worth reiterating that this rule has been established in the Convention as an essential component of the entire inter-American system for the promotion and protection of human rights, by stressing that, as indicated in the second paragraph of its Preamble, the "*international protection…* […] *reinforc[es] or complement[s] the protection provided by the domestic law of the American States."*[29]

Strict adherence to the rule of prior exhaustion of domestic remedies is not, therefore, a mere formalism or legal technicality, but rather its observance consolidates and strengthens the inter-American human rights system, since it guarantees the principles of legal certainty, procedural balance and complementarity that underpin it, leaving no margin - or, in any case, the least margin possible – so that, beyond the explainable discrepancies that the Court's rulings may cause, particularly on the part of those who consider them adverse, it may be perceived that they do not respond strictly and exclusively to considerations of justice.

This has to do with the international legal structure, which is still fundamentally based on the principle of sovereignty, and which, in the case of the Inter-American System, is enshrined in Articles 1[30] and 3(b)[31] of the Charter of the Organization of American States. Thus, the treaty

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[28] *Paras. 1 and 2 :"Reaffirming their intention to consolidate in this hemisphere, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of man; Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states*."

[29] I*dem*.
Perhaps Article 25(1) of the Convention is the one that best expresses the subsidiary nature of the Inter-American System of Human Rights, indicating that: "*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.*"

[30] "*The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency. (…)*".

[31] "*The American States reaffirm the following principles: …b) international order consists essentially of respect for the personality, sovereignty, and independence of States and the faithful fulfillment of obligations derived from treaties and other sources of international law."*

provisions that contemplate restrictions to State sovereignty must be interpreted and applied taking into account this reality.

In this sense, the rule of prior exhaustion of domestic remedies is also an expression of the validity of the sovereignty of the State and of the need to give the State the preferential opportunity to act with respect to alleged human rights violations. This is even more relevant in the present era, in which all States parties to the Convention are governed by the democratic rule of law, i.e., they adhere to democracy.[32]

Consequently, it can be deduced from the foregoing that compliance with the requirement established in Article 46(1)(a) of the Convention must take place before the petition is submitted to the Commission.

B. The petition

The first comment that should be made concerning the petition that initiates the procedure before the Commission that may conclude before the Court is that compliance with the rule of prior exhaustion of domestic remedies is, essentially, an obligation of the presumed victim or the petitioner. It is the latter who must comply with the requirement of prior exhaustion of domestic remedies; in other words, to be able to allege a violation before the inter-American jurisdictional body,[33] the petitioner must previously do so before the corresponding domestic jurisdictional bodies. Otherwise, this would evidently prevent the prompt and timely achievement of the abovementioned *effet utile*. Thus, I reiterate, the aforementioned rule is a requirement or obligation that must be met by the presumed victim or the petitioner.

This is why the Commission's Rules of Procedure in force at the time of the facts and at the time the petition was lodged,[34] approved by the Commission,[35] which reflect the interpretation it has given to Article 46 of the Convention, stipulates in Article 29(d), that the petition must contain *"information on any steps taken to exhaust domestic remedies, or the impossibility of doing so*." Then, the petition itself must indicate that the rule in question has been complied with or that one of the exceptions to it has operated.

Clearly for the same reason, Article 34(3) of the Commission's Rules of Procedure establishes that *"(w)here the petitioner claims that he or she is unable to prove compliance with the requirement of this Article, it shall be for the Government against which the petition is directed to demonstrate to the Commission that domestic remedies have not been previously exhausted, unless this is clear from the background information contained in the petition*."

In other words, this provision indicates that the specific exceptions to the rule of prior exhaustion of domestic remedies are established in favor of the presumed victim or the petitioner. Consequently, it is the petitioner and no one else, not even the Commission, who may argue or

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[32] Inter-American Democratic Charter adopted at the Twenty-eighth Special Session of the General Assembly of the Organization of American States, by Resolution of September 11, 2001.

[33] Art. 44 of the Convention: "*Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party.*"

Art. 61(1) of the Convention: "*Only the States Parties and the Commission shall have the right to submit a case to the Court.*"

[34] Hereinafter, the Rules of Procedure of the Commission.

[35] Adopted by the Commission in its 660th Session, on April 8, 1980, hereinafter the Commission's Rules of Procedure.

assert some of the exceptions to the said rule, and, evidently, this can only be done when the petition is drawn up.

The second comment regarding the petition relates to the fact that Article 46(1) of the Convention refers to it as *"lodged,"* which means that it should be considered just as it was submitted and if, at that time, it meets the requirements set out in this provision, it should be "*admitted.*" Accordingly, it is at that moment - the moment of its submission – when it should have complied with the requirement concerning the prior exhaustion of domestic remedies established in Article 46(1)(a) of the Convention and, only if this is the case, the petition "*lodged*" may be "*admitted*" by the Commission.

Similarly, Article 46(1)(b) of the Convention is based on the same premise since it establishes that, for the petition to be admitted, it must have been *"lodged within a period of six months from the date on which the party alleging the violation of his rights was notified of the final judgment."* Undoubtedly, this should be understood to mean the judgment handed down on the last remedy that was filed, with no other remedies available to be filed. In other words, the time frame indicated for lodging the petition is calculated from the date of notification of the final decision of the domestic authorities or courts on the remedies that have been filed before them and, consequently, that may have resulted in the State's international responsibility, which evidently implies that they must have been exhausted when the petition was "lodged."

Meanwhile, Article 27(1) of the Commission's Rules of Procedure stipulates that the initial processing is carried out on petitions "*that fulfill all the requirements set forth,*" which must indicate, as established in the abovementioned Article 20(d), information on *"the steps taken to exhaust domestic remedies, or the impossibility of doing so,*" and if they do not meet this requirement, as established in Article 27(2) of said Rules, "*the Secretariat of the Commission may request that petitioner or his or her representative to fulfill them."*

Based on all the above, it can be concluded that, ultimately, compliance with the rule of prior exhaustion of domestic remedies constitutes a requirement that the petition must meet in order to be "*lodged.*"

C. Study and initial processing by the Commission

However, Article 46(1)(a) of the Convention is also conceived as a limit to the actions of the Commission which may become a party to the ensuing litigation before the Court. Hence, the purpose of this provision is to prevent the Commission from acting before the requirement or rule that it establishes has been duly complied with in a timely manner; in other words, from proceeding with the matter even though the domestic remedies have not been exhausted, potentially affecting the procedural equality of the parties in the event that the case is heard by the Court.

Therefore, the rule of prior exhaustion of remedies also entails an obligation for the Commission. Indeed, according to Article *27* (1) of its Rules of Procedure, " *[t]he Executive Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the Commission that fulfill all the requirements set forth in the Statute and in these Rules of Procedure*."

Indeed, the Executive Secretariat has the power provided for in Article 27 (2) of the Rules, which states that *"[i]f a petition does not meet the requirements […it may] request the petitioner or his or her representative to fulfill them."*

Furthermore, Article 31(1)(c) of said Rules of Procedure establishes that "*(t)he Commission*, *acting initially through its Executive Secretariat, shall receive and carry out the initial processing of the petitions submitted to it, in accordance with the following rules: if it accepts, in principle, the admissibility, it shall request information from the government of the State concerned, transcribing the relevant parts of the petition."*

Consequently, the steps taken by the Executive Secretariat, acting on behalf of the Commission, as regards the petition that has been "lodged" are not limited merely to verifying whether it includes the required information; rather, it must carry out the "*study and initial processing*" of the petition, provided that it "*fulfills all the requirements set forth,*" including, of course, the most important, namely that "*the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law."*

Thus, the Commission, acting through its Executive Secretariat, must carry out an initial control of conventionality of the petition, ensuring that it meets the requirements established in the Convention in order to be considered "*lodged.*"

From the foregoing, it is reasonable to conclude that the domestic remedies must have been exhausted before the petition is lodged before the Commission; otherwise, the logic and need for the "*study and initial processing*" of the petition by the Commission's Executive Secretariat could not be understood, or the reason why the petitioner might be required to complete the petition or to indicate the steps taken to exhaust domestic remedies. Furthermore, the time frame indicated for the presentation of the petition would be meaningless.

Lastly, bearing in mind that the Commission's function consists of studying the petition, requesting its completion, and processing it, it must be assumed that all of this must be carried out in keeping with the terms in which the petition has been "*lodged.*" Thus, it can be affirmed that, just as "*it is not the task of the Court, or of the Commission, to identify ex officio the domestic remedies that remain to be exhausted, so that it is not incumbent on the international organs to rectify the lack of precision of the State's arguments*,*"*[36] it is also not their task to rectify the petition or accord it a broader scope than the one it expresses and requires. Thus, the Commission must abide by what is requested of it. The most it can do in this regard "*(i)f a petition does not meet the requirements of these Rules*" is to "*request the petitioner or his or her representative to fulfill them."*

This thesis is supported by the provisions of Article 35(1) of the Commission's Rules of Procedure to the effect that the Commission "*shall refrain from considering petitions that are lodged after six months from the date on which the alleged victim has been notified of the decision that exhausted the domestic remedies."* In other words, the Commission must also consider the date on which the alleged violation occurred, which obviously must have happened prior to the submission of the petition.

In short, the Commission's role when a petition is lodged confirms that the requirement of prior exhaustion of domestic remedies must be fulfilled before it acts.

D. Response or observations of the State

[36] Para. 46.

Article 31(1)(c) of the Commission's Rules of Procedure indicate that *"if Commission* (through its Executive Secretariat) *accepts, in principle, the admissibility of the petition, it shall request information from the government of the State concerned, transcribing the relevant parts of the petition,"* which must undoubtedly include, in accordance with Article 29(d) of the Rules of Procedure, *"information on any steps taken to exhaust domestic remedies, or the impossibility of doing so.*"

Article 31(5) of the Commission's Rules also provides that *"(t)he information requested must be provided as soon as possible, within 120 days from the date the request is sent,*" a response which, by the way, must contain, if it is to be lodged, the preliminary objection for failure to exhaust domestic remedies by the alleged victim or the petitioner.

Clearly, for the same reason, Article 34(3) of the Commission's Rules of Procedure stipulates that *"when the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless it is clear evident from the information contained in the petition."*

In other words, if the petitioner alleges in his petition that he is unable to prove that he has previously exhausted the domestic remedies, the State may contest this allegation, in which case it must prove that they have not been exhausted, provided that this is not evident from "*the information contained in the petition.*" It is in relation to this possibility that the Court's assertion that *"(w)hen alleging the failure to exhaust domestic remedies, the State must specify the domestic remedies that remain to be exhausted, and prove that these remedies were available, adequate, suitable and effective,"*[37]should be understood.

Nevertheless, it should be recalled that, logically, also in the case – which is not expressly considered in the Commission's Rules of Procedure – that the petitioner indicates in his petition that he has previously exhausted the domestic remedies (that is, he has met the requirements of Article 46(1)(a) of the Convention), the State may file the objection that this has not occurred.

Thus, it is clear that compliance with the rule of prior exhaustion of domestic remedies or the impossibility of complying with it must be indicated in the petition, because, otherwise, the State could not respond to this. In other words, it is only if the petition indicates that this rule has been complied with or that it is impossible to do so, that the State may argue that it has not been complied with and, in this case, it must prove the availability, adequacy, appropriateness and effectiveness of the domestic remedies that were not exhausted, all of which shows, once again, that this requirement must be met previously; that is before drawing up the petition, the relevant parts of which are forwarded to the State precisely so that it may respond to them.

Furthermore, Article 31(7) and (8) of the Commission's Rules of Procedure point in the same direction. Indeed, they establish that *"(t)he relevant parts of the response and the documents provided by the State will be communicated to the petitioner or his representative, inviting him to submit his observations and evidence to the contrary, within 30 days,*" and that "*if the requested information or documents are received, the relevant parts shall be transmitted to the State, which shall be entitled to submit its final comments within 30 days."*

Consequently, it is undeniable that this response by the State logically and necessarily must relate to the petition that was "lodged" before the Commission, and that it is at that moment,

[37] *Idem*.

and not afterwards, that the legal proceedings, or the adversarial proceedings, are instituted as regards the exhaustion of domestic remedies.

And, for the same reason, it is at that moment that the domestic remedies must have been exhausted or that the petitioner indicates the impossibility of exhausting them. To affirm that those remedies could be exhausted after the petition has been "*lodged*" and, consequently, notified to the State, would affect the essential procedural balance and would leave the State defenseless, because it could not file the pertinent preliminary objection in time and in due form.

It is in this context that the criterion "*consistently affirmed [by the Court that] an objection to the jurisdiction of the Court based on the supposed failure to exhaust domestic remedies must be filed at the appropriate procedural opportunity; that is, during the admissibility stage of the proceedings before the Commission*" should be understood."[38]

It is also in this context that in the judgment, *"(t)he Court recalls that the rule of prior exhaustion of domestic remedies was conceived in the interests of the State, because it seeks to exempt it from responding before an international organ for acts it is accused of before it has had the opportunity to remedy them by its own means."*[39]

Therefore, this rule is also a mechanism to encourage the State to comply with its human rights obligations without waiting for the inter-American system to order it to do so as a result of litigation. It also enables the State to re-establish, as soon as possible, the effective exercise of and respect for the human rights that have been violated, which is the object and purpose of the Convention[40] and, consequently, should happen as soon as is practicable, making the intervention of the inter-American jurisdiction unnecessary.

Thus, its practical effect is that the State re-establish respect for human rights as soon as possible and, to that end, it could be said that this rule has been established also and, above all, to benefit the victim of human rights violations.[41]

This means that, in situations in which it has been argued in the respective sphere of the domestic jurisdiction that the State has not complied with its undertakings as regards respecting and ensuring the free and full exercise of human rights, it is possible to claim the intervention of the international jurisdictional body and not before, so that, if admissible, the State is ordered to comply with the international obligations it has violated, to guarantee that it will not violate them again, and to make reparation for all the consequences of such violations.[42]

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[38] Para. 43.

[39] *Case of Wong Ho Wing v. Peru*, cit., para. 27.

[40] Art. 1(1) of the Convention: *"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."*

[41] Hereinafter the victim.

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

E. Admissibility of the petition

In relation to admissibility, Article 28 of the Commission's Rules of Procedure establishes that: *"(t)he Commission shall consider petitions regarding alleged violations of the human rights enshrined in the American Convention on Human Rights, with respect to a State Party, only when the petitions fulfill the requirements set forth therein, in the Statute, and in these Rules of Procedure*." In turn, Article 30 of the same regulatory text indicates that *"(s)ubject to the provisions of Article 26, if the Commission considers that the petition is inadmissible or incomplete, it shall notify the petitioner requesting him to complete the requirements omitted in the petition*." Finally, Article 32(a) of said regulatory text states that that *"(t)he Commission will continue with the examination of the case by deciding on the following issues: a. the exhaustion of domestic remedies, and may determine such measures as it deems necessary to clarify any remaining doubts."*

It is clear from the aforementioned rules that prior exhaustion of domestic remedies is an indispensable requirement for the Commission to consider the corresponding petition. And if this requirement has not been met or if it is not included in full in the corresponding petition, the Commission, within the framework of this consideration, will request the petitioner to complete the latter. Finally, after this, the Commission decides on compliance with the rule of prior exhaustion of domestic remedies, and may issue orders to clarify any remaining doubts in this regard. Obviously, these doubts can only be related to the matter of whether or not the relevant petition complied, at the time it was filed, with the requirement in question, i.e., it must refer to the petition "*lodged.*" Such doubts, therefore, cannot mean that the requirement of prior exhaustion of domestic remedies was complied with after the petition was filed.

In this connection, it should be pointed out that the aforementioned rules do not stipulate that the remedies under domestic law must necessarily have been exhausted before a decision on admissibility can be made, since such a decision may be to reject the petition on the grounds that such remedies have not been exhausted.

It follows then, that although it is logical that the State must file the preliminary objection of prior failure to exhaust domestic remedies during the procedure on admissibility of the petition - which extends from the date the petition is received and processed by the Commission, through its Executive Secretariat, until the moment at which the Commission rules on its admissibility – this does not mean that it should be at this latter moment (that is, at the end of this procedure) when the said requirement should have been met.

This is evident if we consider that Article 38(a) of the Commission's Rules establishes that *"(t)he Commission shall declare the petition inadmissible when: Any of the requirements established in Article 29 of these Rules is omitted*" and the latter includes "*information on any steps taken to exhaust domestic remedies, or the impossibility of doing so.*"

Hence, it is indisputable that the moment at which the Commission rules on the admissibility of the petition is distinct from the moment when it is lodged or completed. In short, the Commission's Rules of Procedure do not stipulate that domestic remedies must have been exhausted at the time the Commission rules on the admissibility of the petition; on the contrary, they state that, if it finds that the requirement of prior exhaustion of domestic remedies has not been met or has been omitted, the Commission may request the petitioner to complete it and even take steps to clarify any doubts that remain in this regard.

In conclusion, in order to decide whether or not to admit the petition, the Commission carries out a second control of conventionality of the petition, comparing it with the provisions of the Convention as regards the requirements that logically could and should have been met only when it took place, that is, when it was "*lodged.*"

F. The Court's ruling

Lastly, in relation to the Court's function as regards compliance with the requirements that the petition must meet, it should be recalled that, according to Article 61(2) of the Convention, *"(i)n order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed.*"

Thus, the Court must verify that the requirement of prior exhaustion of domestic remedies has been duly complied with before the Commission. As the Court has asserted in the judgment of *Cruz Sánchez et al.*, "*in matters that it is hearing, the Court has the authority to carry out a control of the legality of the Commission's actions,"*[43] and that it "*has the authority to review whether the Commission has complied with the statutory and regulatory provisions, as well as those of the Convention."*[44]

And it could not be otherwise, because if it were not so, the Commission would be accorded the broadest possible authority to take an exclusive and final decision on the admission or rejection of a petition, which would clearly mean that this power would be discretionary and could even be arbitrary, undermining the jurisdiction of the Court, because, under this assumption, the Court would have no alternative but merely to be an entity that confirms or observes, without even ratifying, the actions of the Commission, and there can be no doubt that this is not in keeping with the letter and spirit of said Article 61(2) of the Convention.

In this regard, it should not be forgotten that the Commission is the one that submits the relevant case before the Court and, therefore, is a party to the corresponding litigation, fulfilling its function of "defense of human rights." For this it must necessarily and legitimately adopt one of the positions in dispute in the corresponding case and, consequently, it must be biased. It follows, then, that its own actions in the processing of the case subsequently submitted to the Court may be challenged before the Court, in accordance with the principles of adversarial proceedings and procedural balance between the parties that should prevail in judicial cases.

G. Legal consequences of considering the rule of prior exhaustion of domestic remedies as a requirement for the admissibility of the petition and not a requirement of the petition itself

In addition to the above considerations, it should be reiterated that if it were not compulsory to have exhausted the domestic remedies before lodging the petition, it would be permissible that, at least for some time - that is, between the moment at which the petition is lodged and the moment at which the decision is taken on its admissibility (which in many situations may be considered extremely lengthy) - the same case could be dealt with simultaneously by both the domestic jurisdiction and the international jurisdiction. This would evidently render the statement in the second paragraph of the Preamble meaningless, and even the rule of prior

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[43] *Case of Cruz Sánchez et al. v. Peru*, cit., para. 37.

[44] *Idem,* para. 75.

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exhaustion of domestic remedies as a whole. In other words, in this situation, the inter-American jurisdiction would not reinforce or be complementary to the domestic jurisdiction, but rather would substitute it or, at least, could be used to bring pressure to bear on the latter and, clearly, this is not what the Convention seeks.

Moreover, it might constitute an incentive, which could be considered perverse, to lodge petitions before the Commission when the said requirement has not been met in the hope that it can be complied with before the Commission decides on their admissibility and, evidently, this was not anticipated or sought by the Convention.

In addition, this begs the question of whether the "*study and initial processing*" of the petition is required, if it could be lodged without having previously exhausted the domestic remedies. Indeed, if this requirement was only compulsory when deciding on the admissibility of the petition, it is legitimate to question why it would be necessary to make an initial study of the petition and, furthermore, what would be the reason for and the practical effect of the Convention making a distinction between the moment of the lodging of the petition and the moment of its admissibility. Likewise, if it is considered that the said requirement or rule must be complied with when the decision on the admissibility of the petition is taken and not when it is lodged, it is logical to question the meaning of the petition itself.

It should also be noted that, if the criterion that this compliance should have taken place at the time the petition is lodged or completed is not respected and, to the contrary, the thesis is adopted that compliance is determined when the Commission decides on the admissibility of the petition, this would result in situations of evident injustice or arbitrariness, insofar as the moment of this compliance would ultimately depend not on the victim or the petitioner, but on the Commission's ruling when deciding on the admissibility or inadmissibility of the petition.

Finally, it is reasonable to assume that, if the Commission were to make timely and expeditious rulings regarding the admissibility of the petitions "*lodged,*" it would certainly avoid delays or setbacks in the processing of a considerable number of cases.

III. THE FACTS RELATING TO THE OBJECTION OF PRIOR FAILURE TO EXHAUST DOMESTIC REMEDIES

Based on the norms that have been mentioned, the relevant facts relating to the objection of non-compliance with the rule of prior exhaustion of domestic remedies are as follows.

A. Those set out in in the petition

The petition, presented by the Center for Studies and Action for Peace (*Centro de Estudios y Acción para la Paz* - CEAPAZ), was received by the Commission on July 26, 1991,[45] and relates to events that took place on July 4 of the same year,[46] that is to say, events that occurred 26 days earlier. The petition states[47] that those facts had taken place, describes the complaints that were filed and requests that it "*communicate with the Peruvian government authorities, given the possibility that the minors*" it identifies "*are detained-disappeared.*"

[45] Para. 2.

[46] Para. 1.

[47] Para. 44.

However, the aforementioned communication says nothing about compliance with the rule of prior exhaustion of domestic remedies, as required by Articles 46(1)(a) of the Convention and 29(d) of the Commission's Rules of Procedure, in force at the time.

Nor does the communication invoke the provisions of Articles 46(2) of the Convention and 34(3) of the aforementioned Rules of Procedure, i.e., it does not allege any grounds for being unable to comply with the rule of prior exhaustion of domestic remedies.

B. Study and initial processing

On the other hand, there is no record that the Commission's Executive Secretariat requested that CEAPAZ complete the petition, as required by Article 27(2) of the aforementioned regulatory text.

Likewise, there is no record in the case file that the Executive Secretariat decided, in accordance with Article 31(1) of the Commission's Rules of Procedure, to process the petition because it considered that it met the requirements set forth in Article 46 of the Convention.

In any case, if such a decision was adopted, it is not clear from the record whether it was adopted because of compliance with the provisions of Article 46(1) of the Convention, i.e., prior exhaustion of domestic remedies, or because one of the hypotheses set forth in Article 46(2) of the Convention was invoked and proven, i.e., one of the grounds for exemption from this obligation was alleged.

Finally, it should be noted that there is no record of the Commission having requested CEAPAZ, in accordance with the provisions of Article 30 of its Rules of Procedure, to complete the petition or, in accordance Article 32(a) of the same text, to clarify any remaining doubts.

C. Those contained in the State's response or observations

In a note dated November 4, 1991 in response to the petition, the State reported that "*the Joint Command of the Armed Forces, after the conducting investigations, has reported that it has been proven that a patrol of the Counterinsurgency Battalion No. 43-PAMPAS, committed excesses against fourteen (14) peasants, presumed to be subversive criminals from the Rodeo Pampa peasant community*" and that "*the Ministry of Defense (…) reports that the corresponding complaint against [various persons] has been referred to the Court Martial of the Second Army Judicial District*."

Later, in a communication of September 21, 1992, the State made it known that "(*t)he criminal proceeding initiated is currently (...) in the second jurisdictional instance, which will issue the respective judgment soon"* and that *"in the present case, the domestic jurisdiction has not been exhausted."* For that reason, *"it requests that we proceed accordingly."* Thus, the State filed, in the petition itself, the objection regarding the non-exhaustion of domestic remedies with respect to the petition.

Thus, in accordance with Article 31(1)(c) of the Commission's Rules of Procedure, the State responded to the pertinent parts of the petition that were transcribed, just as the petition was "*lodged*" and, therefore, did not have to demonstrate the domestic remedies that had not been exhausted or which were adequate, suitable and effective, given that the petition, as indicated above, did not allege prior exhaustion of domestic remedies or the impossibility of complying with this requirement. If the petition had argued compliance with the requirements of Article 46

of the Convention, the State would certainly have had to demonstrate the non-exhaustion of domestic remedies and the availability, suitability, adequacy and effectiveness of such remedies, all in accordance with the provisions of Article 34(3) of the said Rules of Procedure.

D. Those relating to the Admissibility Report

First of all, it should be noted that the Report on Admissibility and Merits was issued on July 21, 2011, that is, almost twenty years after the petition was lodged; therefore, it was not limited to verifying compliance with the requirement of prior exhaustion of domestic remedies at the time the petition was filed, but did so with respect to that entire period.

This obviously resulted in the present case being dealt with simultaneously by the domestic and the international jurisdictions, with all the undesirable consequences that this entailed. In fact, by proceeding in this manner, the Report on Admissibility and Merits assessed subsequent actions of the State and, based on these, considered the domestic remedies to be unsuitable, inadequate and ineffective.

Furthermore, and subsidiarily, the Commission applied, *ex officio* - that is, without it being requested in the petition - the provisions of Article 46(2) of the Convention, namely, one of the exceptions to compliance with the rule of prior exhaustion of domestic remedies.

IV. CONSIDERATIONS ON THE JUDGMENT

The judgment states for the record that the preliminary objection referring to the failure to comply with the rule of prior exhaustion of domestic remedies was filed at the appropriate procedural moment and, in this regard, recalls that, in addition to the notes of 1991 and 1992, the State alleged this objection on January 25, March 21 and May 17, 2011.[48]

However, the judgment reiterates its jurisprudence to the effect that the rule of prior exhaustion of domestic remedies must be complied with at the time the Commission rules on the admissibility of the petition and not at the time the petition is filed or lodged, which is the position that inspires this dissenting opinion. And so, it bases its decision not to admit the objection raised by the State on events that occurred well after the petition was lodged with the Commission. In this regard, it points out that *"the Report on Admissibility and Merits of the Commission was issued on July 21, 2011,"* that is, after the aforementioned notes of the State; "*therefore, the present preliminary objection was filed at the proper procedural moment.*"

From this perspective, the judgment focuses substantially on the State's acknowledgement of the facts of the case. And so, it states that *"(i)n relation to the facts of the instant case, the State acknowledged them in the terms established in the judgment of the National Criminal Chamber of February 9, 2012 and the Final Judgment (ejecutoria suprema) of May 29, 2013,"* adding that *"(i)n other words, it did not specifically admit all the facts described in the Commission's Report on Admissibility and Merits or in the pleadings and motions brief of the representatives"*[49] and concludes that "*the acknowledgement made by the State constitutes a partial acceptance of the facts.*"[50]

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[48] Para. 44.

[49] Para. 24.

[50] Para. 26.

On this basis, the judgment, having previously applied the rule of *estoppe*l to the legal arguments put forward by the parties,[51] holds "*that preliminary objections cannot limit, contradict or render ineffective the content of a State's acknowledgement of responsibility*" and "*that the preliminary objection of failure to exhaust domestic remedies filed by Peru is not compatible with the State's partial acknowledgement of responsibility in this case (…), since, if declared admissible, it would exclude all the facts and violations admitted by Peru from the jurisdiction of the Court.*"

Thus, the judgment does not clearly distinguish between the acknowledgement or "*acceptance of the facts*" and acknowledgement or "*acceptance of the claims,*" contemplated in Article 62 of the Court's Rules of Procedure.[52] It only refers to the "*acknowledgement of responsibility*" of the State, in circumstances in which, in the present case, it was only an "*acceptance of facts,*" but not of "*claims,*" thereby expressly excluding the acknowledgment of responsibility for them.

On the other hand, the judgment does not seem to consider the fact that the State's acknowledgment was made after it alleged in the case file that domestic remedies had not been exhausted and before the Commission had ruled on the matter, which it did in the Report on Admissibility and Merits, issued twenty years after the presentation of the petition. In other words, the State made this acknowledgment at the admissibility stage, without prejudice to the preliminary objection it had raised and when the Commission had not yet ruled on the matter. In no way, therefore, did such acknowledgment imply that it disregarded or rendered ineffective that objection. To claim otherwise would imply accepting as legitimate that the State has been placed in a situation of procedural inequality by being denied the possibility of submitting allegations and arguments, including the aforementioned acknowledgment, made in the event that the preliminary objection raised from the beginning of the case was not accepted, or by depriving the latter of any legal effect because of having raised them subsidiarily.

This is certainly very relevant, given that the criterion followed in the judgment entails conferring on the State's acknowledgement a purpose other than that pursued and declared by the State.

Indeed, the State made the acknowledgment in question at the admissibility stage, not to admit responsibility, but precisely to demonstrate that there were pending proceedings on the facts of the case at the time the petition was "*lodged*" and that, in any event, reparations had already been made, at least in part, to the victims. This acknowledgment implied, then, at least as far as the facts were concerned, an acceptance of the facts as understood by the State, as the subject of the petition and, moreover, it did not expressly include an acceptance of international responsibility for them.[53]

In this regard, it should be recalled that acquiescence is one of the unilateral juridical acts of the State. In other words, it is an act that emanates solely from the State, its effectiveness does not depend on another legal act, it does not produce obligations for third parties, it is formulated with the unequivocal intention of producing binding and enforceable legal effects for its author and it cannot be withdrawn or rendered ineffective if another subject of international law has acted in conformity with it. The latter is known as the rule of *estoppel*. Thus, the State's

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[51] Para. 27 and following paras.

[52] "*If the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects.*"

[53] Paras. 24 and 25.

acquiescence is a unilateral juridical act by which it accepts as legitimate a fact, a situation or a claim with legal effects.

As for the acquiescence provided for in Article 62 of the Court's Rules of Procedure, this is a unilateral juridical act of the State regarding which the Court is only required to decide "whether to accept that acquiescence, and […] rule upon its juridical effects" in the proceedings before it. In other words, the Court can only rule on whether such act is in accordance with the law, i.e., in this case, whether it complies with the provisions of its Rules of Procedure, and on the obligations arising therefrom. But in order to do so, it must consider it as it was formulated, that is, without the possibility of modifying it.

However, the judgment includes in the State's acknowledgement a fact that it had not contemplated therein: that, in its formulation, it waived the objection it had raised concerning the non-exhaustion of domestic remedies by the petitioner. In addition, the judgment disregards an essential element of this acknowledgement, namely, that it expressly excluded international responsibility "*for events that occurred and for which the aforementioned violations have been acknowledged [,] since for [the State] the competent authorities of the domestic administration of justice did not fail in their duty to investigate and prosecute the accused (beyond the shortcomings alleged by the [Commission] and the representatives of the alleged victims) related to the obligation to guarantee the aforementioned rights, and is aware of the duty to provide reparation arising from the violations.*"[54]

In other words, the State's acknowledgement did not encompass its objection regarding the petitioner's failure to exhaust domestic remedies or the petitioner's failure to invoke one of the exceptions provided for in Article 46(2) of the Convention to the rule of prior exhaustion of domestic remedies, and expressly excluded any possible international responsibility insofar as it was formulated precisely to demonstrate that it had not arisen or been incurred.

Additionally, the judgment mentions another reason to justify its decision to dismiss the preliminary objection filed by the State. It indicates that "*the Court recalls that, in order for a preliminary objection on the non-exhaustion of domestic remedies to proceed, the State presenting this objection must specify the domestic remedies that have not yet been exhausted, and demonstrate that these remedies were available and were adequate, suitable and effective.*"[55]

Thus, the judgment appears to overlook the fact that the obligation of the State to specify the domestic remedies not exhausted and to demonstrate their availability, adequacy, suitability and effectiveness only applies if the petition alleges that it has complied with the rule of prior exhaustion of domestic remedies or that one of the exceptions to this rule set forth in Article 46(2) of the Convention applies, which does not appear to have occurred in this case. In the case in question, the State was not required to "*specify the domestic remedies that [had] not yet been exhausted, and to demonstrate that these remedies were available and were adequate, suitable and effective."*

On this point it should also be noted that the judgment states that "*it is not a task for the Court, or the Commission to identify ex officio the domestic remedies that remain to be exhausted"* and "*emphasizes that it is not incumbent on the international organs to rectify the lack of precision*

[54] Para. 19.

[55] Para. 46.

of the State's arguments."[56] However, it does not mention that this rule also applies to the petition, which, as noted above, did not refer to the rule of prior exhaustion of domestic remedies, either to indicate that it had been complied with or to invoke one of its exceptions.

CONCLUSION

In view of the foregoing, it is clear that the judgment did not consider that the petition should indicate whether or not it had met the requirement of prior exhaustion of domestic remedies. In doing so, it did not comply with the provisions of Article 46 of the Convention, which requires that the admissibility on which the Commission must rule is on the petition "*lodged.*" Consequently, the judgment validated the Commission's actions, which, in turn, were in violation of the provisions of Article 29(d) of its own Rules of Procedure.

Furthermore, the judgment did not consider that the petition did not invoke the provisions of Article 46(2) of the Convention and Article 34(3) of these Rules of Procedure, that is to say, it did not allege any reason for the impossibility of previously exhausting domestic remedies.

On the other hand, and despite the above, the Commission applied, *ex officio,* that is, without the petition having requested it, the provisions of Article 46(2) of the Convention, i.e. one of the exceptions to compliance with the rule of prior exhaustion of domestic remedies, which was supported by the judgment.

Clearly, all of this led the judgment to base its decision to reject the preliminary objection regarding the non-exhaustion of domestic remedies on facts that occurred well after the petition and its completion.

It should also be noted that the judgment does not refer to the lack of information and, therefore, possibly to the Commission's failure to fulfill its obligation to request the petitioner to complete his petition if it does not include information on the prior exhaustion of domestic remedies, as required by Article 27(2) of its Rules of Procedure.

And it is clear that all these shortcomings affected the State's capacity to defend itself and the principle of procedural equality between the parties in this case.

However, it should also be added that the judgment, by invoking the State's acknowledgment of certain facts, grants said unilateral legal act a scope that it in no way had, especially given that it did not consider that it expressly excluded from its scope everything related to a possible acknowledgment of international responsibility and that it was formulated to demonstrate that, in any case, the latter had already been remedied in the domestic sphere.

Likewise, the judgment requires the State to indicate the domestic remedies that have not been exhausted and to show their availability, adequacy, suitability and effectiveness, given that such obligation is only and exclusively foreseen in the event that the petition indicates that such remedies have been exhausted or that it is not appropriate for them to be exhausted.

Based on these proceedings and as expressed in the judgment, it is once again evident that there is doubt as to the value, usefulness and effectiveness of the petition and of the State's response or observations to it. This is because everything that is set forth and requested in such

[56] *Idem.*

submissions can be dismissed without further ado by the Commission by considering only what happened after those acts, which, when subsequently endorsed by the Court, aggravates the situation of defenselessness of one of the parties to the litigation before the latter, all of which can lead to a distortion of the inter-American human rights system.

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Pablo Saavedra Alessandri
Registrar