

INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF ROSADIO VILLAVICENCIO V. PERU

JUDGMENT OF OCTOBER 14, 2019

(Preliminary Objections, Merits, Reparations and Costs)

In the case of *Rosadio Villavicencio*,

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

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

also present:

Pablo Saavedra Alessandri, Registrar

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

TABLE OF CONTENTS

I INTRODUCTION OF THE CASE AND CAUSE OF ACTION	4
II PROCEEDINGS BEFORE THE COURT	5
III JURISDICTION	6
IV PRELIMINARY OBJECTIONS	6
A. OBJECTION OF LACK OF EXHAUSTION OF DOMESTIC REMEDIES	7
A.1. <i>Arguments of the State and observations by the Commission and the representative</i>	7
A.2. <i>Considerations of the Court</i>	7
B. OBJECTION OF FOURTH INSTANCE.....	8
B.1. <i>Arguments of the State and observations by the Commission and the representative</i> 8	
B.2. <i>Considerations of the Court</i>	8
C. OBSERVATIONS REGARDING THE INCLUSION OF ARTICLE 25 OF THE AMERICAN CONVENTION IN THE COMMISSION'S REPORT ON THE MERITS.....	9
C.1. <i>Arguments of the State and observations by the Commission and the representative</i>	9
C.2. <i>Considerations of the Court</i>	9
V EVIDENCE	10
A. ADMISSIBILITY OF THE EVIDENCE.....	10
A.1. <i>Admissibility of documentary evidence</i>	10
A.2. <i>Admissibility of testimonial and expert evidence</i>	11
VI PRELIMINARY CONSIDERATION	11
VII FACTS	12
A. REGARDING THE ALLEGED VICTIM AND BACKGROUND OF THE PROCEEDINGS AGAINST HIM	12
B. INVESTIGATION BY THE INSPECTORATE OF THE LEONCIO PRADO DETACHMENT	13
C. MILITARY DISCIPLINARY PROCEEDINGS	14
D. ORDINARY CRIMINAL PROCEEDINGS	15
E. MILITARY CRIMINAL PROCEEDINGS	17
VIII MERITS	20
VIII.1 PRINCIPLE OF <i>NE BIS IN IDEM</i> REGARDING THE PROCEEDINGS AGAINST THE ALLEGED VICTIM (ARTICLE 8(4) OF THE CONVENTION IN RELATION TO ARTICLE 1(1) THEREOF)	21
A. ARGUMENTS OF THE COMMISSION AND THE PARTIES	21
B. CONSIDERATIONS OF THE COURT.....	22
B.1. <i>Criminal proceedings and military disciplinary proceedings</i>	26
B.1.1 Ordinary criminal proceedings and military disciplinary proceedings.....	26
B.1.2 Military criminal proceedings and military disciplinary proceedings.....	28
C. CONCLUSION	28
VIII.2 RIGHT TO RECEIVE PRIOR NOTIFICATION IN DETAIL OF THE CHARGES AGAINST HIM, RIGHT TO DEFEND ONESELF AND RIGHT TO BE INFORMED OF THE REASONS FOR DETENTION (ARTICLES 1(1), 8(2)(B) AND 8(2)(C) OF THE AMERICAN CONVENTION) IN THE THREE PROCEEDINGS	28
A. ARGUMENTS OF THE COMMISSION AND THE PARTIES	29
B. CONSIDERATIONS OF THE COURT.....	29
B.1. <i>Regarding the investigation by the Inspectorate of the Leoncio Prado Detachment and the ordinary criminal proceedings</i>	30
B.2. <i>Regarding the military criminal proceedings</i>	31
C. CONCLUSION	32
VIII.3 RIGHT TO JUDICIAL GUARANTEES AND RIGHT TO FREEDOM FROM EX POST FACTO LAWS (ARTICLES 1(1), 8(1), 8(2) AND 9 OF THE AMERICAN CONVENTION) ...	32
A. MILITARY DISCIPLINARY PROCEEDINGS: ALLEGED VIOLATION OF THE RIGHT TO BE ASSISTED BY LEGAL COUNSEL, RIGHT TO DEFEND ONESELF, RIGHT TO A HEARING, RIGHT TO THE PRESUMPTION OF INNOCENCE AND RIGHT TO ADEQUATE GROUNDS	32
A.1. <i>Arguments of the Commission and the parties</i>	32

A.2.	<i>Considerations of the Court</i>	33
A.2.1.	Right to be assisted by legal counsel of his own choosing or provided by the State (Articles 8(2)(d) and 8(2)(e) of the Convention).....	33
A.2.2.	Right to a hearing, duty to provide grounds and right to defend oneself (Articles 8(1) and 8(2)(c) of the Convention).....	34
A.2.3.	Right to freedom from ex post facto laws (Article 9 of the Convention).....	37
A.2.4.	Other arguments presented regarding the disciplinary proceedings.....	37
A.3.	<i>Conclusion on the military disciplinary proceedings</i>	37
B.	ORDINARY CRIMINAL JURISDICTION: ALLEGED VIOLATIONS OF THE DUTY TO PROVIDE GROUNDS, THE RIGHT TO BE ASSISTED BY LEGAL COUNSEL AND THE RIGHT TO DEFEND ONESELF	37
B.1.	<i>Duty to provide grounds</i>	37
B.1.1	Arguments of the Commission and the parties	37
B.1.2	Considerations of the Court	38
B.2.	<i>Right to be assisted by legal counsel provided by the State and right to defend oneself (Articles 8(2)(e) and 8(2)(c) of the Convention)</i>	40
B.1.3	Arguments of the Commission and the parties	40
B.1.4	Considerations of the Court	40
B.3.	<i>Conclusion on the ordinary military proceedings</i>	41
C.	MILITARY CRIMINAL JURISDICTION: RIGHT TO AN IMPARTIAL AND INDEPENDENT JUDGE AND THE ALLEGED VIOLATION OF THE RIGHT TO DEFEND ONESELF	42
C.1.	<i>Arguments of the Commission and the parties</i>	42
C.2.	<i>Considerations of the Court</i>	43
C.2.1.	Right to an impartial and independent judge.....	43
VIII.4	RIGHT TO PERSONAL LIBERTY (ARTICLE 7 OF THE AMERICAN CONVENTION)	45
A.	ARGUMENTS OF THE COMMISSION AND THE PARTIES	45
B.	CONSIDERATIONS OF THE COURT.....	46
B.1.	<i>Arbitrariness of the preventive detention</i>	46
B.1.1	Regarding the detention orders	47
i.	Regarding the detention order in the ordinary criminal jurisdiction.....	48
ii.	Regarding the definitive detention order in the military criminal jurisdiction	48
iii.	Conclusion on the preventive detention orders	48
B.1.2	Regarding the lack of periodic review of the detention.....	48
B.2.	<i>Duration of preventive detention</i>	49
C.	GENERAL CONCLUSION	50
IX.	REPARATIONS (APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION)	50
A.	INJURED PARTY.....	51
B.	MEASURES OF RESTITUTION REQUESTED: ELIMINATION OF THE DISCIPLINARY SANCTION AND CRIMINAL RECORDS	51
C.	MEASURES OF SATISFACTION REQUESTED: PUBLICATION OF THE JUDGMENT	52
D.	OTHER MEASURES REQUESTED	52
E.	COMPENSATION	54
E.1.	<i>Pecuniary damages</i>	54
E.2.	<i>Nonpecuniary damages</i>	55
F.	COSTS AND EXPENSES.....	56
G.	REIMBURSEMENT OF EXPENSES TO THE VICTIMS' LEGAL ASSISTANCE FUND	56
H.	METHOD OF COMPLIANCE WITH THE PAYMENTS ORDERED	57
X	OPERATIVE PARAGRAPHS	58

I INTRODUCTION OF THE CASE AND CAUSE OF ACTION

1. *The case submitted to the Court.* – On September 22, 2017, the Inter-American Commission on Human Rights (hereinafter “the Inter-American Commission” or “the Commission”) submitted to the jurisdiction of the Court the case of Rosadio Villavicencio v. the Republic of Peru (hereinafter “the State” or “Peru”). According to the Commission, the case relates to the alleged international responsibility of the State for the alleged violation of due process in the three proceedings against Jorge Rosadio Villavicencio: disciplinary, ordinary criminal and military criminal proceedings, regarding his participation in an intelligence operation where he had to infiltrate drug trafficking organizations in the Sión area of Peru. The Commission considered that in the disciplinary proceedings the State failed to comply with the obligation to provide prior notification in detail to the accused of the charges against him; it violated the alleged victim’s right to defend himself, the right to presumption of innocence and the right to adequate grounds, as well as the principle of freedom from ex post facto laws. In the military criminal jurisdiction, the Commission concluded that the State violated the alleged victim’s right to an independent and impartial judge, of receiving prior notification in detail of the charges against him, and the right to defend himself. In the ordinary criminal jurisdiction, the Commission maintained that the State violated the duty to provide grounds for the increase in sentence. The Commission also maintained that the principle of *ne bis in idem*¹ was violated, given that two convictions were issued with penalties of the same nature (in the military criminal and ordinary criminal jurisdictions) based on the same facts. Finally, it claimed that Peru violated the right to personal liberty in relation to the preventive detention that he was subject to, as well as the right to an effective remedy to challenge the deprivation of liberty. Based on the foregoing, the Commission concluded that the State of Peru is responsible for the violation of the rights to personal liberty, to judicial guarantees and to judicial protection, enshrined in Articles 7(1), 7(3), 7(5), 7(6), 8(1), 8(2), 8(2) (b), (c), (e), 8(4) and 25(1) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Jorge Rosadio Villavicencio.

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

- a) *Petition.* – On April 13, 1998, Amelia Villavicencio de Rosadio (hereinafter “the petitioner”) submitted the initial petition to the Commission.
- b) *Admissibility Report.* – On February 20, 2003, the Commission approved Admissibility Report No. 13/03, whereby it concluded that the petition was admissible.²
- c) *Report on the Merits.* – On May 23, 2017, the Commission approved Report on the Merits No. 42/17, in conformity with Article 50 of the Convention (hereinafter “the Report on the Merits” or “Report on the Merits No. 42/17”). In that report the Commission reached a number of conclusions and made several recommendations to the State. The Report on the Merits was notified to the State on June 23, 2017.
- d) *Report on the Commission’s recommendations.* – The State of Peru submitted a brief in which it rejected the conclusions of the Report on the Merits and indicated that no reparation was required for the alleged victim.
- e) *Submission to the Court.* – On September 22, 2017, the Commission submitted all of the facts and human rights violations described in the Report on the Merits to the jurisdiction of the Inter-American Court “due to the need to obtain justice for the [alleged] victim.”³

¹ Although the doctrine in criminal matters distinguishes between the terms *non bis in idem* and *ne bis in idem*, in the instant case the Court will use *ne bis in idem* regardless of the expression used by the parties or the Commission.

² In that report, the Commission decided that the petition was admissible regarding the alleged violation of the rights recognized in Articles 1(1), 7, 8 and 9 of the American Convention to the detriment of Jorge Rosadio Villavicencio. Cf. Admissibility Report No. 13/03, *Case of Jorge Rosadio Villavicencio*, February 20, 2003 (evidence file, folio 1085).

³ The Commission appointed as its delegates before the Court Commissioner Paulo Vannuchi and Executive Secretary Paulo Abrão. Furthermore, it appointed as legal advisors Elizabeth Abi-Mershed, who was Assistant Executive Secretary at the time, and Silvia Serrano Guzmán and Christian González Chacón, attorneys of the Executive Secretariat.

3. *Requests of the Inter-American Commission.* – Based on the foregoing, the Commission requested the Court to declare the international responsibility of the State for the same violations indicated in its Report on the Merits (*supra* para. 1). Furthermore, the Commission requested the Court to order the State to provide certain reparation measures, which are detailed and analyzed in chapter IX of this judgment

II PROCEEDINGS BEFORE THE COURT

4. *Notification to the representatives and to the State.* – The submission of the case was notified by the Court to the alleged victim’s representative⁴ (hereinafter “the representative”) and to the State on November 21, 2017.

5. *Brief containing pleadings, motions and evidence.* – On January 27, 2018, the alleged victim’s representative submitted to the Court the brief containing pleadings, motions and evidence (hereinafter “the brief containing pleadings, motions and evidence”). The representative substantially agreed with the Commission’s claims and requested the Court to declare the international responsibility of the State for the violation of the same articles claimed by the Commission, as well as the violation of Article 9 of the Convention,⁵ to the detriment of Jorge Enrique Rosadio Villavicencio. Furthermore, the alleged victim, through his representative, applied for the Victims’ Legal Assistance Fund of the Inter-American Court (hereinafter “the Legal Assistance Fund”). Lastly, it asked the Court to order the State to adopt reparation measures and to reimburse certain legal expenses and costs.

6. *Answering brief.* – On June 28, 2018, the State submitted to the Court its answering brief to the submission of the Report on the Merits by the Inter-American Commission and the representative’s brief containing pleadings, motions and evidence (hereinafter “the answering brief”).⁶

7. *Victims’ Legal Assistance Fund.* – The order of the President of the Court dated September 17, 2018, accepted the request filed by the alleged victim to avail himself of the Court’s Legal Assistance Fund.⁷

8. *Observations on the preliminary objections.* – On September 12 and 13, 2018, the Commission and the representative submitted, respectively, their observations on the preliminary objections filed by the State and requested that the objections be dismissed. The representative submitted annexes along with the brief of September 13, 2018. On September 28, 2018, the State submitted its observations to the annexes and on October 4, 2018, the Commission indicated that it did not have any observations. On October 18, 2018, the victim’s representative submitted a “justification for [its] presentation of annexes, on which the State of Peru submitted observations [...],” along with additional annexes.

⁴ The attorney César Villacorta Spinner acted as the victim’s representative in this case.

⁵ In the Admissibility Report in the instant case, the Commission indicated that “the petitioner did not specify the alleged violation of Article 9 of the Convention; therefore, it is not applicable to admit this violation since in the context of the petition there are no facts that characterize it as such.” However, in the same report it decided “to [d]eclare admissible the allegations contained in the instant case regarding the alleged violation of Articles 1(1) 7, 8 and 9 of the American Convention to the detriment of Jorge Rosadio Villavicencio by the State of Peru.” On March 12, 2018, the alleged victim’s representative submitted “additional information” regarding the case that will not be taken into consideration since it is time-barred.

⁶ In the communication of December 28, 2017, the State appointed Iván Arturo Bazán Chacón as Agent, and Luis Alberto Huerta Guerrero, Sergio Manuel Tamayo Yáñez and Helmut Andrés Olivera Torres as Deputy Agents.

⁷ *Cf. Case of Rosadio Villavicencio v. Peru. Victims’ Legal Assistance Fund.* Order of the President of the Inter-American Court of September 17, 2018. Available at: http://www.corteidh.or.cr/docs/asuntos/villavicencio_fv_18.pdf.

9. *Public hearing.* – On December 6, 2018, the President of the Court issued an order summoning the State, the representative and the Inter-American Commission to a public hearing to receive their allegations and final observations regarding the preliminary objections and subsequent merits, reparations and costs, as well as the statements of the alleged victim and an expert witness proposed by the Inter-American Commission. The public hearing was held on February 6, 2019, during the 129th period of regular sessions of the Court, held at its seat. The alleged victim, Jorge Enrique Rosadio Villavicencio, gave his statement and the expert witness, Hernán Víctor Gullco, gave his expert opinion during the hearing.

10. *Evidence to facilitate adjudication of the case.* – The Registrar’s note of January 30, 2019, requested the State and the representative to provide specific evidence to facilitate adjudication of the case. The State submitted part of the evidence requested on February 4, 2019.⁸ The representative submitted another part of the evidence requested, some documents not requested by the Court,⁹ as well as its observations on the evidence submitted by the State, on February 13, 2019. The Court asked the State and the Commission to present their observations on the documents submitted by the representative.

11. *Observations and final written arguments.* – On February 27, 2019, the Commission submitted its final written arguments. On March 6, 2019, the State and the representative submitted their corresponding final written arguments.¹⁰

12. *Deliberation of the case.* – The Court began the deliberation of this judgment on October 8, 2019, and it ended on October 14, 2019.

III JURISDICTION

13. The Inter-American Court has jurisdiction to hear the instant case pursuant to Article 62(3) of the Convention, as Peru has been a State Party to the American Convention since July 28, 1978, and it recognized the contentious jurisdiction of the Court on January 21, 1981.

IV PRELIMINARY OBJECTIONS

14. In its answering brief the State filed two preliminary objections regarding: (a) lack of exhaustion of domestic remedies, and (b) the objection of fourth instance. In addition, it submitted an “observation” regarding the alleged inclusion of Article 25 of the American Convention, which will be examined as a preliminary objection.

⁸ The State did not submit: (i) “the orders for preventive detention issued in the ordinal criminal and military criminal jurisdictions for Mr. Rosadio Villavicencio”; (ii) a copy of “the publication of Supreme Decrees 09 and 049 in the ‘El Peruano’ Official Newspaper”; (iii) the “notification of the charges against Mr. Rosadio Villavicencio before the Inspectorate of the Leoncio Prado Detachment, in the administrative disciplinary proceedings”; (iv) the “documentation submitted by the State during the proceedings before the Inter-American Commission which, as per the answering brief, evidenced the notification of the accusation made by Military Prosecutor’s Office on October 17, 1995, before the Permanent War Council of the Fifth Judicial Military Region against Mr. Rosadio Villavicencio”; (v) the “notification to Mr. Rosadio Villavicencio that the hearing of the Permanent War Council would be held on November 29, 1996, and proof that he had a private or *ex officio* legal counsel before said notification”; or (vi) the “notification to Mr. Rosadio Villavicencio that the hearing would be held on December 15, 1997, before the Permanent War Council of the Sixth Judicial Military Area.”

⁹ These documents will not be taken into consideration because they are time-barred.

¹⁰ On March 25, 2019, the alleged victim’s representative submitted “an exceptional and extraordinary communication” regarding the case. That brief is time-barred; therefore, it will not be taken into account by the Court.

A. Objection of lack of exhaustion of domestic remedies

A.1. Arguments of the State and observations by the Commission and the representative

15. The **State** claimed that the alleged victim had the obligation to exhaust a domestic remedy in administrative proceedings “against the order of the Army General Command No. 527 CP/EP/CP-JAPE dated [...] March 3, 1995,” which decided to retire him as a disciplinary measure, before recurring to an international jurisdiction.

16. The State also indicated that the objection was made at the correct procedural time, given that in the brief of November 13, 1998, it clearly specified the remedy that was not exhausted. Regarding the suitability and effectiveness of the domestic remedy not exhausted, in its answering brief the State cited the articles of the Political Constitution of 1993 and the Civil Procedural Code in effect at the time of the facts that permitted filing an action in administrative proceedings before a civil judge of the corresponding area, and indicated that in previous petitions the Commission had determined that said proceedings constituted “an effective remedy to challenge administrative orders.” Finally, it concluded that the instant case “does not meet the conditions to make an exception to the requirement of exhaustion of domestic remedies.”

17. The **Commission** expressed that “although during the admissibility stage the State indicated several times that the petition was inadmissible due to its lack of merit and it invoked Article 47(c) of the American Convention and Article 35(b) of its Rules of Procedure, “it did not expressly file the objection of lack of exhaustion of domestic remedies.” It claimed that “it was before the Inter-American Court that the State first expressly filed the objection of lack of exhaustion of domestic remedies and identified the regulation in the Political Constitution and in the Civil Procedural Code of Peru,” without providing information that “would prove the suitability and effectiveness of the administrative remedy.” Consequently, the Commission argues that the preliminary objection filed by the State of Peru is time-barred and requests that it be rejected.

18. The **representative** claimed that during the admissibility stage before the Commission the State did not file “within the adequate term or procedural time the preliminary objection of lack of exhaustion of domestic remedies.” Furthermore, it argued that the remedy specified by the State “was not [...] suitable or effective in the case of the [alleged] victim.” This is because at the time of the facts, in the context of a “civilian-military dictatorship,” “there were no references of Army Officers retired by disciplinary measure and prosecuted for civil and military crimes, [...] that were reinstated after resorting to that domestic remedy.” Thus, the alleged victim “did not have the obligation to file an administrative claim against the order of the General Command” that retired him. Hence, it asked the Court to declare the State’s request inadmissible.

A.2. Considerations of the Court

19. The **Court** notes that Article 46(1)(a) of the Convention establishes that in order for the Commission to admit a petition or communication lodged 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.¹¹ The Court has also established that this objection must be presented in a timely manner, meaning, during the admissibility stage before the Commission¹² and it has indicated that the State that files this preliminary objection must specify the domestic remedies that remain to be exhausted and prove that they are applicable and effective.¹³

¹¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 88 and *Case of Perrone and Preckel v. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of October 8, 2019. Series C No. 384, para. 33.

¹² Cf. *Case of Velásquez Rodríguez v. Honduras, Preliminary Objections, supra* note 11, para. 31, and *Case of Cuscul Pivaral et al v. Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 23, 2018. Series C No. 359, para. 21.

¹³ Cf. *Case of Velásquez Rodríguez v. Honduras. Preliminary Objections*. Judgment of June 26, 1987. Series C No. 1, para. 88, and *Case of Perrone and Preckel v. Argentina, supra* note 11, para. 33.

20. The Court confirmed that during the admissibility process before the Commission,¹⁴ the State submitted seven briefs.¹⁵ Only in the brief of November 13, 1998, received by the Commission on November 16, 1998, it specified that the order that concluded the military disciplinary proceedings against Mr. Rosadio Villavicencio “was not challenged in administrative proceedings, meaning it was accepted by said government official” without clearly referring to the objection of lack of exhaustion of domestic remedies. In addition, in its brief the State did not refer to the effectiveness of that remedy; therefore, it did not comply with the burden of proof in that regard. Based on the foregoing, the Court dismisses the objection of lack of exhaustion of domestic remedies.

B. Objection of fourth instance

B.1. Arguments of the State and observations by the Commission and the representative

21. The **State** filed the objection of fourth instance, indicating that it is not within the jurisdiction of the inter-American system to review “jurisdictional or similar decisions issued domestically[,] or to question the criteria and/or appraisal of the judicial entities in those cases (in process or completed), in regular proceedings that respect the guarantees of due process contemplated in the Political Constitution of Peru and in the [Convention].”

22. The **Commission** claimed that the objection filed by the State is based on the incorrect assumption that there were no violations to the American Convention in the proceedings against the alleged victim, which is in fact an analysis that corresponds to the merits stage.

23. The **representative** did not make any specific arguments in this regard.

B.2. Considerations of the Court

24. The **Court** has indicated that when assessing compliance with certain international obligations, there can be an intrinsic interrelationship between the analysis of international law and domestic law. Therefore, in order to clarify whether the State has violated its international obligations owing to the acts of its judicial organs, the Court may have to examine the respective domestic proceedings to determine their compatibility with the American Convention¹⁶ and the inter-American instruments that grant it jurisdiction.

25. In the instant case, neither the Commission nor the representative have requested the review of domestic decisions with regard to the assessment of the evidence, of the facts, or the application of domestic law. The goal of the merits stage is to analyze, pursuant to the American Convention and international law, whether there were human rights violations, specifically to the procedural guarantees and personal liberty of the alleged victim in domestic judicial and disciplinary proceedings. Consequently, the Court rejects the exception of fourth instance filed by the State.

C. Observations regarding the inclusion of Article 25 of the American Convention in the Commission’s Report on the Merits

¹⁴ The admissibility process concluded with the issuing of Admissibility Report No. 13/03 of February 20, 2003, by the Inter-American Commission on Human Rights (*supra* para. 2.b).

¹⁵ Cf. State’s briefs of August 12, 1998 (evidence file, folios 659 and 660), November 16, 1998 (evidence file, folios 632 to 639), of January 29, 1999 (evidence file, folios 491 to 494), of February 26, 1999 (evidence file, folios 487 and 488), of May 25, 1999 (evidence file, folios 427 to 434), of January 3, 2000 (evidence file, folios 410 to 412) and January 2, 2001 (evidence file, folios 1151 to 1154).

¹⁶ Cf. *Case of the “Street Children” (Villagran-Morales et al.) v. Guatemala. Merits*; para. 222 and *Case of Villamizar Durán et al. v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 20, 2018. Series C No. 364, para. 30.

C.1. Arguments of the State and observations by the Commission and the representative

26. The **State** claimed that the Commission “admitted the petition in relation to Articles 1(1), 7, 8 and 9 of the American Convention; however, in the Report on the Merits, it included [...] Article 25 of that instrument” without any justification or grounds, which affects the “right of the State to defend itself” since it resulted in that this aspect was not debated before the Commission. Furthermore, it indicated that “you cannot claim that there was a violation of the right to an effective remedy only because the result was unfavorable for the petitioner.”

27. The **Commission** argued that the State’s claim does not have “the characteristics of a preliminary objection and corresponds to the debate on the merits.” In addition, “there is no regulation that establishes that the Report on the Merits must determine all of the rights allegedly violated” nor does it “constrain the Commission to perform the examination of [the case] exclusively in conformity with the violations indicated by the parties.” Thus, the Commission requested that “the objection be dismissed.”

28. The **representative** did not make any specific arguments in this regard.

C.2. Considerations of the Court

29. Regarding the inclusion of new rights in the Report on the Merits that were not previously included in the Commission’s Admissibility Report, the **Court** confirms that in the American Convention and in the Rules of Procedure of the Inter-American Commission there is no regulation indicating that all of the rights allegedly violated must be established in the Admissibility Report.¹⁷ In this regard, Articles 46¹⁸ and 47¹⁹ of the American Convention establish the requirements for a petition to be declared admissible or inadmissible, but do not impose on the Commission the obligation to determine which rights will be subject to the proceedings. In this regard, the rights indicated in the Admissibility Report are the result of a preliminary assessment of the petition in progress; therefore, the possibility of including other rights or articles allegedly violated at subsequent stages of the proceedings is not limited, provided that the State’s right to defend itself is protected within the framework of the factual background of the case under consideration.²⁰

30. Finally, the Court considers that the analysis of the reasons why the Commission claimed the violation of Article 25 of the Convention by the State corresponds to the merits of the case. Based on the foregoing, the Court rejects the preliminary objection raised by the State.

¹⁷ Cf. *Case of Furlán and family v. Argentina. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2012. Series C No. 246, para. 52, and *Case of Lagos del Campo v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 31, 2017. Series C No. 340, para. 139.

¹⁸ Article 46 of the Convention establishes 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; (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.”

¹⁹ Article 47 of the American Convention establishes that: “The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if: (a) any of the requirements indicated in Article 46 has not been met; (b) the petition or communication does not state facts that tend to establish a violation of the rights guaranteed by this Convention; (c) the statements of the petitioner or of the state indicate that the petition or communication is manifestly groundless or obviously out of order; or (d) the petition or communication is substantially the same as one previously studied by the Commission or by another international organization.”

²⁰ Cf. *Case of Furlán and family v. Argentina, supra* note **iError! Marcador no definido.**, para. 52 and *Case of Lagos del Campo v. Peru, supra* note **iError! Marcador no definido.**, para. 20.

V EVIDENCE

A. Admissibility of the evidence

A.1. Admissibility of documentary evidence

31. The Court received several documents submitted as evidence by the Commission, the representative and the State along with their main briefs. In this case, as in others,²¹ the Court admits the evidentiary value of those documents filed by the parties and the Commission at the correct procedural time, which were not disputed or objected, and whose authenticity was not questioned. In addition, the Court admits the documents provided by the State and by the representative, which were requested as evidence to facilitate adjudication of the case, in conformity with that set forth in Article 58 of the Rules of Procedure of the Court (*supra* para. 10).

32. On September 13, 2018, the representative submitted, along with the brief on observations to the preliminary objections filed by the State, several annexes corresponding to briefs of the proceedings before the Commission, as well as information requests to the State regarding the operation plan "Limpieza 94" (Cleaning '94). The State claimed that such evidence is time-barred and thus inadmissible. The Court observes that the documentation presented by the representative was already in the file and was admitted in the previous paragraph.

33. Subsequently, the representative submitted a brief on October 18, 2018, as "justification for the presentation of annexes on September 13, 2018" and submitted additional annexes. In conformity with Article 57(2) of the Rules of Procedure, the procedural time for the presentation of documentary evidence is, in general, along with the brief of submission of the case, the brief containing pleadings, motions and evidence, or the answering brief, as applicable. Since the annexes submitted along with the brief of October 18, 2019, are time-barred and were not justified by any of the exceptions contemplated in the Rules of Procedure, it was not expressly requested by the Court as evidence to facilitate adjudication and it is not supervening evidence, such annexes will not be admitted or considered by the Court.²²

34. Moreover, the Court notes that the representative objected to some of the documents submitted by the State in the brief of February 13, 2019.²³ Firstly, regarding the Regulations of Investigative Councils, the representative claimed that it did not have knowledge of that document prior to 2009, and that "the Supreme Decrees that support such Regulations were never published in the 'El Peruano' Official Newspaper." Regarding the copy of the publication of Supreme Decrees 09 and 049 in the "El Peruano" Official Newspaper, the representative argued that "these [were] never published," and submitted two documents in which the "documentation center" of "El Peruano" Official Newspaper indicates that Supreme Decrees "No. 009-85-GU, of October 22, 1985" and "No. 049-91-DE/EP, of September 26, 1991" have not been published in the "in the separate section of legal regulations of 'El Peruano' Official Newspaper." Similarly, the representative submitted a series of documents to demonstrate that the "court-appointed legal counsel [...] Fernando Morales Cabala [...] was not present at any of the hearings [...] and] that the Minutes and Certifications submitted by the State of Peru have fake signatures of the court-

²¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Merits*. Judgment of July 19, 1988. Series C No. 4, para. 140, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 20.

²² This evidence consisted of: (i) a request made by Jorge Rosadio Villavicencio to the General Commander of the Army of Peru, for an "authenticated copy of Decree N° 25635, Law of the National Intelligence System [...] and Decree N° 065-DE-SG from July 1992, Regulations on the Organization and Functions of SINA"; (ii) a request made by Jorge Rosadio Villavicencio to the General Commander of the Army of Peru, for the "Administrative Disciplinary File, related to the investigation opened and performed by the Inspectorate of the Leoncio Prado Detachment which concluded with INF INV N° 044 DLP/K-1/20.04.a dated September 23, 1994," and (iii) a request made by Jorge Rosadio Villavicencio to the General Commander of the Army of Peru, to receive "certified copies" of different "documents that are instruments for [his] means of defense."

²³ By means of the Secretariat's note of February 15, 2019, the Court informed that it will not take into account the arguments regarding the merits expressed by the representative in the aforementioned brief dated February 13, 2019.

appointed legal counsel, Fernando Morales Cabala.” The Court considers that the representative’s arguments do not affect the admissibility of the documents presented by the State; rather, they concern their evidentiary value, which will be taken into consideration in the merits of the case.

A.2. Admissibility of testimonial and expert evidence

35. The Court considers it appropriate to admit the statement and the expert assessment given at the public hearing, insofar as they agree with the objective defined by the Presidency in the order that requested them²⁴ and the purpose of this case.

VI PRELIMINARY CONSIDERATION

36. The Court notes that in the brief containing pleadings, motions and evidence, the representative referred to the imprisonment conditions of the alleged victim²⁵ and the alleged context of unlawful and irregular actions by members of the Army of Peru from 1992 to 1995.

37. As repeatedly indicated in the jurisprudence of the Court, the Report on the Merits constitutes the factual background of the proceedings before the Court; therefore, it is not admissible to allege new facts different from those presented in that report, without detriment to presenting those that may explain, clarify or reject the facts that have been mentioned in the application, or that are consistent with the claims of the plaintiff.²⁶ The exception to this principle is supervening facts, which can be presented to the Court at any stage of the proceeding before judgment has been delivered. Ultimately, it corresponds to the Court to decide in each case the admissibility of claims related to the factual background while protecting the procedural balance of the parties.²⁷

38. In this regard, the Court observes that in the Report on the Merits, the Commission only presented allegations regarding three proceedings opened against Mr. Rosadio Villavicencio: (i) military disciplinary proceedings; (ii) military criminal proceedings; and (iii) ordinary criminal proceedings; all of these related to his participation in an assigned operation (*supra* paras. 29 and 30). The Commission did not refer to the detention conditions of the alleged victim or to an alleged context of unlawful and irregular actions by members of the Army of Peru. These facts do not help explain, clarify or reject the facts mentioned in the Report on the Merits and they cannot be classified as supervening facts. Therefore, the Court will not adjudge on these facts claimed by the representative, since they are not part of the factual background presented by the Commission.

VII FACTS

39. The Court will establish the facts of the instant case in the following order: (a) regarding the alleged victim and background of the three proceedings against him; (b) investigation by the

²⁴ In the public hearing, the Court received the statement of the alleged victim, Jorge Enrique Rosadio Villavicencio, and the expert witness, Hernán Víctor Gullco, which were proposed by the representative and the Commission, respectively. The purpose of these statements were set forth in the Order of the President of the Inter-American Court issued on December 6, 2018. Available at: http://www.corteidh.or.cr/docs/asuntos/rosadiovillavicencio_06_12_18.pdf.

²⁵ That the General Commander of the Leoncio Prado detachment allegedly did not bring Mr. Rosadio Villavicencio before the judge until December 5, 1994, 68 days after the request, and he was placed in a hole, in a very reduced space, along with eight other persons, for more than 110 days, from December 5, 1994 to March 20, 1995; that “during the 45 days that he was detained and in isolation[,] [the officers of the High Command of the Leoncio Prado detachment] tried to break his will [Mr. Rosadio Villavicencio’s] so that he would sign the statement indicating that he was aware of the Operation Plan “LIMPIEZA 94”; and that he was allegedly “taken by the personnel, without any prior notice, from his cell to the Hearings Chamber of the criminal establishment where he was serving his sentence.”

²⁶ Cf. *Case of the “Five Pensioners” v. Peru*. Merits, Reparations and Costs. Judgment of February 28, 2003, paras. 153-155, and *Case of Valenzuela Ávila v. Guatemala*. Merits, Reparations and Costs. Judgment of October 11, 2019. Series C No. 386, para. 40.

²⁷ Cf. *Case of the “Mapiripán Massacre” v. Colombia*. Preliminary Objections. Judgment of March 7, 2005, para. 58, and *Case of Valenzuela Ávila v. Guatemala*, *supra* note 26, para. 40.

Inspectorate of the Leoncio Prado Detachment; (c) the military disciplinary proceedings; (d) the ordinary criminal proceedings; and (e) the military criminal proceedings.

A. Regarding the alleged victim and background of the proceedings against him

40. The alleged victim, Jorge Rosadio Villavicencio, held the position of Intelligence Lieutenant of the Army of Peru as of January 1, 1990.²⁸ On June 30, 1994, Mr. Rosadio Villavicencio was assigned to the Fifth Military Region, Leoncio Prado Detachment, Intelligence Company No. 341 in the Sión area.²⁹ He was Chief of the Leoncio Prado Detachment as of August 5, 1994,³⁰ date on which he was transferred to the Sión Countersubversive Base.³¹

41. Mr. Rosadio Villavicencio was given instructions to carry out a mission by Colonel EM,³² also known as "Colonel Jano" or "Colonel Jemo,"³³ who at that time was Chief of the Army General Staff Office of the Leoncio Prado Detachment.³⁴ As part of the mission, Mr. Rosadio Villavicencio had to identify drug traffickers that operated in the area and pretend to be a corrupt official, accept money in exchange for authorizing drug-trafficking flights from the base, and later seize the drugs and capture the drug traffickers.³⁵

42. While carrying out the operation, Mr. Rosadio Villavicencio authorized three drug-trafficking flights on August 17, 24 and 31, 1994, on the Sión landing strip, for which he received USD

²⁸ Cf. Order of the General Commander of the Army Personnel Command of January 1, 1994. (Evidence file, folio 5).

²⁹ Cf. Memorandum No. 296 of the Chief of Army Personnel Management to Jorge Rosadio Villavicencio, June 30, 1994. (Evidence file, folio 7).

³⁰ Cf. Statement of Jorge Enrique Rosadio Villavicencio before the Examining Judge, September 15, 1994. (Evidence file, folio 25).

³¹ Cf. Minutes of the Investigative Council for Junior Officers, Session No. 007-95, February 7, 1995. (Evidence file, folio 55).

³² Cf. Minutes of the hearing of the oral proceedings of March 12, 1996 (evidence file, folios 10 and 14); Cf. Statement of Colonel M before the Examining Judge of September 22, 1994 (evidence file, folios 34 and 35).

³³ As can be inferred from the minutes of the hearing of the oral proceedings of March 12, 1996, Colonel EM was also known by the aliases "Colonel JANO" or "Colonel JEMO". Cf. Minutes of the hearing of the oral proceedings of March 12, 1996 (evidence file, folios 9, 10 and 14).

³⁴ Cf. Statement of Jorge Enrique Rosadio Villavicencio before the Examining Judge of September 15, 1994 (evidence file, folio 25).

³⁵ The parties to the case disagree on: (i) the nature of the mission, whether it was an intelligence operation or an anti-drug trafficking operation; (ii) the scope, whether the second flight had to be seized or the number of flights to be authorized was not specified; and (iii) the distribution of money received as bribes; meaning, whether Mr. Rosadio had to keep it or if he had to send it to the detachment. According to the victim, it was an intelligence mission that "consisted in identifying drug traffickers in the area, capturing a small aircraft and seizing the drugs, for which I had to present myself as a corrupt officer colluding with drug trafficking, to be able to fulfill the mission that I was assigned, which I carried out until September 5, 1994." Cf. Statement of Jorge Enrique Rosadio Villavicencio before the Examining Judge of September 15, 1994 (evidence file, folio 25). In order to protect himself from any irregularities in the execution of the operation, he created the document "Angel Operation Plan," which contained all of the instructions provided to him. According to the document, the plan consisted of five steps to be carried out by the implementing officer: (i) step one was to present himself as a corrupt official and accept invitations, gifts and money from drug traffickers, without letting the troops know that he was working in an intelligence team; (ii) step two was to identify how small aircraft loaded with drugs entered the area and the activities at the time of exchange of drugs for money; (iii) step three was for the official to authorize drug-trafficking flights in exchange for payment; (iv) step four was to change the staff at the base; (v) the last step was to capture the drug traffickers. In addition, part of the money seized in the operation had to be taken to the general base of the Leoncio Prado detachment to pay the troop that had provided the information and collaborated in the operation. Cf. Copy of "Angel Operation Plan" of August 1994 (evidence file, folios 9-11, 21-23). This document was sent for approval to the High Command. On the other hand, the State indicated that Mr. Rosadio Villavicencio "was appointed by his Command, in compliance with that set forth in the 'Cleaning 94' Operation Plan, to perform an anti-drug trafficking operation; he was named Chief of the Base, and his mission was to discover, dismantle and capture the drug trafficking organizations that operated in the area of Sión, as well as to capture a light aircraft and seize drugs, money and inputs used for its creation. To be able to fulfill the aforementioned tasks, the alleged victim had to earn the trust of the drug trafficking organizations and the compromised troops, accept the bribe to perform a flight and distribute the money among the personnel of the base to prevent suspicions, and as to the portion corresponding to him, he would retain it and draft a report to send it to the Leoncio Prado detachment. In the second flight, the light aircraft, drugs and other had to be seized."

13,000.00 (thirteen thousand United States dollars).³⁶ On September 1, 1994, Lt. Rosadio Villavicencio informed Colonel M of the flight of August 31, 1994. According to the State, at that time the alleged victim hid the other flights dated August 17 and 24.³⁷

43. It is an undisputed fact that, as previously indicated, Mr. Rosadio Villavicencio was detained on September 5, 1994, and subjected to investigations: (i) by the Inspectorate of the Leoncio Prado Detachment; (ii) in military disciplinary proceedings; (iii) in the criminal military jurisdiction, and iv) in the ordinary criminal jurisdiction.

44. The Court does not have the files for each of these proceedings, only the procedural documents provided by the parties, to which the description of such proceedings will be limited.

B. Investigation by the Inspectorate of the Leoncio Prado Detachment

45. It is an undisputed fact that in September 1994, the Inspectorate of the Leoncio Prado Detachment opened an investigation against the alleged victim and other members of the military personnel of the Sión Base to determine whether they committed irregularities in the exercise of their functions as part of the assigned operation.

46. On September 5, 1994, the same day on which he was detained (*supra* para. 43), the alleged victim gave his first statement before the Investigation Officer³⁸ and on September 12, 1994, he presented an addendum to the statement.³⁹

47. On September 23, 1994, the Inspectorate of the Leoncio Prado Detachment issued its investigation report, which concluded that Mr. Rosadio Villavicencio had acted "maliciously" by hiding information on the illicit drug-trafficking flights and that he "committed perjury by trying to surprise in his statements, since he recounted the facts in an incomplete manner."⁴⁰ Furthermore, the Inspectorate indicated that it denounced Lt. Rosadio Villavicencio before the Permanent War Council of the Fifth Judicial Military Region, that is, before the military criminal jurisdiction, and recommended that he be subjected to the Investigative Council for Junior Officers as a disciplinary measure to determine his status in the Army as a result of the alleged perpetration of crimes included in the Criminal Code⁴¹ and in the Code of Military Justice⁴² due to lack of professionalism, honor, ethics and moral capacity, by causing an anti-drug trafficking operation to fail; colluding with drug traffickers with the only goal of obtaining economic benefits, putting at risk the reputation of the Army of Peru; demonstrating an absolute lack of military capacity and ability as a commander, since he allowed the personnel under him to disregard their functions, relate with drug traffickers, steal and sell war material to drug-trafficking hired gunmen, thus threatening the discipline and image of the Army of Peru.⁴³

³⁶ Cf. Statement of Jorge Enrique Rosadio Villavicencio before the Examining Judge, September 15, 1994 (evidence file, folio 26).

³⁷ Cf. Statement of Colonel M before the Examining Judge, September 22, 1994 (evidence file, folios 35 and 36).

³⁸ Cf. Statement of Lt. Jorge Enrique Rosadio Villavicencio before the Investigation Officer, September 5, 1994 (evidence file, folios 3940-3948).

³⁹ Cf. Addendum to the statement of Lt. Jorge Enrique Rosadio Villavicencio before the Investigation Officer, September 12, 1994 (evidence file, folios 3949-3951).

⁴⁰ Cf. Report of the Inspectorate of the Leoncio Prado Detachment, December 16, 1994 (evidence file, folios 42-53).

⁴¹ Illicit drug trafficking, Article 296.

⁴² Offense against the duty and dignity of the service (Article 200, accepting money and gifts while having knowledge that it was in violation of his obligations); falsehood (Article 299, knowingly provide false information about service matters); negligence (Article 238, failing to comply with the duties corresponding to his grade and position); offense against the administration of justice (Article 302, subsection 4, failing to inform his commander of the crime committed); abuse of authority (Article 180, subsection 8(a), demanding from junior officers, for his personal benefit, obligations foreign to the military services), and failure to obey a lawful order (Article 158, due to non-compliance with the orders to fulfill a mission).

⁴³ Cf. Report of the Inspectorate of the Leoncio Prado Detachment, December 16, 1994 (evidence file, folios 42-53).

48. On September 25, 1994, the General Commander of the Leoncio Prado Detachment informed the alleged victim that, as a result of the investigation carried out by the Inspectorate of the detachment, he was accused: (i) in the ordinary criminal jurisdiction, for the crime of illicit drug trafficking contemplated in Article 296 of the Criminal Code, and (ii) in the military criminal jurisdiction, due to offense against the duty and dignity of the service, falsehood, negligence, offense against the administration of justice, abuse of authority and failure to obey a lawful order, contemplated in Articles 200, 299, 238, 302, 180 and 158 of the Code of Military Justice.⁴⁴

C. Military disciplinary proceedings

49. In the administrative proceedings, on February 7, 1995, the Investigative Council for Junior Officers held a hearing in which the alleged victim did not participate because he was detained.⁴⁵ It can be inferred from the minutes of the hearing that the Secretary of the Council, the CTP Infantry Colonel, indicated at that time that the Council could decide on the administrative status of that officer, even if he were not present, because there are legal provisions whereby if a summoned officer has a detention order his presence is not necessary,⁴⁶ pursuant to Supreme Decree 9 of October 22, 1985, and Supreme Decree 049 of September, 1991.⁴⁷

50. On February 7, 1995, the Investigative Council for Junior Officers recommended to the Army General Command to retire Mr. Rosadio Villavicencio as a disciplinary measure due to offenses against the honor, decorum, moral and military duties: offense against the duty and dignity of the service, falsehood, negligence, offense against the administration of justice, abuse of authority, failure to obey a lawful order and illicit drug trafficking, considering that he had authorized three drug-trafficking flights but reported only the last one and had permitted the installation of a laboratory to make basic cocaine paste, activities from which he obtained personal economic benefits; moreover, grenades were stolen from the base and he did not report their subsequent recovery.⁴⁸

51. On March 3, 1995, the Army General Command decided to retire the alleged victim, considering only that "Legislative Decree 752 (Law on the Military Situation of the Officers of the Army, Navy and Air Force), in Article 55 subsection f and Article 61, regulates the transition to retirement as a disciplinary measure, establishing [in] Article 66 [...] that an officer who is retired will remain in the reserve for up to two years after passing the age limit corresponding to his rank" and that "Supreme Decree 041 DE/SG of December 15, 1989, in Article 2 authorizes the Army General [...] to approve personnel actions of junior officers of the institution." No additional considerations are recorded in the decision.⁴⁹

⁴⁴ Cf. Communication of the General Commander of the Leoncio Prado detachment to Jorge Rosadio Villavicencio, September 25, 1994 (evidence file, folio 40).

⁴⁵ Cf. Minutes of the Investigative Council for Junior Officers, Session No. 007-95 of February 7, 1995 (evidence file, folios 55-60).

⁴⁶ Cf. Minutes of the Investigative Council for Junior Officers, Session No. 007-95 of February 7, 1995 (evidence file, folios 55-60).

⁴⁷ Cf. Supreme Decree 09 of October 22, 1985, amended by Supreme Decree 049 of September 1991 (evidence file, folio 62). Article 14 of Supreme Decree 09 established that "personnel investigated due to a disciplinary measure and/or professional inadequacy will be heard and their evidence in answer to the charges will be examined; they must present their situation orally and answer the questions formulated by members of the Council." However, this provision would not apply, according to Supreme Decree 049 (which amended 09), when the personnel under investigation is involved in a common crime, unrelated to the service, and the investigation or criminal judicial proceedings have issued a definitive detention order or conviction with a penalty of deprivation of liberty.

⁴⁸ Cf. Minutes of the Investigative Council for Junior Officers, Session No. 007-95 of February 7, 1995 (evidence file, folios 55-60).

⁴⁹ Cf. Order of the Army General Command, March 3, 1995 (evidence file, folios 82 and 83).

D. Ordinary criminal proceedings

52. On September 15, 1994, Mr. Rosadio Villavicencio, gave his statement before the Examining Judge of the National Police of Peru at the Leoncio Prado Detachment of the Army of Peru. On September 22, 1994, at the office of the Leoncio Prado Detachment, Colonel M (alias "JANO") gave his statement before the examining judge, during which JRH acted as his advisor.⁵⁰

53. On September 23, 1994, the National Anti-Drug Department of the National Police of Peru submitted a complaint before the Second District Attorney's Office of San Martín Tarapoto against the alleged victim and other persons for the crime of illicit drug trafficking.⁵¹

54. On September 28, 1994, the Judge of Mixed First Instance opened an investigation with a detention order against the alleged victim and other persons for the crime "against public health due to illicit drug trafficking," considering that they "actively participated in covering up the illegal crime denounced [...]."⁵²

55. On February 6, 1995, the alleged victim and other codefendants requested unconditional release, arguing that there was no procedural risk that "we will avoid justice or interfere with the production of evidence [...]" and quoted Article 201 of the Code of Criminal Procedure, modified by the Decriminalization Law,⁵³ which established that "if at any time during the investigation it is demonstrated that the accused is not guilty, the Judge, *ex officio* or at the request of the accused, shall order his unconditional release [...]."⁵⁴ On February 9, 1995, the Judge of Mixed First Instance declared the request inadmissible, stating that Article 201 was not applicable.⁵⁵

56. On February 13, 1995, the alleged victim and other codefendants filed an appeal, considering that the order deviates from the law, because the proceedings had not proven the crime that they were accused of.⁵⁶ On April 24, 1995, the Supreme Court of Justice dismissed the appeal with regard to the alleged victim, but admitted it for the codefendants. It indicated that the actions of the alleged victim were "serious" since he failed to follow the instructions given by his command and he misappropriated the dollars received for personal benefit.⁵⁷

⁵⁰ Cf. Statement of Colonel M before the Examining Judge of September 22, 1994 (evidence file, folios 32 to 36).

⁵¹ Cf. Complaint of the National Anti-Drug Department of the National Police of Peru of September 23, 1994 (evidence file, folios 152-195). As indicated in the complaint, the Department considered that there were certain indications that the alleged victim committed a crime, namely: i) they seized a deposit slip for USD 2,000 destined for the mother of the accused, derived from drug trafficking; ii) he authorized the departure of aircraft loaded with drugs on three different occasions and he received USD 13,000 from [AOZH] for those authorizations; iii) he distributed the money received between his personnel and himself, and iv) he allowed several drug traffickers to set up an operation center for their illicit activities within the area that he was responsible for.

⁵² Cf. Order of the Judge of Mixed First Instance of September 28, 1994 (evidence file, folio 199).

⁵³ Cf. Request for the unconditional release of Jorge Enrique Rosadio Villavicencio et al. of February 7, 1995 (evidence file, folio 389).

⁵⁴ Cf. Code of Criminal Procedure of Peru (evidence file, folios 3618-3740).

⁵⁵ Cf. Decision of the Judge of Mixed First Instance of February 9, 1995 (evidence file, folios 391-392).

⁵⁶ Cf. Appeal filed by Jorge Enrique Rosadio Villavicencio et al. on February 13, 1995 (evidence file, folio 394).

⁵⁷ Cf. Decision on the appeal by the Superior Court of Justice San Martín of April 24, 1995 (evidence file, folios 399 to 403).

57. On May 5, 1995, the Judge of Mixed First Instance issued his decision, in which he found that the alleged victim and other persons committed the crime of illicit drug trafficking.⁵⁸ On September 15, 1995, the Judge Specialized in Civil Law issued his final report on the investigation in the ordinary stage.⁵⁹ On October 23, 1995, the legal counsel of the alleged victim filed an objection of nature of action against the criminal action opened against him.⁶⁰

58. Hearings were held on January 25, March 4, 7, 11, 12, 14, 19, 20 and 21, April 12 and 17, 1996, as part of the oral proceedings against the alleged victim and other persons.⁶¹ In the hearing of March 4, 1996, the alleged victim submitted evidence.⁶² In the hearing of March 12, 1996, the alleged victim gave his statement; he was interrogated by the Superior Prosecutor and other attorneys acting as defense counsel.⁶³

59. On April 17, 1996, the Mixed Chamber of the Superior Court of San Martín declared groundless the objection of nature of the action filed by the alleged victim and convicted him to six years of prison for the crime of illicit drug trafficking "under the classification of aiding and abetting illicit drug trafficking." In that decision it was considered that the alleged victim, contrary to what was authorized by his supervisors:

[...] authorized a second and a third flight with drugs destined abroad, which Colonel [M] alias "Jano" found out about and felt betrayed by Lt. Rosadio; consequently, he was detained on September 5, 1994. It has been confirmed that a fourth flight was going to take place, in which the orders of the Command to intercept the aircraft, seize the drugs and money and apprehend the occupants were going to be implemented. However, in the report to his superiors he indicated that that was going to be the second flight. Moreover, instead of remitting the money from those flights to his commander as money seized, with the corresponding report, Lt. Rosadio Villavicencio divided it among his personnel [...].⁶⁴

60. In addition, the Mixed Chamber issued a ruling whereby it "ACQUITTED the other accused individuals, who were not present, of all charges [...] due to lack of evidence; ORDERED the suspension of detention orders against them; [...]; GRANTED the *ex officio* nullity of this count, since it is unfavorable for the State, and must be remitted to the Supreme Court, with a note of caution"; therefore, the proceedings were elevated to the Supreme Court.⁶⁵

61. On April 24, 1996, the Mixed Chamber complemented this ruling indicating that, regarding the objection of nature of the action filed by the accused, Jorge Enrique Rosadio Villavicencio, "the presentation of the corresponding grounds was inadvertently omitted." To correct this omission, it added that "the objection raised only applies when the fact denounced does not constitute a crime or is not legally punishable"; therefore, "the objection [...] is groundless since the legal status of the accused, namely determining his innocence or guilt, requires discussion, as has been done during the investigation and oral proceedings, but cannot be protected by means of an objection."⁶⁶

⁵⁸ Cf. Decision of the Judge of Mixed First Instance of May 5, 1995 (evidence file, folios 230-268).

⁵⁹ Cf. Final report of the Judge Specialized in Civil Law of September 15, 1995 (evidence file, folio 270-273).

⁶⁰ Cf. Objection of nature of the action, filed by the legal counsel of the alleged victim on October 23, 1995 (evidence file, folios 275 to 279).

⁶¹ Initially, when the hearing was declared open, it was mentioned that "the legal counsel of the accused includes the attorneys Tito García Alfaro, Roberto Cerpa Rodríguez and Carlos Prada Remuzgo," as well as the "appointed defense counsel, Dr. Perla Gaube Ruíz" for the accused persons that were not present. Although when the legal counsel were mentioned they did not indicate who represented whom, it can be inferred that Mr. Rosadio Villavicencio was represented by Carlos Prada Remuzgo. However, later on they declare "groundless the objection of nature of the action [filed] by the [female attorney as per the Spanish] defense counsel of Mr. Rosadio Villavicencio," so it is unclear who is acting as his legal counsel at the end of the hearing. Cf. Minutes of the hearings of the oral proceedings of January 25, March 4, 7, 11, 12, 14, 19, 20 and 21, as well as April 12 and 17, 1996 (evidence file, folios 281-349).

⁶² Cf. Minutes of the hearing of the oral proceedings of March 4, 1996 (evidence file, folios 351-352).

⁶³ Cf. Minutes of the hearing of the oral proceedings of March 12, 1996 (evidence file, folio 9).

⁶⁴ Cf. Minutes of the hearing of the oral proceedings of April 17, 1996 (evidence file, folios 281-349).

⁶⁵ Cf. Minutes of the hearing of the oral proceedings of April 17, 1996 (evidence file, folios 281-349).

⁶⁶ Cf. Order of April 24, 1996 (evidence file, folio 354).

62. On June 19, 1997, the Second Criminal Chamber of the Supreme Court of Justice admitted the annulment of the victim's sentence and increased it from 6 to 15 years in prison, as well as increasing the amount of civil damages payable. It considered that "the criminal penalty must be imposed considering the personal conditions of the accused [...] as well as the manner and circumstances in which the crime was committed [...]."67

63. On June 19, 1997, the legal counsel of the alleged victim filed an appeal for annulment of the judgment before the President of the Second Criminal Chamber, requesting the acquittal of the accused. The Court does not have information regarding the result of that remedy.68

64. It is an undisputed fact that on March 4, 1999, the alleged victim obtained the penitentiary benefit of study or work release ("semi-libertad"). Approximately two years later, on May 24, 2001, Law 27454, named "Law that modifies Article 300 of the Code of Criminal Procedure," was published in the Official Gazette. It established that "if the appeal for annulment is filed by one or several sentenced individuals, the Supreme Court can only confirm or reduce the penalty imposed and adjudge the subject matter of the appeal." Furthermore, the law contained a transition provision that established its retroactive application.69

65. Mr. AZH, who was sentenced along with Jorge Rosadio Villavicencio and another individual to more than 15 years of prison, subsequently requested the adjustment of the sentence. On September 28, 2001, the Mixed Chamber of the Superior Court adjusted, *ex officio*, the sentence imposed on Mr. Rosadio Villavicencio of fifteen years to six years; therefore, the prison sentence ended on September 4, 2000.70

E. Military criminal proceedings

66. On November 7, 1994, a Military Judge71 decided to open an investigation of the alleged victim "for the offense against the duty and dignity of the service, with the aggravating circumstances of falsehood, negligence and abuse of authority to the detriment of those under his command, contemplated in Articles 200, 209, 238 and 180 a) of the Military Code of Justice."72

67. On March 12, 1995, the Permanent Military Judge of Tarapoto, JRH, who acted as legal counsel of the alleged victim when he gave his statement during the investigation by the Inspectorate of the Leoncio Prado Detachment and also assisted Mr. Rosadio Villavicencio's hierarchical superior during those proceedings, ordered the investigation of the alleged victim and other victims and the reception of their discovery statements.73

68. On June 20, 1995, at the facilities of the Juanjuí prison, Peru, the alleged victim appeared before the Permanent Military Judge of Tarapoto, JRH, to give his discovery statement. He was assisted by the defense counsel appointed by the military court, DTYO; however, the alleged

67 Cf. Decision of the Second Transitory Criminal Chamber of the Supreme Court of Justice of the Republic, which resolved the appeal for annulment of June 19, 1997 (evidence file, folio 365 and 366).

68 Cf. Brief filed before the President of the Second Criminal Chamber of the Supreme Court of Justice by José Pablo Castro Mora on June 18, 1997 (evidence file, folios 370 to 380).

69 "Exclusive clause.- This law will apply retroactively, in conformity with that set forth in Article 103, paragraph 2, of the Political Constitution and Article 6, paragraph 2, of the Criminal Code. For these purposes, convicted individuals who were given a more serious sentence can request the adjustment of that sentence to the instance that issued the appealed decision. The sentence will be adjusted to that established in first instance."

70 Cf. Order of September 28, 2001, of the Mixed Chamber of the Superior Court of Justice of San Martín (evidence file, folios 3246 and 3247).

71 Cf. Decision of the Military Judge that opened an investigation of the alleged victim of November 7, 1994 (evidence file, folio 85).

72 Cf. Decision of the Military Judge that opened an investigation of the alleged victim of November 7, 1994 (evidence file, folio 85).

73 Cf. Order of the Permanent Military Judge of Tarapoto JRH of March 12, 1995 (evidence file, folios 86 and 88).

victim indicated that “since his legal counsel was in the city of Lima, he would not answer any questions.” Therefore, the session was concluded.⁷⁴

69. On July 27, 1995, the alleged victim gave his discovery statement, exhorted by the Permanent Military Judge of Tarapoto, before the Criminal Judge of Mariscal de Caceres.⁷⁵

70. On August 9, 1995, the Permanent Military Judge of Tarapoto decided to issue a definitive detention order against the alleged victim, considering that “the accused recognized that he received money from drug traffickers and distributed it among the codefendants” and that he was serving the detention imposed in the ordinary jurisdiction, where he was processed for the crime of illicit drug trafficking.⁷⁶

71. On October 14, 1995, the Military Judge⁷⁷ submitted the final report to the President of the Permanent War Council of the Fifth Judicial Military Region, indicating that “this Court considers that Intelligence Lieutenant (R) Jorge Rosadio Villavicencio is responsible for the offense against the duty and dignity of the service, with the aggravating circumstances of falsehood, negligence and abuse of authority to the detriment of those under his command [...]”.⁷⁸

72. On October 17, 1995, the Military Prosecutor’s Office issued an accusation against the alleged victim for the offense against the duty and dignity of the service, abuse of authority and negligence, contemplated in Articles 200(2), 180(8) and 238 of the Military Code of Justice.⁷⁹ There are no records that this accusation was notified to the alleged victim.

73. On December 4, 1995, the President of the Permanent War Council appointed a defense counsel for the alleged victim,⁸⁰ who presented his pleadings in the brief of December 18, 1995, requesting the acquittal of the alleged victim.⁸¹

⁷⁴ Cf. Discovery statement of Jorge Rosadio Villavicencio before the Permanent Military Judge of June 20, 1995 (evidence file, folio 90).

⁷⁵ Cf. Discovery statement of Jorge Enrique Rosadio Villavicencio before the Criminal Judge of July 27, 1995 (evidence file, folios 92 to 95). He indicated that he was assigned to perform a special intelligence mission at the Counter-subversive base of Sión, which consisted of “infiltrating and presenting himself as a corrupt officer before the drug traffickers in order to earn their trust.” He also indicated that during his time working at Sión, he authorized three drug-trafficking flights, and the money received from those operations he distributed as follows: “the deponent, two thousand dollars; Technician [DG], one thousand five hundred dollars; Sub Officer [RA] one thousand dollars; Sargent [JJ], one hundred and ten dollars; Sargent, [PG], one hundred and ten dollars, and forty dollars to each member of the troop, approximately fifty-four; the drug trafficker known as ‘Cincuenta’, one thousand dollars.” Furthermore, he observed the type of arms held by the drug traffickers, the number of personnel and the time that it took to load the drugs. He also added that the orders were given by Colonel [M] verbally, “since there was no written operation plan and intelligence operations are normally given verbally to prevent betrayals, adding that the plan consisted in him earning the trust of the drug traffickers so as to subsequently “capture aircraft, drugs, drug traffickers, arms, radio equipment, materials and other,” locating radio stations and the drug traffickers’ hideouts.

⁷⁶ Cf. Definitive detention order issued by the Permanent Military Judge of August 9, 1995 (evidence file, folio 407).

⁷⁷ Cf. Report of October 14, 1995 (evidence file, folios 97 to 100).

⁷⁸ Cf. Report of October 14, 1995 (evidence file, folios 97 to 100).

⁷⁹ Cf. Accusation of the Military Prosecutor’s Office against Jorge Rosadio Villavicencio et al., October 17, 1995 (evidence file of the IACHR, folios 102 to 109).

⁸⁰ Cf. Ruling of the President of the Permanent War Council of the Fifth Judicial Military Region of December 4, 1995, whereby he enforced a warning of appointment of the public defender (evidence file, folio 111).

⁸¹ He claimed that the defendant recognized having authorized three drug-trafficking flights and dividing the money from those flights as ordered by Colonel [M], for which he created and presented a report. He indicated that “he is being judged because he allegedly misappropriated more money than what was reported, without there being any evidence.” Cf. Pleadings of December 18, 1995, made by the defense counsel in favor of Rosadio Villavicencio (evidence file, folios 113 to 114).

74. On November 29, 1996, a public hearing was held in this case before the Permanent War Council of the Sixth Judicial Military Area regarding the "offense against the duty and dignity of the service, with the aggravating circumstances of falsehood, negligence and abuse of authority." The hearing was regarding the alleged victim and two other persons, and the appointed defense counsel was present, the Captain of the Army's Legal Services [FMC].⁸² There is no evidence on record that the alleged victim was notified of the date on which the hearing would be held.

75. That same day, November 29, 1996, the Permanent War Council convicted the alleged victim to 16 months of prison for the crime of negligence. It considered that Mr. Rosadio Villavicencio "acted negligently, failing to complete the mission assigned to him, losing control over his personnel, particularly the troops, and failing to timely report to the Command the activities that he was performing [...]."

76. On September 16, 1997, the Supreme Council of Military Justice issued a ruling on the appeal; it annulled the judgment and recommended to the corresponding body that when issuing the new judgment it should take into account that "Rosadio Villavicencio committed the crime of failure to obey a lawful order" and "admonished the members of the lower court [...] for failing to comply with their authority, as required by law."⁸³

77. On December 5, 1997, the President of the Permanent War Council of the Sixth Judicial Military Area decided to set a new date for the public hearing of the accused regarding the offense against the duty and dignity of the service and corresponding aggravating circumstances.⁸⁴ He also indicated that the prosecutor, the accused, their legal counsel and the Solicitor General would be summoned to the hearings chamber of the "San Cristobal" detention center in Moyobamba, although there are no records that the accused and their legal counsel were notified.

78. On December 15, 1997, a new public hearing was held in the processing of the alleged victim and two other persons, to which only the alleged victim appeared. The appointed defense counsel that appeared was once again Mr. [FMC]. At that hearing, the Permanent War Council of the Sixth Judicial Military Area read a judgment whereby it sentenced the alleged victim to 28 months of prison for the crime of failure to obey a lawful order and to the payment of civil damages to the State.⁸⁵ In the judgment, the members of the Council determined that Mr. Rosadio Villavicencio:

[...] acted negligently, failing to complete the mission assigned to him, losing control over his personnel, particularly the troops, and failing to timely report to the Command the activities that he was performing [...]; the accused [...] is serving the definitive detention order since August 9, 1995, [and...] has no criminal record other than that derived from these proceedings [...]. [T]he facts committed by the intelligence lieutenant [...] fall within the crime of illicit drug trafficking, which is being heard in proceedings at the Specialized Criminal Court of Juanjuí, especially as regards to the drug-trafficking flights, and these facts were inadequately classified in the order for the trial to commence as [...] offense against the duty and dignity of the service, with the aggravating circumstances of falsehood, negligence and abuse of authority; therefore, in conformity with that set forth in subsection e) of Article 616 of the Code of Military Justice, with the adequate classification of the facts, these constitute the crime of failure to obey a lawful order, which is contemplated and penalized by Article 159 of the Code of Military Justice, due to non-compliance with the instructions given by the Command to the military personnel that provided services in those emergency areas.⁸⁶

⁸² Cf. Minutes of the Public Hearing of November 29, 1996, regarding Jorge Rosadio Villavicencio et al. (evidence file, folio 116).

⁸³ Cf. Order of the First Chamber of the Supreme Council of Military Justice of September 16, 1997, which annulled the judgment of the Permanent War Council of the Sixth Judicial Military Area (evidence file, folios 132 and 133).

⁸⁴ Cf. Decision of the Permanent War Council of the Sixth Judicial Military Area of December 5, 1997, which set a new date for the hearing (evidence file, folio 3074).

⁸⁵ Cf. Minutes of the hearing of December 15, 1997, regarding Jorge Rosadio Villavicencio et al. (evidence file, folios 135 to 139).

⁸⁶ Cf. Judgment No. 025-97 of the Permanent War Council of the Sixth Judicial Military Area of December 15, 1997 (evidence file, folios 143 to 146).

79. At the end of the hearing, the accused Jorge Rosadio Villavicencio and the military prosecutor indicated that they appealed the decision.⁸⁷

80. On June 30, 1998, the Supreme Council of Military Justice upheld the sentencing decision of the Permanent War Council of the Sixth Judicial Military Area, and convicted the victim to "TWENTY-EIGHT MONTHS OF EFFECTIVE PRISON, which discounting the detention already served ended on December 8, 1997." It added that "the sentence imposed on the accused, ROSADIO VILLAVICENCIO, for the crime of failure to obey a lawful order, corresponds to the adequate classification of the facts; and it ACQUITTED the intelligence lieutenant of the Army of Peru Jorge ROSADIO VILLAVICENCIO, of the offenses against the duty and dignity of the service, falsehood, negligence and abuse of authority."⁸⁸

⁸⁷ Cf. Minutes of the hearing of December 15, 1997, regarding Jorge Rosadio Villavicencio et al. (evidence file, folios 135 to 139).

⁸⁸ Cf. Order of the First Chamber of the Supreme Council of Military Justice of June 30, 1998, which confirmed the judgment of December 15, 1997 (evidence file, folios 149 and 150).

VIII MERITS

81. This case relates to the alleged international responsibility of the State for the alleged violation of due process in the three proceedings against Jorge Rosadio Villavicencio: military disciplinary, ordinary criminal and military criminal proceedings, regarding his participation in an intelligence operation. Among other violations, the State allegedly infringed the principle of *ne bis in idem*, given that two convictions were issued with penalties of the same nature (in the military criminal and ordinary criminal jurisdictions) based on the same facts. Furthermore, the State of Peru allegedly violated the right to personal liberty due to the preventive detention that he was subject to, as well as the right to an effective remedy to question the deprivation of liberty. The Court will now analyze the pleadings regarding merits of the parties in the following order: (i) the alleged violation of the principle of *ne bis in idem* regarding the two proceedings against the alleged victim; (ii) the alleged violation of the right to receive prior notification in detail of the accusation, the right to defend himself and the right to be informed of the reasons for his detention, regarding the three proceedings against Mr. Rosadio Villavicencio; (iii) other violations of the right to judicial guarantees (right to a fair trial) in each of the three proceedings; and (iv) the alleged violation of the right to personal liberty.

VIII.1

PRINCIPLE OF *NE BIS IN IDEM* REGARDING THE PROCEEDINGS AGAINST THE ALLEGED VICTIM (Article 8(4) of the Convention in relation to Article 1(1) thereof)

A. Arguments of the Commission and the parties

82. The **Commission** claimed that the State violated Article 8(4) of the Convention to the detriment of Mr. Rosadio Villavicencio because he was convicted in two final judgments, one in the ordinary jurisdiction for 15 years of prison and another in the military jurisdiction for 28 months of prison. In addition, it claimed that these penalties were of the same nature and based on the same facts. According to the Commission, the double jeopardy and conviction can be confirmed with the reasons for the judgment in the criminal military jurisdiction; although Mr. Rosadio Villavicencio was convicted of the crime of failure to obey a lawful order, there was no autonomous analysis to determine that crime; it was based on that the facts fell within the crime of illicit drug trafficking that was being heard in the ordinary jurisdiction.

83. Regarding the correlation between the administrative disciplinary sanction imposed and the criminal penalties mentioned, the Commission observed that the authorities did not clearly define the disciplinary reasons for the investigation of the alleged victim, and the Investigative Council did not clearly define the facts that corresponded to each of the grounds invoked. It considered that the State combined criminal offenses with disciplinary offenses, meaning that it imposed two different penalties based on the same legal grounds, subject matter and parties.

84. The **representative** agreed with that indicated by the Commission.

85. The **State** indicated that in order for there to be a violation of Article 8(4) of the American Convention: (i) the accused must have been previously acquitted, (ii) the acquittal must be by a non-appealable judgment; and (iii) the new trial must be based on the same facts that substantiated the first trial.⁸⁹ However, in the dispute at hand none of these requirements are met, given that the judgments issued in both criminal jurisdictions were convictions. Furthermore, the condition that one of the criminal proceedings in the domestic jurisdiction must have concluded

⁸⁹ It claimed that the wishes of the States who ratified the Convention and the very text of that document would be highly affected if the Court intended, at this time, to introduce a new modality of violation of Article 8(4) of the Convention that is not contemplated in that provision and that the Court itself has not considered in the development of its jurisprudence.

and the other initiated afterwards is not met either, since the proceedings took place at the same time.

86. Moreover, it indicated that although it is true that the facts for which the alleged victim was punished in the criminal proceedings against him are somewhat related, it is not possible to state that the same fact served as grounds to impose the penalties on Mr. Rosadio Villavicencio. The alleged victim was penalized in the ordinary jurisdiction for the crime of illicit drug trafficking for having authorized a second and third flight. In the military criminal proceedings, the alleged victim was penalized for the crime of failure to obey a lawful order due to noncompliance with the instructions issued by the Command. Lastly, it claimed that the military criminal proceedings were carried out based on grounds different from the ordinary criminal proceedings, not only due to the status of the defendants penalized in the former, but also the type of facts heard, which solely and exclusively affect the military and police sphere. Based on the foregoing, the State requests the Court to declare that it did not violate Article 8(4) of the Convention.

A. Considerations of the Court

87. In this chapter, the main question addressed is whether the State is responsible for the violation of Article 8(4) of the Convention, given that it allegedly incurred in *ne bis in idem* by having prosecuted and penalized the victim in two criminal proceedings that resulted in convictions, one in the military jurisdiction and another in the ordinary jurisdiction, as well as having subjected him to military disciplinary proceedings, all based on the same factual background.

88. It is worth noting that, before this **Court**, there has been no previous supposition claiming that the State violated the principle of *ne bis in idem* or Article 8(4) of the Convention where, after a conviction, the alleged victim was processed and penalized once again for the same acts. Therefore, the scope of Article 8(4) of the Convention must be considered so as to determine whether it encompasses this supposition.

89. It is possible for the wording of Article 8(4) of the Convention to raise doubts about the scope of the principle of *ne bis in idem*, given that a merely exegetical understanding is limited to the case where a person is judged for the same fact from which he or she was previously acquitted, so in a literal sense the instant case would not be covered by that principle since it concerns the same fact for which the person had been convicted. This circumstance requires an analysis and adequate interpretation of Article 8(4), especially its nature, in relation to the particulars of this case. It is worth noting that the exegetical or literal method of interpretation of legal texts, according to the doctrine and widely published case law, must be balanced with other methods of interpretation included in the Vienna Convention on the Law of Treaties and other international human rights treaties. In this regard, it is important to understand that the guarantees included in Article 8 on the one hand constitute a human right enshrined in the Convention and, on the other hand, are not restrictive, so it shall be interpreted that its text encompasses everything necessary to achieve the guarantees related to substantive criminal law and other applicable international laws.

90. In Article 29(b) of the Convention, the Court notes that “[n]o provision of this Convention shall be interpreted as: [...] b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any of State Party or by virtue of any other convention to which one of the said States is a party [...].” In this regard, Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR) establishes that “[n]o one shall be liable to be tried or punished again for an offense for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”⁹⁰ According to the ICCPR, *ne bis*

⁹⁰ The Human Rights Committee has issued 35 general comments (the last in 2014), which have included the content of the ICCPR and the scope of various principles applicable to the administration of justice, including the principle

in idem contains a procedural guarantee (no one shall be tried) and also a substantive guarantee of criminal law (also called “the merits”), which is expressed with the addition of “or punished.”

91. Without detriment to the above, if we were to understand the Convention to contain only the procedural guarantee and not the substantive guarantee –as would follow from a literal interpretation– then it would allow States to impose multiple penalties for the same fact, which is not permitted by any criminal law in effect in any of the States Parties or, according to the ICCPR, in the Universal Human Rights System. It is worth mentioning that Peru signed the ICCPR on August 11, 1977, and ratified it on April 28, 1978.⁹¹

92. Article 8(4) of the Convention is part of the section “Right to a Fair Trial,” meaning that it clearly refers to a procedural guarantee. Criminal procedural law (also known as “criminal procedure”) is different from criminal law (also called “substantive criminal law”) due to the different nature of their sanctions: the violation of criminal procedure would result in an annulment, while the violation of criminal law would entail a penalty. Therefore, its provisions must contribute to substantive criminal law.⁹² “Criminal law solely determines the penalty applicable in each case and its requirements; criminal procedure defines the human activities that must be carried out to impose that penalty”; therefore, “criminal procedure is inconceivable without criminal law.”⁹³

93. Based on the foregoing, the “judicial” guarantee that prohibits *ne bis in idem*, due to its procedural nature, should be understood as a means to materialize substantive criminal law. Consequently, as limited as the text may be, it cannot be interpreted in a sense contrary to all criminal laws of the States Parties and the dominant global doctrine and case law or as opposed to the main instrument of the Universal Human Rights System and the rational understanding of law, whereby only one penalty may be imposed for one crime, while two or more penalties may be imposed for two or more crimes. Since any other understanding is inadmissible, the definitive conclusion is that regardless of the interpretation given to Article 8(4) of the Convention, even admitting *ad demonstratorem* that it omits the substantive criminal law aspect of that guarantee, it can never be interpreted that the Convention disregards the prohibition of *ne bis in idem*.

94. Otherwise, it would allow for a person to be punished for a crime and, having already served the punishment, be tried and punished again for the same crime, which would result in an unending chain of convictions interrupted only by the statute of limitations. A procedural provision, as limited as it may be, can never permit a solution contrary to substantive criminal law, simply because the goal of criminal procedure is to implement substantive criminal law, not to distort it in any way by permitting abnormal solutions, including to the key principle of *ne bis in idem*. Therefore, the only interpretation of Article 8(4) of the Convention that prevents this consequence is that the principle of substantive criminal law that prohibits the imposition of multiple punishments for the same offense is implicit in that instrument.

of *ne bis in idem*. In General Comment No. 13 of 1984, the Committee noted that “in examining State reports, different views have often been expressed as to the scope of paragraph 7 of Article 14. Some States parties have even felt the need to make reservations in relation to procedures for the resumption of criminal cases. It seems to the Committee that most States parties make a clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of *ne bis in idem* as contained in paragraph 7.” Thus, the Committee considered that “[t]his understanding of the meaning of *ne bis in idem* may encourage States parties to reconsider their reservations to Article 14, paragraph 7.” In General Comment No. 32 of 2007, the Committee set forth that paragraph 7 of Article 14 of the Covenant “embodies the principle of *ne bis in idem*. This provision prohibits bringing a person, once convicted or acquitted of a certain offence, either before the same court again or before another tribunal again for the same offence; thus, for instance, someone acquitted by a civilian court cannot be tried again for the same offence by a military or special tribunal.” The Committee considers that “Article 14, paragraph 7 does not prohibit retrial of a person convicted *in absentia* who requests it, but applies to the second conviction.”

⁹¹ This information is available on the United Nations website, at the following link:

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en#EndDec

⁹² Cf. Claus Roxin, *Derecho Procesal Penal* (Ediciones del Puerto, Buenos Aires, 2000), p. 1.

⁹³ Cf. Ernst Beling, *Derecho Procesal Penal* (Labor, Barcelona, 1945), p. 6.

95. It is therefore clear that, according to a dogmatic interpretation of the Convention whereby it is inadmissible to understand any of its provisions as contrary to the Universal Human Rights System or any of the criminal laws of the countries in the region, Article 8(4) of the Convention must be understood to strictly prohibit multiple punishments for a single crime. Consequently, it is important to determine in this case whether the penalty imposed on the victim in the ordinary criminal jurisdiction and that imposed in the military criminal jurisdiction refer to the same crime or to two separate crimes. In this regard –although it was not claimed by the parties– it is worth noting that some doctrine has considered the military criminal jurisdiction to be of an “administrative” nature, argument that is dismissed *ab initio* in the instant case due to the clear criminal nature of the penalty imposed on the alleged victim.

96. It can be inferred from Article 9 of the Convention that crimes cannot be other than “acts or omissions”; therefore, what the Convention prohibits is that a person who was acquitted or convicted for an act or omission be penalized once again for the same act or omission. This necessarily requires determining whether the alleged victim incurred in one or two acts.

97. The criminal laws of Peru in fact raise this question; Article 48 of the Criminal Code of Peru states that: “[w]hen several provisions are applicable to the same fact, the greater penalty will be applied for up to the maximum amount, and it can be increased up to one fourth [...]”. This is the concept of “ideal concurrence,” in which a punishment –according to the law– is regulated by the “principle of absorption” (the greater penalty absorbs the lesser one), or, as in Peruvian law, by “aggravation of punishment” (the greater penalty is increased to a certain extent, making it graver), solutions that, with slight variations, are reiterated in all criminal codes. The Criminal Code of Peru, as that of other State Parties and the global criminal codes in general, requires answering that question in order to distinguish between an “ideal concurrence” (one act, a single offense, one penalty) from “real concurrence” (two or more acts, two or more independent offenses; hence, two or more penalties). Although the codes differ with regard to the applicable penalties, there is a governing principle that one act can only give rise to one offense and, therefore, only one punishment, whereas multiple acts give rise multiple offenses and thus multiple punishments, which can be accumulated or joined, according to the different legal solutions, which are not worth delving into at this time.

98. A single act requires as a minimum that there be a single decision of intent, which is necessary, but not sufficient, to determine whether it constitutes a single act. Evidently, when there is a single movement it is not possible to consider the existence of multiple acts; however, in general, a single act encompasses multiple movements. In that case, a single intent must be present.

99. In this case it is not necessary to consider all possible doctrinal difficulties when determining the existence of a single act; it is sufficient to point out that when there are multiple legal classifications this does not multiply the acts. Rather, we are dealing with the hypothesis of a single crime (a single act) with multiple legal classifications, or a clear case of “ideal concurrence” in which there is a plurality of applicable criminal code provisions to a single act.

100. It is quite clear in this case that the two convictions have the same factual background, meaning that they refer to the same act of which the alleged victim was accused. In fact, the Permanent War Council of the Sixth Judicial Military Area, in its judgment of December 15, 1997,⁹⁴ in which it decided to convict Mr. Rosadio Villavicencio for the crime of failure to obey a lawful order in the military criminal jurisdiction, the act that constituted the offense was the same act for which he was convicted in the ordinary jurisdiction. This is because in the judgment the Permanent War Council, after reiterating the proven facts, mentions in its sole considering paragraph that “[...] the facts committed by intelligence lieutenant ROSADIO VILLAVICENCIO

⁹⁴ Judgment No. 025-97, Case No. 1594-0648, of December 15, 1997 (evidence file, folio 143).

Jorge, fall within the crime of illicit drug trafficking, which is being heard in proceedings at the Specialized Criminal Court of Juanjuí, especially as regards to the drug-trafficking flights [...].⁹⁵ It then indicated that the acts committed by Rosadio Villavicencio constituted the crime of failure to obey a lawful order “[...] due to non-compliance with the instructions given by the Command to the military personnel that provided services in those emergency areas [...]”.⁹⁶ Notwithstanding the foregoing, non-compliance with those instructions precisely consisted of authorizing the flights to transport drugs. This demonstrates that the insubordination corresponded in substance with the fact that was being investigated in the ordinary jurisdiction, which falls under the ordinary legal classification of illicit drug trafficking.

101. The Court notes that when the same act or behavior is prohibited by of two or more rules underlying legal classifications it continues to be a single act, since all acts are human behaviors and a single offense must receive a single penalty. This is precisely what occurs in this case, a single act attributed to Mr. Rosadio Villavicencio, the authorization of drug-trafficking flights, falls into two different legal classifications: failure to obey a lawful order and illegal drug trafficking. Typically, a twofold classification of the same facts presumes that two different offenses were committed, which can in turn be sanctioned with two different penalties; this starts from the flawed assumption that there are two different acts, which would enable the multiple and unending chain of punishments that is prohibited by substantive criminal law, due to the splitting of the same facts into as many crimes as there are applicable legal classifications.

102. Though redundant, it is worth noting that for purposes of determining whether there was a single act, it is inconsequential that different juridical rights were infringed, precisely because offenses do not multiply the acts. In this case, the existence of a single act is a reality that cannot be denied by any legal interpretation. There are multiple examples of ideal concurrence in which the legal classifications that overlap in a single act require the infringement of different juridical rights: it is common for courts to decide on cases where there is an ideal concurrence of theft with physical violence and injuries, damages to property and physical integrity, but this does not permit splitting what ontically constitutes a single act, with a single decision of intent and sometimes even a single movement (the thief pulls on a handbag, which makes the victim lose balance, fall and injure him or herself).

103. It is worth reiterating that dividing up the offenses to match the number of overlapping legal classifications disregards the reality of the physical world, since it splits up a single act with several legal classifications into as many acts as there are possible legal classifications. This “law,” by ignoring the necessary ontic basis that links it to the real world, would attribute to itself the power to create an inexistent reality, thus agreeing with the philosopher Antisthenes, who claimed that “a white racehorse is in fact two horses,” to which Plato fittingly responded: “it still is one horse.”⁹⁷ Pursuant to the Convention, dividing up a single act, or seeking to punish as many offenses as there are possible legal classifications, is incompatible with the requirement of “acts or omissions” set forth in Article 9 of the Convention.

104. It is worth noting that, apart from the reasons provided above, the requirement established in Article 9 is a clear rejection of all substantive criminal law with strong authoritarian tendencies. In fact, considering that there are as many crimes as there are infringed laws would mean punishing according to the number of breached mandates; that is, it would obey the number of “failures to obey a lawful order” and not the unlawful acts of its inhabitants, because crimes would not be actions but failures to comply with State mandates. This is the method whereby –in more authoritarian and totalitarian versions of substantive criminal law– the requirement of infringement of a juridical right is suppressed, since the “failure to obey a lawful order” of State mandates takes precedence. This does not preclude an act from having multiple legal

⁹⁵ Judgment No. 025-97, Case No. 1594-0648, of December 15, 1997 (evidence file, folio 146).

⁹⁶ Judgment No. 025-97, Case No. 1594-0648, of December 15, 1997 (evidence file, folio 146).

⁹⁷ N. Abbagnano. *Historia de la filosofía* (Montaner y Simón, Barcelona, 1973), Vol. I, p. 68.

classifications, such as in this case in the ordinary criminal law and in military criminal law; rather, the legal system of each State must decide the question of jurisdiction in a manner that prevents the splitting up of a single fact.

105. In sum, what violates the American Convention is imposing multiple punishments for the same act or omission, given that the judicial guarantee presumes that a single act or omission shall not be subject to multiple proceedings.

106. Based on the foregoing, the Court concludes that the State is internationally responsible for the violation of Article 8(4) of the Convention in relation to the ordinary criminal proceedings and the military criminal proceedings.

B.1. Criminal proceedings and military disciplinary proceedings

107. Regarding the criminal penalties mentioned and the administrative disciplinary sanction imposed, the Commission and the representative claimed that the authorities did not clearly define the facts and disciplinary reasons for the investigation of the alleged victim and that the Investigative Council for Junior Officers failed to clearly define the facts that corresponded to each of the grounds invoked. According to the Commission, the facts referred to in these proceedings are the same as those discussed in the ordinary and military criminal proceedings. Moreover, the State did not present its arguments regarding the difference between the crime of failure to obey a lawful order and that legal concept as a disciplinary offense, or the distinction between the crime of illicit drug trafficking and that legal concept in the disciplinary jurisdiction. Therefore, the State combined criminal offenses with disciplinary offenses, meaning that it imposed two different penalties based on the same legal grounds, subject matter and parties, in violation of Article 8(4) of the Convention.

108. Firstly, the Court considers that the Commission's claim that the State's judicial and military-administrative authorities failed to clarify the grounds for their decisions must be analyzed in relation to right to adequate grounds, which will be addressed in chapter VIII.3 *infra*.

109. Secondly, the purpose of this chapter is to determine whether the State violated the principle of *ne bis in idem* by carrying out military disciplinary proceedings and two criminal proceedings (ordinary and military) against the same party, based on the same legal grounds and in relation to the same subject matter or protected juridical rights. It is an undisputed fact that in both criminal proceedings and in the disciplinary proceedings the person tried and punished was Jorge Enrique Rosadio Villavicencio. Therefore, the analysis required is whether the facts (grounds) and subject matter of the aforementioned proceedings are the same.

B.1.1 Ordinary criminal proceedings and military disciplinary proceedings

110. Regarding the identity of the facts, it has been confirmed that the same factual background was used in the ordinary criminal proceedings and disciplinary proceedings. In fact, in the disciplinary proceedings, the order of March 3, 1995, issued by the Army General Command, decided to retire the alleged victim "[pursuant to] that proposed by the Division General of the Army General Command."⁹⁸ In the Minutes of the Investigative Council for Junior Officers of February 7, 1995, signed by the presidency of the Division General,⁹⁹ the following facts were considered proven in relation to then Lieutenant Rosadio Villavicencio:

[...] he authorized three illegal drug-trafficking flights (on August 17, 24 and 31, 1994), but reported only the last flight (August 31, 1994) to the Command position of the Leoncio Prado Detachment;

[...] he permitted the installation and operation of a laboratory to prepare basic cocaine paste at the Sión location, and

⁹⁸ Order of the Army General Command, No. 0527 CP/EP/CP-JAPE 1d (evidence file, folio 82).

⁹⁹ Minutes of the Investigative Council for Junior Officers, Session No. 007-95 (evidence file, folio 55).

[...] he obtained personal economic benefits from the authorization of drug-trafficking flights and the installation and operation of a lab.

111. Moreover, in the ordinary criminal jurisdiction, the Mixed Chamber of the Superior Court of San Martín, as per the order of April 17, 1996, whereby it convicted Mr. Rosadio Villavicencio for the crime of illicit drug trafficking,¹⁰⁰ considered the following to be proven facts:

[...] the accused [...] was given instructions by his superiors to carry out an intelligence mission in the Sión area, which consisted of infiltrating the drug trafficking circles by pretending to be a corrupt officer, to find out who the bosses were, how they operated, the number of people involved and amount of arms that they had, etc. He was to allow one flight transporting drugs and subsequently intervene, with the soldiers, junior officers and officers under this command, to seize an aircraft loaded with drugs, money and capture the people involved, as part of the "Limpieza 94" operative, for which he began working on August 5, 1994, replacing Captain Cusicanqui;

[...] that, in his statement before the Interim Deputy District Attorney of Tarapoto [...] he stated that the first and only flight with drugs from Sión to Colombia authorized by his Command took place on [August 17, 1994] and in his position as Chief of the Sión Base, contrary to that authorized by his hierarchical superiors, he permitted a second and third flight with drugs destined abroad, and

[...] that Lt. Rosadio Villavicencio, instead of remitting the money from those flights to his commander as money seized along with a report, divided it among his personnel [...] and kept a significant amount in US dollars, which he sent to his mother, to the Interbank account in her name.

112. As can be inferred from the considering paragraphs transcribed above, both the Mixed Chamber of the Superior Court of San Martín in the ordinary criminal jurisdiction and the Investigative Council in the disciplinary proceedings noted in their findings essentially the same behavior or facts, concluding that Mr. Rosadio Villavicencio had incurred in the crimes or misconduct that he was accused of in each of the proceedings.

113. Without detriment to the above -that is, the identity of the facts- the question in this case is whether the same facts that are penalized as a crime can be subject to sanctions in another juridical branch, in this case disciplinary law.

114. In principle, a criminal penalty does not exclude the possibility that the same facts or conduct be sanctioned by applying the laws of another juridical branch; for example, the possibility of reparation in the civil jurisdiction is clearly not excluded, given that the penalty and civil reparation have different goals and liability is determined in each branch according to its principles. The same occurs with political sanctions that remove from office a person subject to a political trial, these do not preclude a possible penalty in the criminal jurisdiction and reparation in the civil jurisdiction.

115. In the instant case it is necessary to determine whether the criminal penalty and the administrative sanction have the same goal and identical principles to determine liability. However, this question does not require much analysis, since it is common legal knowledge that a sanction in disciplinary law has the goal of preserving the internal order of an institution, meaning that it is reserved to its *intraneus* so as to maintain discipline among them, even excluding a person from the institution because their behavior is considered incompatible with that order. It is evident that the goal of the administrative sanction has nothing to do with the goal of criminal law, to the extent that even if the behavior of the alleged victim did not have a criminal classification, it would not have impeded the feasibility of the administrative sanction, which, because of its goal and nature different from criminal law, responds to separate liability criteria.

¹⁰⁰ File No. 357/995 (evidence file, folio 335).

116. Therefore, since the sanctions do not seek the same goal, the Court considers that the State did not violate the principle of *ne bis in idem* established in Article 8(4) of the Convention in relation to the ordinary criminal proceedings and the military disciplinary proceedings.

B.1.2 Military criminal proceedings and military disciplinary proceedings

117. Lastly, regarding the possible violation of the principle of *ne bis in idem* due to the opening of the military criminal proceedings and the military disciplinary proceedings, the Court considers that both were based on the same facts, as inferred from the comparison of that included in the order of the General Army Command and the Minutes of the Investigative Council for Junior Officers in the disciplinary proceedings, cited above, and the judgment of the Permanent War Council of the Sixth Judicial Military Area of December 15, 1997,¹⁰¹ which convicted Rosadio Villavicencio for the crime of failure to obey a lawful order in the military criminal jurisdiction.

118. Regarding these two proceedings, since the penalty imposed in the conviction of the military criminal proceedings is of a criminal nature and that of the disciplinary proceedings is of an administrative nature, the same considerations of the Court regarding the conviction in the ordinary criminal jurisdiction are applicable.

119. Consequently, in relation to the proceedings in the military criminal jurisdiction and the administrative disciplinary jurisdiction, there was no violation of Article 8(4) of the American Convention.

B. Conclusion

120. In the instant case, the Court concludes that the State of Peru is responsible for the violation of the principle of *ne bis in idem* enshrined in Article 8(4) of the Convention to the detriment of Mr. Rosadio Villavicencio with regard to the ordinary criminal proceedings and the military criminal proceedings. The State of Peru did not violate the principle of *ne bis in idem* enshrined in Article 8(4) of the Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Rosadio Villavicencio with regard to the disciplinary proceedings and the ordinary criminal and military criminal proceedings.

VIII.2

RIGHT TO RECEIVE PRIOR NOTIFICATION IN DETAIL OF THE CHARGES AGAINST HIM, RIGHT TO DEFEND ONESELF AND RIGHT TO BE INFORMED OF THE REASONS FOR DETENTION (ARTICLES 1(1), 8(2)(b) AND 8(2)(c) OF THE AMERICAN CONVENTION) IN THE THREE PROCEEDINGS

121. Since the Commission and the representative claimed the lack of prior notification in detail of the charges against Mr. Rosadio Villavicencio in each of the three proceedings, the Court will now analyze the alleged violations jointly.

A. Arguments of the Commission and the parties

122. The **Commission** indicated that, in relation to the investigation by the Inspectorate of the Leoncio Prado Detachment, there is no evidence in the file that the alleged victim, at the time of his first statement on September 15, 1994, had been previously notified of the facts and grounds for investigation; it was until September 25, 1994, that said officer was informed that he had been accused of ordinary and military crimes. Moreover, the communication of September 25, 1994, does not include the disciplinary grounds under investigation. Regarding the military criminal proceedings, the Commission indicated that Mr. Rosadio Villavicencio was not notified of the accusation dated October 17, 1995, by the Military Prosecutor's Office regarding the offense against the duty and dignity of the service, abuse of authority and negligence. Based on the

¹⁰¹ Judgment of the Permanent War Council of the Sixth Judicial Military Area, of December 15, 1997 (evidence file, folio 143).

foregoing, the Commission concluded that the State violated the right to defend oneself enshrined in Article 8(2)(b) and 8(2)(c) of the American Convention, in relation to the obligation to guarantee rights established in Article 1(1) thereof, to the detriment of Mr. Rosadio Villavicencio.

123. The **representative** agreed with the Commission. However, it added that Mr. Rosadio Villavicencio was not notified of the charges before his first statement of September 15, 1994, in the ordinary criminal proceedings.

124. The **State** claimed, in relation to the investigation by the Inspectorate, that in the process before the Commission it was able to evidence, by presenting documentation, that the allegedly omitted notifications were in fact performed. Furthermore, it requested the Court to take into consideration the repeated lack of accuracy by the other party, which makes it hard to obtain documents that are over 20 years old. Regarding the military criminal proceedings, the State indicated that contrary to that expressed by the representative regarding the "lack of notification of procedural documents," they were in fact correctly notified, and that the representative was insincere and unclear when expressing his arguments, which should be considered by the Court in view of the alleged failure to notify the accusation dated October 17, 1995. In this regard, it indicated that the notification of the aforementioned accusation was ordered; however, since the military criminal proceedings took place over 20 years ago, it was unable to obtain it, but it would be reasonable to presume that it was performed.

B. Considerations of the Court

125. This **Court** has indicated that the application of the guarantees contained in Article 8 of the American Convention, although titled "Judicial Guarantees," is not strictly limited to judicial remedies, but rather to the series of requirements that should be observed in procedural instances to ensure that the individual is able to defend his rights adequately concerning any type of act by the State that could infringe them. In other words, any act or omission of the State organs in the course of proceedings, whether these are punitive administrative, disciplinary, or jurisdictional, must respect due process of law.¹⁰² In each case it is important to determine the minimum guarantees for the specific non-criminal punitive proceedings, according to their nature and scope.¹⁰³

126. Concerning the punitive nature of the proceedings that retired Mr. Rosadio Villavicencio, since retirement is established as a disciplinary measure in conformity with Articles 55 and 61 of the Law on the Military Status of Army, Navy and Air Force Officers,¹⁰⁴ based on offenses against honor, decorum, moral and military duties, specifically the offense against the duty and dignity of the service, falsehood, negligence, offense against the administration of justice, failure to obey a lawful order, abuse of authority and illicit drug trafficking,¹⁰⁵ the Court considers that the procedural guarantees contemplated in Article 8 of the American Convention, including some of those listed in Article 8(2), are part of the minimum guarantees that should be respected in order to adopt a decision that is not arbitrary and that conforms to due process. Therefore, the guarantees mentioned should have been applied *mutatis mutandis* to the disciplinary proceedings in this case, considering their punitive juridical nature and consequences.

127. In this regard, Article 8(2)(b) of the Convention establishes that "[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to

¹⁰² Cf. *Case of the Constitutional Court v. Peru. Merits, Reparations and Costs*. Judgment of January 31, 2001. Series C No. 71, para. 69, and *Case of Flor Freire v. Ecuador*. Preliminary Objection, Merits, Reparations and Costs. Judgment of August 31, 2016. Series C No. 315, para. 164.

¹⁰³ Cf. *Case of Maldonado Ordóñez v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of May 3, 2016, para. 75.

¹⁰⁴ Cf. Law on the Military Status of Army, Navy and Air Force Officers (evidence file, folios 3900-3920) and Order of the Army General Command, March 3, 1995 (evidence file, folios 82 and 83).

¹⁰⁵ Cf. Minutes of the Investigative Council for Junior Officers (evidence file, folio 57).

the following minimum guarantees: [...] b. prior notification in detail to the accused of the charges against him.” This precept orders the competent authorities to inform the accused of the accusation made against him, providing a clear, detailed and specific description of the facts, the grounds for the accusation and the crimes or offenses that he is accused of, prior to the proceedings.

128. Even though the contents of the notification will vary according to the stage of the investigation and the nature of the proceedings, as a minimum, the accused must be provided with, in as much detail as possible, the charges against him; this information will be most complete when the final charges are officially filed.¹⁰⁶ The Court has established that, before giving the first statement, the accused must have been officially informed of the facts for which he is being prosecuted, and not to infer them from the questions asked.¹⁰⁷ The Court also notes that this State obligation acquires greater relevance in criminal cases and when the accused is subject to deprivation of liberty, as in the instant case.¹⁰⁸

B.1. Regarding the investigation by the Inspectorate of the Leoncio Prado Detachment and the ordinary criminal proceedings

129. First, the Court clarifies that, contrary to that indicated by the Commission, the first statement given by the alleged victim before the Inspectorate of the Leoncio Prado Detachment took place on September 5, 1994, as part of the military disciplinary proceedings, the same date on which he was detained (*supra* para. 43). On September 15, 1994, Mr. Jorge Enrique Rosadio Villavicencio gave his statement before the Examining Judge of the National Police of Peru, in the ordinary criminal proceedings.

130. In the instant case, the Commission and the representative claimed that Mr. Rosadio Villavicencio was never notified of the accusations against him, while the State claimed that it was already proven in the process before the Commission that he was notified at the beginning of the investigation. The burden of proof of the notification or prior communication of the charges to the alleged victim falls on the State, who is in the best procedural position to provide such evidence. However, the State did not provide any evidence that demonstrates that Mr. Rosadio Villavicencio was notified of the accusation prior to his first statement or of the reasons for his detention on September 5, 1994, even though it was expressly requested by the Court.¹⁰⁹ The State only provided the transcripts of the victim’s statement before the Inspectorate of September 5 and 12, 1994,¹¹⁰ from which it cannot be inferred that he had knowledge, prior to his appearance, of an accusation against him or of the reasons for his detention.¹¹¹

131. The State did not provide any evidence either that the alleged victim was notified of the charges in the ordinary criminal jurisdiction prior to his statement of September 15, 1994, before the Examining Judge of the National Police of Peru. Although the Court requested the State to provide it as evidence to facilitate adjudication of the case,¹¹² the State submitted the

¹⁰⁶ Cf. *Case of J. v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 27, 2013, para. 199, and *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*. Judgment of November 17, 2009, para. 31.

¹⁰⁷ Cf. *Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs*. Judgment of June 20, 2005, paras. 67-68, and *Case of J. v. Peru. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 27, 2013, para. 199.

¹⁰⁸ Cf. *Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005, para. 225, and *Case of J. v. Peru, supra*, para. 199.

¹⁰⁹ Cf. Request for evidence made by the Court to the State, dated January 30, 2019 (merits file, folios 754 and 755).

¹¹⁰ Cf. Report No. 046-2019-JUS/CDJE-PPES related to the Case of Jorge Rosadio Villavicencio v. Peru [or Brief submitted by the State of Peru] dated February 4, 2019 (merits file, folio 766); and Annexes to Report No. 046-2019-JUS/CDJE-PPES related to the Case of Jorge Rosadio Villavicencio vs. Peru [or Brief submitted by the State of Peru] dated February 4, 2019 (evidence file, folios 3940-3951).

¹¹¹ Cf. Statement of Lt. Jorge Enrique Rosadio Villavicencio before the Investigation Officer, dated September 5, 1994, and Addendum to the Statement of Lt. Jorge Enrique Rosadio Villavicencio before the Investigation Officer, dated September 12, 1994 (evidence file, folios 3949-3951).

¹¹² Secretariat’s Note of June 20, 2019.

aforementioned transcript of the statement of September 15, 1994, indicating that during that [hearing] “[Mr. Rosadio Villavicencio] was informed of the charges brought against him.”¹¹³

132. Therefore, the Court concludes that the State violated the right to prior notification in detail of the charges against him, enshrined in Article 8(2)(b) of the Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Rosadio Villavicencio, as regards to the ordinary criminal proceedings and the military disciplinary proceedings.

B.2. Regarding the military criminal proceedings

133. As regards to the military criminal proceedings, the records indicate that on October 17, 1995, the Military Prosecutor’s Office presented an accusation before the President of the Permanent War Council of the Fifth Judicial Military Area against Lt. Rosadio Villavicencio, as responsible for offenses against the duty and dignity of the service and abuse of authority.¹¹⁴

134. In the instant case, the representative claimed that Mr. Rosadio Villavicencio was never notified of the aforementioned accusation. The State recognized that it does not have the documentation to prove that notification, justifying it by indicating with that more than 20 years have passed since it took place. In addition, the State argued that before the Commission it had proven, by means of documentation, that the notification was performed. Thus, the Court requested the State to provide, as evidence to facilitate adjudication of the case, the documentation submitted in the process before the Inter-American Commission.¹¹⁵

135. On February 4, 2019, the State submitted two documents,¹¹⁶ neither of which constitutes evidence of notification to Jorge Rosadio Villavicencio of the accusation by the Military Prosecutor’s Office of October 17, 1995. The Court points out that both of the documents were issued after the accusation of October 17, 1995, and do not refer to that accusation.

136. Consequently, there is no evidence on file that Mr. Rosadio Villavicencio was notified in writing of the act that he was accused of, with a clear, detailed and accurate description of the facts being investigated and the offenses or crimes that he was charged with. Therefore, the Court considers that the State did not fulfill the burden of proof of notification of the accusation of October 17, 1995, to Mr. Rosadio Villavicencio and concludes that the State violated the right enshrined in Article 8(2)(b) of the American Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Rosadio Villavicencio, in the military criminal proceedings.

C. Conclusion

137. The Court concludes that the State violated the right to prior notification in detail of the charges against him, enshrined in Article 8(2)(b) of the Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Rosadio Villavicencio, as regards to the ordinary criminal proceedings, military criminal proceedings and military disciplinary proceedings.

¹¹³ It also submitted the statement of Mr. Rosadio from December 14, 1994, which is evidently subsequent to the aforementioned statement of September 15, 1994.

¹¹⁴ Cf. Accusation of the Military Prosecutor’s Office against Jorge Enrique Rosadio Villavicencio et al. October 17, 1995 (evidence file, folios 102-109).

¹¹⁵ Cf. Request for evidence made by the Court to the State, dated January 30, 2019 (merits file, folios 766 and 767).

¹¹⁶ Cf. Ruling of the President of the Permanent War Council of the Fifth Judicial Military Region of December 4, 1995, (evidence file, folio 3953), whereby he appointed a defense counsel for Mr. Jorge Rosadio Villavicencio; and the brief of defense of December 18, 1995, filed by the Captain of the Army’s Legal Services, Luis Hernández Sangai, *ex officio* defense counsel of Mr. Jorge Rosadio Villavicencio, December 18, 1995 (evidence file, folios 3955-3956).

VIII.3

RIGHT TO JUDICIAL GUARANTEES AND RIGHT TO FREEDOM FROM EX POST FACTO LAWS (ARTICLES 1(1), 8(1), 8(2) AND 9 OF THE AMERICAN CONVENTION)

138. In the instant case, the Commission and the representative claimed a series of additional violations to the judicial guarantees of Mr. Rosadio Villavicencio in each of the proceedings that he was subject to. The Court will now analyze the alleged additional violations claimed in relation to: A) the disciplinary proceedings; B) the ordinary criminal proceedings, and C) the military criminal proceedings.

A. Military disciplinary proceedings: Alleged violation of the right to be assisted by legal counsel, right to defend oneself, right to a hearing, right to the presumption of innocence and right to adequate grounds

A.1. Arguments of the Commission and the parties

139. The **Commission** indicated that, in the disciplinary proceedings: (i) the alleged victim was unable to appear at the hearing before the Investigative Council that would recommend his retirement, due to the existence of provisions whereby, if a summoned Officer was detained, his presence was not necessary. Thus, the alleged victim was denied the right to a hearing and to submit evidence for the defense, which constituted a violation of the right to defend himself, even though another army officer who was also detained and was subject to disciplinary proceedings was allowed to appear. Furthermore, it claimed that: (ii) in the Order of the Investigative Council for Junior Officers which recommended the retirement of Mr. Rosadio Villavicencio, which was the basis for the decision of the Army General Command, it was considered proven and a key element of analysis that the alleged victim was accused in the military and ordinary criminal jurisdictions. This is contrary to the principle of presumption of innocence, as it entails considering *a priori* that the accused is guilty of that which he is accused of. Lastly, the Commission argued that: (iii) the recommendation of the Investigative Council for Junior Officers and the decision of the Army General Command of February 7, 1995, to retire the alleged victim violated the duty to provide grounds and the right to freedom from ex post facto laws. Based on the foregoing, the Commission concluded that the State violated Articles 8(1) and 8(2) of the American Convention, in relation to 1(1) thereof, to the detriment of Mr. Rosadio Villavicencio.

140. The **representative** agreed with the Commission. Furthermore, it argued that Peru deprived Mr. Rosadio Villavicencio of the possibility "to have legal counsel of his own choosing, and did not provide him with one either" during the statement of September 5, 1994, before the Inspectorate of the Leoncio Prado Detachment. In addition, it claimed that Supreme Decree 09, which allegedly permitted the Investigative Council to issue its recommendation without hearing the accused was not applicable because that decree was never published in the "El Peruano" Official Newspaper and was therefore not binding. Similarly, it claimed that the investigation in the disciplinary proceedings against the alleged victim should have been performed by the Inspectorate of the Army's Intelligence Division (DINTE) and not the Inspectorate of the Leoncio Prado Detachment, which violated Article 8(1) of the Convention. It also claimed the violation of the presumption of innocence, insofar as the Inspectorate of the Leoncio Prado Detachment took the statements of Colonel M to be the absolute truth, with no objections. Lastly, it claimed the violation of Article 9 of the Convention.

141. The **State** argued: (i) regarding the *alleged victim not appearing at the hearing before the Investigative Council*, that hearing the accused is not necessary in all cases of disciplinary investigation, such as in the case of common crimes, including illicit drug trafficking, when there is a legal and material impediment that cannot be overridden by the administration, namely, a judicial detention order. The foregoing is according to Supreme Decree 049 of 1991, which modified Supreme Decree 09 of 1985 of the Regulations of the Investigative Councils for Army Officers. Regarding the failure to publish the referred Regulations in the El Peruano Official

Newspaper, the State claimed that the decree was approved before the Constitution of 1993; (ii) regarding the *grounds for the order of the Investigative Council that recommended retiring the alleged victim*, Peru claimed that the Council based its recommendation on nine considerations of fact, which did not include reference to the existence of criminal accusations in the military and ordinary jurisdictions. Although the recommendation of the Council mentions that he was accused before the Permanent War Council of the Fifth Judicial Military Area, this was as part of a description of the alleged victim's situation and not a recognition, *per se*, of his criminal liability. Thus, it claims that it did not violate the presumption of innocence; (iii) regarding the *alleged lack of adequate grounds of the order that decided to retire the alleged victim*, the State claimed that the decision of the Army General Command referred to the minutes of the session of the Investigative Council of February 7, 1995, so it would not be possible to argue a lack of grounds, and (iv) regarding the *alleged violation of the right to freedom from ex post facto laws*, the State claimed that the Commission did not argue which specific facts violated the principle of freedom from ex post facto laws.

A.2. Considerations of the Court

A.2.1. Right to be assisted by legal counsel of his own choosing or provided by the State (Articles 8(2)(d) and 8(2)(e) of the Convention)

142. Subparagraphs d) and e) of Article 8(2) express, within the list of minimum guarantees, "the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing" and, if he does not do so, "the inalienable right to be assisted by counsel provided by the State, paid or not as the domestic law provides." The Court considers that this guarantee was applicable to the military disciplinary proceedings against Mr. Rosadio Villavicencio, since it was in those proceedings that he was detained.

143. The **Court** emphasizes that the defense counsel provided by the State must be effective; therefore, it must adopt all the appropriate measures.¹¹⁷ This Court has noted previously that the accused must have access to legal counsel during the procedure in which he gives his first statement. To prevent the accused from receiving assistance by a defense counsel severely limits the right to defend himself, which leads to a procedural imbalance and leaves the individual unprotected before the punishing authority.¹¹⁸

144. In the instant case, Mr. Rosadio Villavicencio gave his first statement before the Inspectorate on September 5, 1994,¹¹⁹ the same day that he was detained, without having been notified of the charges against him (*supra* para. 46). It cannot be inferred from the transcript of the statement whether Mr. Rosadio Villavicencio had legal counsel at that time.

145. Therefore, Peru violated the right of Mr. Rosadio Villavicencio to be assisted by legal counsel of his own choosing or provided by the State since his first statement, established in Articles 8(2)(d) and 8(2)(e) of the Convention, in relation to Article 1(1) thereof.

A.2.2. Right to a hearing, duty to provide grounds and right to defend oneself (Articles 8(1) and 8(2)(c) of the Convention)

146. The Court has developed that the right to a hearing enshrined in Article 8(1) of the Convention shall be understood as that every person has the right to have access to a court or

¹¹⁷ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 21, 2007. Series C No. 170, para. 159, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations and Costs*. Judgment of May 10, 2019. Series C No. 376, para. 83.

¹¹⁸ Cf. *Case of Barreto Leiva v. Venezuela. Merits, Reparations and Costs*. Judgment of November 17, 2009, para. 62; *Case of Cabrera García and Montiel Flores v. Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 26, 2010, para. 155.

¹¹⁹ Cf. Statement of Lt. Jorge Enrique Rosadio Villavicencio before the Investigation Officer, September 5, 1994 (evidence file, folios 3940-3948).

organ of the State responsible for determining his rights and obligations.¹²⁰ The Court has recognized that this right entails two aspects: on the one hand, a formal and procedural aspect that ensures access to the competent body to determine the right that is claimed, respecting due procedural guarantees (such as the presentation of arguments and evidence). On the other hand, this right includes a material aspect of protection which means that the State must guarantee that the decision resulting from the proceedings satisfies its original purpose.¹²¹

147. In the instant case, the disciplinary proceedings involved an investigation stage before the Inspectorate of the Leoncio Prado Detachment, a stage before the Investigative Council for Junior Officers, and a last stage before the Army General Command, which decided to retire Mr. Rosadio Villavicencio.

148. In the second stage before the Investigative Council, a hearing was held without the alleged victim being present due to his detention as per the detention order in the ordinary jurisdiction.¹²² In this regard, the Court confirms that Article 61 of the Law on the Military Status of Army, Navy and Air Force Officers requires that for all officers subject to proceedings to determine their retirement as a disciplinary measure, a prior summons, a hearing and assessment of evidence by the Investigative Council are required.¹²³

149. In this regard, the State claimed that said law was not applicable due to the amendment of Article 14 of the Regulations of the Investigative Councils for Army officers set forth in Supreme Decree 049 of 1991, which modified Supreme Decree 09 of 1985. This amendment excluded the right to a hearing in cases of common crimes, unrelated to the service, for which in the substantiation a definitive detention order or a conviction with a penalty of deprivation of liberty were issued.¹²⁴ The foregoing was challenged by the representative, considering that said law was not published in the "El Peruano" Official Newspaper. The Court asked the State to provide a copy of that publication;¹²⁵ however, it was not provided.¹²⁶

¹²⁰ Cf. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 5, 2008, para. 72, and *Case of Wong Ho Wing v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 30, 2015. Series C No. 297, para. 228.

¹²¹ Cf. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 5, 2008, para. 72; *Case of Barbani Duarte et al. v. Uruguay. Merits, Reparations and Costs.* Judgment of October 13, 2011, para. 120-122.

¹²² Cf. Minutes of the Investigative Council of Junior Officers, Session No. 007-95 of February 7, 1995 (evidence file, folio 55).

¹²³ Cf. Law on the Military Status of Army, Navy and Air Force Officers of November 8, 1991 (evidence file, folio 3916). The article reads: "*Article 61.- Retirement as a disciplinary measure will be applicable in cases of serious offenses against the service and/or when the officer's misconduct gravely affects the honor, decorum and military duties, independently of the potential criminal sanction, if the fact or facts that the officer is accused of are defined as crimes by law, with the prior recommendation of the Investigative Council. The Investigative Council must previously summon the officer, hold a hearing and assess the evidence for the defense; having completed those steps, it shall issue the respective ruling.*" The Court requested the parties to provide a copy of the Law as evidence to facilitate adjudication. The representative and the State presented the same law quoted herein.

¹²⁴ Cf. Supreme Decree 09 of October 22, 1985, modified by Supreme Decree 049 of September 1991 (evidence file, folio 67). At the time of the facts, the article read as follows: "*Article 14.- Personnel investigated for disciplinary measures and/or personal offenses must be heard and the evidence for the defense must be examined; he must present his situation orally and answer any questions made by the members of the Council, which he may confirm in writing after leaving the chamber. The following text was added by DS N°049 DE/EP, September 26, 1991.- The previous provision is not applicable if the officer is involved in a common crime, unrelated to the service, for which in the investigation or criminal judicial proceedings a definitive detention order or conviction with a penalty of deprivation of liberty was issued, which prevents him from attending by his own means.*"

¹²⁵ Cf. Request for evidence made by the Court to the State, dated January 30, 2019 (merits file, folios 754 and 755).

¹²⁶ Cf. Report No. 046-2019-JUS/CDJE-PPES related to the Case of Jorge Rosadio Villavicencio v. Peru [or Brief submitted by the State of Peru] of February 4, 2019 (merits file, folios 762-767); and Annexes to Report No. 046-2019-JUS/CDJE-PPES related to the Case of Jorge Rosadio Villavicencio vs. Peru [or Brief submitted by the State of Peru] dated February 4, 2019 (evidence file, folios 3921-3929).

150. In these circumstances, the Court cannot establish whether Supreme Decree 049, which modified Decree 09, was in effect at the time of the facts; furthermore, it considers that the applicable regulation is the Law on the Military Status of Army, Navy and Air Force Officers, whose content and validity at the time of the facts has not been contested. Consequently, the Investigative Council had the obligation to summon, hear and assess the evidence that the alleged victim may have in order to defend himself during this stage of the investigation. However, the Council held the hearing in his absence, without a prior summons, and issued the recommendation to retire him.

151. Subsequently, in the third stage before the Army General Command, the Court notes that in that instance the decision was made to retire the alleged victim once the report from the Investigative Council was received, without any type of process summoning him to defend himself, submit evidence or claims, or present his objections to the report of the Investigative Council. There is definitely no evidence that he was allowed any type of intervention before the decision was presented.¹²⁷ Within the framework of that decision, Mr. Rosadio Villavicencio was never granted the right to a hearing required by the American Convention, or any way to guarantee its formal aspect, that would allow him to submit arguments and evidence regarding his version of the facts and the offenses that he was charged with.

152. Thus, there is no evidence that during the disciplinary proceedings against Mr. Rosadio Villavicencio, in any manner or at any of its stages, he was allowed to submit arguments, either orally or in writing, to make objections, submit evidence, or that he was permitted any type of procedural activity to guarantee the right to defend himself, apart from the statement given at the beginning of the proceedings, for which he did not receive prior notification of the facts and did not have any legal counsel.

153. Based on the foregoing, the Court concludes that the State violated the right to a hearing and the right to defend himself, enshrined in Articles 8(1) and 8(2)(c) of the Convention, to the detriment of Mr. Rosadio Villavicencio.

154. Regarding the lack of adequate grounds of the aforementioned recommendation by the Investigative Council and the decision of the Army General Command to retire Mr. Rosadio Villavicencio, the Court has pointed out that "the duty to provide grounds is one of the 'due guarantees' included in Article 8(1) to safeguard the right to due process."¹²⁸ The Court has indicated that the grounds "are the exteriorization of the reasoned justification that allows a conclusion to be reached"¹²⁹ and involves a rational explanation of the reasons that led the judge to adopt a decision. Thus, the arguments behind a decision and certain administrative acts must allow knowing the facts, the reasons and the regulations used by the authority to make its decision, in order to rule out any indication of arbitrariness.¹³⁰ Moreover, it must demonstrate that the arguments of the parties were duly weighed and that the body of evidence was analyzed.¹³¹

155. In the instant case, the Army General Command, body in charge of making the final decision regarding the retirement of the alleged victim and, therefore, affecting his rights and

¹²⁷ Cf. Order of the Army General Command, March 3, 1995 (evidence file, folios 82 and 83).

¹²⁸ Cf. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment August 5, 2008, para. 78, and *Case of Amrhein et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs.* Judgment of April 25, 2018, para. 268.

¹²⁹ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 21, 2007, para. 107, and *Case of Amrhein et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs.* Judgment of April 25, 2018, para. 268.

¹³⁰ Cf. *Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs.* Judgment of September 19, 2006, para. 122, and *Case of Dismissed Employees of PetroPerú et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2017, para. 171.

¹³¹ Cf. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 5, 2008, para. 78, and *Case of Ramírez Escobar et al. v. Guatemala. Merits, Reparations and Costs.* Judgment of March 9, 2018, para. 187.

obligations, had the duty to adopt a reasoned decision (duty to provide grounds), based on the arguments presented by the parties and the available evidence, providing its own reasoning and assessing the recommendation of the Investigative Council. In these circumstances, not only was Mr. Rosadio Villavicencio not heard in the disciplinary proceedings, but the Army General Command did not assess any evidence, limiting itself to quoting two regulations of the Law on the Military Status of Army, Navy and Air Force Officers, regarding the effects of retirement and the jurisdiction of the Army General Command to approve personnel actions.¹³²

156. Due to the foregoing, the Court concludes that the State also violated the duty to provide grounds enshrined in Article 8(1) of the Convention, to the detriment of Mr. Rosadio Villavicencio.

157. Lastly, the Court considers that the facts described above do not constitute an additional violation of the right to presumption of innocence established in Article 8(2) of the Convention, as requested by the representative.

A.2.3. *Freedom from ex post facto laws (Article 9 of the Convention)*

158. Article 9 of the American Convention provides that: “[n]o one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.” This Court has interpreted that freedom from ex post facto laws is applicable not only in the criminal jurisdiction; rather, its scope extends to administrative punitive action.¹³³

159. In this regard, the Court has already established that both the recommendation of the Investigative Council and that of the Army General Command lacked grounds, since it was unable to observe any subsumption regarding the offense and acts attributed to the alleged victim (*supra* para. 156). The Court does not have evidence to verify that the sanctions applied to Mr. Rosadio Villavicencio corresponded to acts that had not been previously established as administrative offenses, or that the sanction applied was materially different from that contemplated in the internal regulations for the facts that he was charged with. Therefore, it does not find a violation of Article 9 of the Convention.

A.2.4. *Other arguments presented regarding the disciplinary proceedings*

160. Regarding the representative’s argument that the competent body to carry out the investigation in the disciplinary proceedings was the Army’s Intelligence Division (DINTE) and not the Inspectorate of the Leoncio Prado Detachment (*supra* para. 140), the Court points out that the representative did not provide the regulatory provisions or evidence from which it could be inferred that DINTE had jurisdiction on the subject matter and that it was the body responsible for carrying out the investigation. Consequently, the Court does not have evidence to confirm this argument.

¹³² Cf. Order of the Army General Command, March 3, 1995 (evidence file, folios 82 and 83), which indicated the following:

“Having seen RCGE 0492 SG-CGE/CONS INV of February 23, 1995 which approves the minutes of the session of the Investigative Council for Junior Officers No. 007-95, held on February 7, 1995, in which the decision was made to retire intelligence lieutenant Rosadio Villavicencio as a disciplinary measure.

CONSIDERING THAT:

Legislative Decree 757 (Law on the Military Status of Army, Navy and Air Force Officers), in Article 55, subparagraph f) and Article 61, regulates retirement as a disciplinary measure set forth in Article 66 of the aforementioned legal instrument, that an Officer who is retired shall remain in the reserve for up to two years after passing the age limit corresponding to his rank;

That Supreme Decree 041 DE/SG of December 15, 1989, in Article 2 authorizes the Army General of the Army General Command to approve personnel actions for junior officers of the Institution;

Pursuant to that proposed by the Division General of Army General Command:

DECIDES...”

¹³³ Cf. *Case of Baena Ricardo v. Panama. Merits, Reparations and Costs*. Judgment of February 2, 2001, para. 106.

A.3. Conclusion on the military disciplinary proceedings

161. Based on the foregoing, regarding the military disciplinary proceedings, the Court concludes that the State of Peru violated the right of Mr. Rosadio Villavicencio to be assisted by legal counsel, the right to a hearing, the right to adequate grounds and the right to defend oneself enshrined in Articles 8(1) and 8(2)(c), 8(2)(d), 8(2)(e) of the Convention, in relation to Article 1(1) thereof. However, the Court considers that the State did not violate the right to presumption of innocence enshrined in Article 8(2) of the Convention or the right to freedom from ex post facto laws set forth in Article 9 of that instrument.

B. Ordinary criminal jurisdiction: Alleged violation of the duty to provide grounds, right to be assisted by legal counsel and right to defend oneself

B.1. Duty to provide grounds

B.1.1 Arguments of the Commission and the parties

162. The **Commission** claimed that the State corrected the lack of adequate grounds of the judgment of April 17, 1996, through the order of April 24, 1996. However, it argued that the judgment of June 19, 1997, that decided on the appeal for annulment and increased the sentence to more than double that imposed in the first instance lacked adequate grounds, since it only listed the general criteria that the sentence must be imposed in relation to the personal conditions of the accused and the manner and circumstances in which the crime was committed, without making any specific determinations. Therefore, it considered that the State violated Article 8(1) of the American Convention in relation to Article 1(1) thereof.

163. The **representative** agreed with that indicated by the Commission.

164. The **State** argued that, as recognized by the Commission and the representative, it did not violate Article 8(1) of the Convention given that it corrected the alleged lack of legal grounds of the order of April 17, 1996, of the Mixed Chamber of the Superior Court of San Martín. Moreover, regarding the alleged lack of legal grounds of the judgment of June 19, 1997, which increased the alleged victim's sentence from 6 to 15 years, the State claimed that in practice the increase in the sentence did not have any effect or detriment to the alleged victim because: (i) on March 4, 1999, two years after that judgment was issued, the alleged victim obtained the penitentiary benefit of study or work release. Therefore, he was only imprisoned until March 4, 1999, for a total of four years and six months; (ii) on May 24, 2001, Law 27454 was published in the official newspaper, which modified the Code of Criminal Procedure and prohibited the Supreme Court from imposing greater sentences, with retroactive application; moreover, individuals who had been convicted to longer sentences could request the modification of the sentence; and (iii) in the order of September 28, 2001, the Mixed Chamber of the Superior Court of Justice of San Martín, modified *ex officio* the sentence imposed on Mr. Rosadio Villavicencio to 6 years, which, discounting the time served since September 5, 1994, ended on September 4, 2000. Thus, it requested the Court to indicate that it did not violate Article 8(1) of the Convention on this count.

B.1.2 Considerations of the Court

165. The controversy at this point is determining whether the State violated the duty to provide grounds established in Article 8(1) of the Convention in relation to the judgment issued on June 19, 1997, which increased the alleged victim's sentence from 6 to 15 years, given that the Commission and the representative claim that this increased sentence lacked legal grounds.

166. The **Court** calls to mind that "the responsibility of the State under the Convention can only be demanded internationally after the State has had the opportunity to recognize the violation of

a right, where applicable, and provide reparation for the damages *ex officio*.”¹³⁴ The foregoing is based on the principle of complementarity, which permeates the inter-American system of human rights, which is, as stated in the Preamble to the American Convention, “reinforcing or complementing the protection provided by the domestic laws of the American states.” Therefore, 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 for the protection of human rights, which derives from the subsidiary nature of the international system *vis-à-vis* the domestic systems for the protection of human rights.”¹³⁵

167. The aforementioned subsidiary nature of the international jurisdiction means that the system of protection established by the American Convention on Human Rights does not replace the national jurisdictions; rather, it complements them.¹³⁶ The above means that a dynamic and complementary control of the treaty-based obligations of States to respect and guarantee human rights has been established between the domestic authorities (who have the primary obligation) and the international instance (complementarily), so that their decision-making criteria can be established and harmonized. Thus, the jurisprudence of the Court includes cases in which the decisions of domestic courts have been examined in order to establish the legal grounds and determine the violation of the Convention in the specific case.¹³⁷ In other cases it has been recognized that, in accordance with international obligations, the domestic bodies, instances or courts have adopted adequate measures to remedy the situation that gave rise to the case,¹³⁸ have already resolved the alleged violation,¹³⁹ have ordered reasonable reparations,¹⁴⁰ or have exercised an adequate control of the treaty obligations.¹⁴¹ In this regard, the Court has pointed out that the responsibility of the State under the Convention can only be required at the international level after the State has had an opportunity to acknowledge, if applicable, the violation of a right and to provide reparation, by its own means, of the damages caused.¹⁴² Consequently, the Court has established that States are not internationally responsible when they have already acknowledged having committed an international crime, have ceased the violation and have remedied the consequences of the measure or situation that caused it.¹⁴³

168. In the instant case, the Court observes that the judgment issued on June 19, 1997, by the Second Criminal Chamber of the Supreme Court of Justice increased the sentence imposed on Mr. Rosadio Villavicencio from 6 to 15 years.¹⁴⁴ However, on May 24, 2001, Law 27454, titled “Amendment Law to Article 300 of the Code of Criminal Procedure” was published in the “El Peruano”

¹³⁴ Cf. *Case of the Santo Domingo Massacre v. Colombia. Preliminary Objections, Merits and Reparations*. Judgment of November 30, 2012. Series C No. 259, para. 143, and *Case of Terrones Silva et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2018. Series C No. 360, para. 167.

¹³⁵ Cf. *Case of Acevedo Jaramillo et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of February 7, 2006. Series C No. 144, para. 66, and *Case of Amrhein et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of April 25, 2018. Series C No. 354, para. 281.

¹³⁶ Cf. *Case of Acevedo Jaramillo et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of February 7, 2006. Series C No. 144, para. 66, and *Case of Amrhein et al. v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of April 25, 2018. Series C No. 354, para. 281.

¹³⁷ Cf. *Case of the Santo Domingo Massacre v. Colombia, supra*, paras. 143, 196, 200, 203, 206, 209, 220, 221, 225, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 99.

¹³⁸ Cf. *Case of García Ibarra et al. v. Ecuador, supra*, para. 103, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 99.

¹³⁹ Cf. *Case of García Ibarra et al. v. Ecuador, supra*, para. 103, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 99.

¹⁴⁰ Cf. *Case of García Ibarra et al. v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 17, 2015. Series C No. 306, para. 103, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 99.

¹⁴¹ Cf. *Case of Gelman v. Uruguay, supra*, para. 239, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 99.

¹⁴² Cf. *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 143, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 99.

¹⁴³ *Case of Andrade Salmón v. Bolivia, supra*, para. 96, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 99.

¹⁴⁴ Cf. Judgment of June 19, 1997, of the Second Transitory Criminal Chamber of the Supreme Court of Justice of the Republic (evidence file, folios 365 a 368).

Official Newspaper, which established that the Supreme Court can only confirm or reduce a sentence imposed on a convicted individual.¹⁴⁵ Moreover, Law 27454 set forth its retroactive application for individuals who had been given a more serious sentence by that court.¹⁴⁶

169. Consequently, on September 28, 2001, Mr. Rosadio Villavicencio's sentence was modified *ex officio* by the Mixed Chamber of the Superior Court of Justice of San Martín, reducing it to the original six years imposed.¹⁴⁷ Moreover, there is evidence that Mr. Rosadio Villavicencio remained in custody for four years and six months only; he did not reach the six years initially imposed by the Mixed Chamber of the Superior Court of Justice of San Martín.¹⁴⁸ Based on the foregoing, the Court considers that the alleged violation of lack of grounds of the judgment of June 19, 1997, of the Second Criminal Chamber of the Supreme Court of Justice had ceased and that reparation was subsequently provided by means of the order of September 28, 2001. Therefore, in application of the aforementioned principle of complementarity, the Court considers that the State is not responsible for the violation of Article 8(1) of the American Convention.

B.2. Right to be assisted by legal counsel provided by the State and the right to defend oneself (Articles 8(2)(e) and 8(2)(c) of the Convention)

B.1.3 Arguments of the Commission and the parties

170. The **Commission** claimed that in the investigation by the Inspectorate both the alleged victim and his superior, who accused him of committing irregularities in the exercise of his functions as Chief of the Leoncio Prado Detachment, gave their statements under the same legal counsel/advisor, JRH, who was appointed by the State. It noted that the statements given by Mr. Rosadio Villavicencio and his superior were particularly relevant within the framework of the investigation by the Inspectorate and in the disciplinary proceedings, and that these parties had contrary interests. Consequently, it claimed that the State of Peru violated Articles 8(2)(c) and 8(2)(e) of the Convention.

171. The **representative** noted that joint legal counsel for the prosecutor and the accused is inadequate, given that the parties have contrary interests. Moreover, it agreed with the Commission and highlighted that the participation of that specific legal counsel as a judge in the military proceedings further demonstrates that the alleged victim did not have access to adequate legal counsel, considering that said individual was hierarchically and professionally connected to the military authorities. Consequently, these situations affected Mr. Rosadio Villavicencio's right to defend himself and, since it was an individual appointed by the State, it violates not only Article 8(2)(c) of the Convention but also Article 8(2)(e) thereof.

172. The **State** observed that the statement given by Colonel M (hierarchical superior of the alleged victim) does not demonstrate that he also received assistance from JRH. Notwithstanding the foregoing, if the opposing party were to prove that JRH intervened in the statement of both persons (Colonel M and Mr. Rosadio Villavicencio), it is worth noting that the presence of an attorney during statements seeks to protect their guarantees. Moreover, it was not confirmed that the legal counsel acted in the disciplinary proceedings providing arguments for or against either

¹⁴⁵ Cf. Law No. 27454 "Amendment Law to Article 300 of the Code of Criminal Procedure," published in the "El Peruano" Official Newspaper of May 24, 2001. "Article 300.- If an appeal for annulment is filed by one or several convicted individuals, the Supreme Court can only confirm or reduce the sentence imposed and adjudge on the subject matter of the appeal. Sentences that have not been annulled can only be modified when it is favorable to the sentenced individuals [...]."

¹⁴⁶ Cf. Law No. 27454 "Amendment Law to Article 300 of the Code of Criminal Procedure," published in the "El Peruano" Official Newspaper of May 24, 2001. Exclusive clause.- This law will apply retroactively, in conformity with that set forth in Article 103, paragraph 2, of the Political Constitution and Article 6, paragraph 2, of the Criminal Code. For these purposes, convicted individuals who were given a more serious sentence can request the adjustment of that sentence to the instance that issued the appealed decision. The sentence will be adjusted to that established in first instance [...]."

¹⁴⁷ Cf. Order of the Judge of Mixed First Instance of September 28, 1994 (evidence file, folios 3246 and 3247).

¹⁴⁸ According to the information submitted by the Commission, the representative and the State, Mr. Rosadio Villavicencio was imprisoned until March 4, 1999, when he obtained the benefit of study or work release.

party. The opposing party has not evidenced that the participation of JRH as legal counsel caused any specific damages to his human rights or of having requested a different legal counsel. If he considered that he was not suitably represented he could have requested a change of legal counsel, but he did not do so or, at least, no evidence has been provided of his having done so.

B.1.4 Considerations of the Court

173. Before analyzing the arguments of the parties, the **Court** notes that the Inter-American Commission claimed that Mr. JRH's participation as legal counsel for both the alleged victim and his hierarchical superior affected Mr. Rosadio Villavicencio's rights in the disciplinary proceedings. However, said participation was part of the ordinary criminal proceedings¹⁴⁹ and will thus be analyzed in this subsection.

174. In light of that indicated *supra* regarding the right to be assisted by legal counsel, the Court calls to mind that the appointment of a defense counsel is not sufficient to guarantee the right to defend oneself; rather, the effective exercise of that right requires providing the alleged victim with adequate time and means for the preparation of his defense.¹⁵⁰

175. The Court has considered that the appointment of a defense counsel for the sole purpose of complying with a procedural formality would be tantamount to not having technical legal representation; therefore, it is imperative that the defense counsel act diligently in order to protect the procedural guarantees of the accused and thereby prevent his rights from being violated, thereby breaking the bond of trust. The Court has recognized that to accomplish this objective the State must adopt all appropriate measures to ensure access to qualified and trained attorneys who can act with functional autonomy.¹⁵¹

176. The Court has established that the right to defend oneself includes an effective and prompt defense conducted by qualified professionals, which safeguards the specific interests of the accused.¹⁵² Thus, any form of apparent defense would be a violation of the American Convention. Moreover, when the domestic body of law permits joint legal counsel for several codefendants, it is the State's responsibility to identify, through the competent authorities, whether there are any incompatibilities and to adopt the measures necessary to effectively guarantee the right to defend oneself.¹⁵³

177. The Court confirms that the statement given by the alleged victim on September 15, 1994, was done "[...] in the presence of [...] Dr. JRH," who subsequently signed the statement as "legal counsel" of Jorge Enrique Rosadio Villavicencio, in the investigation conducted by the National Anti-Drug Department of the National Police of Peru (PNP – DINANDRO).¹⁵⁴ The statement was subsequently used by the Commander of the National Police of Peru to file the accusation before the Second District Attorney of San Martín Tarapoto.¹⁵⁵ Furthermore, the statement by Colonel M dated September 22, 1994, indicates that the legal counsel, JRH, was present. Thus, Mr. JRH was appointed as legal counsel for both Mr. Rosadio Villavicencio and Colonel M, his hierarchical

¹⁴⁹ Cf. Order of the Judge of Mixed First Instance of September 28, 1994 (evidence file, folio 199).

¹⁵⁰ Cf. *Case of Palamara Iribarne v. Chile*, para. 170, and *Case of Martínez Coronado v. Guatemala*, *supra*, paras. 83-84.

¹⁵¹ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 21, 2007, para. 159, and *Case of Martínez Coronado v. Guatemala. Merits, Reparations and Costs*. Judgment of May 10, 2019, para. 83.

¹⁵² Cf. *Case of Ruano Torres et al. v. El Salvador. Merits, Reparations and Costs*. Judgment of October 5, 2015. Series C No. 303, para. 157, and *Case of Martínez Coronado v. Guatemala*, *supra*, para. 84.

¹⁵³ Cf. *Case of Martínez Coronado v. Guatemala*, *supra*, paras. 86 and 87.

¹⁵⁴ Cf. Statement of Jorge Enrique Rosadio Villavicencio before DINANDRO, September 15, 1994 (evidence file, folio 25).

¹⁵⁵ Cf. Complaint of the Commander of the National Police of Peru of September 23, 1994 (evidence file, folio 152).

superior, who declared in his statement that the alleged victim had “distorted the orders” given to him, and that “[h]e lied about the number of drug trafficking flights from the Sión location.”¹⁵⁶

178. In this case, the Court considers that based on the described facts, by having assigned the same defense counsel to two codefendants, although their defense was incompatible due to the clearly conflicting versions of the facts, Mr. Rosadio Villavicencio’s right to be assisted by legal counsel was violated.

179. Consequently, the Court considers that the alleged victim was deprived of a suitable defense, in violation of Articles 8(2)(c) and 8(2)(e) of the Convention, in relation to Article 1(1) thereof.

B.3. Conclusion on the ordinary criminal proceedings

180. Regarding the ordinary criminal proceedings, the Court considers that the State is not responsible for the violation of the duty to provide grounds established in Article 8(1) of the Convention. However, it considers that Peru violated the rights enshrined in Articles 8(2)(c) and 8(2)(e) of the Convention to the detriment of Mr. Rosadio Villavicencio, in relation to Article 1(1) thereof, since he did not receive adequate legal counsel.

C. Military criminal jurisdiction: Right to an impartial and independent judge and alleged violation of the right to defend oneself

C.1. Arguments of the Commission and the parties

181. The **Commission** claimed that the proceedings before the military criminal jurisdiction were presided by the Permanent Military Judge of Tarapoto, JRH, who had acted as defense counsel of Mr. Rosadio Villavicencio and also as advisor to his hierarchical superior in the investigation by the Inspectorate of the Leoncio Prado Detachment. Hence, it argued that the State violated Article 8(1) and 8(2)(e) of the Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Rosadio Villavicencio, in the military criminal proceedings.

182. Additionally, the Commission maintained that on September 16, 1997, the Supreme Council of Military Justice annulled the ruling that convicted him of the crime of negligence. Subsequently, on December 15, 1997, the Permanent War Council of the Sixth Judicial Military Area held a hearing and convicted the alleged victim of the crime of failure to obey a lawful order, after having reclassified the facts, although that crime was not included in the accusation made by the Military Prosecutor’s Office or in the final report by the Military Judge; therefore, the alleged victim was deprived of the opportunity to defend himself regarding that change in legal classification. Consequently, it considered that the State violated Articles 8(1), 8(2)(b) and 8(2)(c) of the Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Rosadio Villavicencio in the proceedings before the military jurisdiction.

183. The **representative** agreed with that indicated by the Commission and also argued that Mr. Rosadio Villavicencio was not notified in advance of the hearings held on November 29, 1996, and December 15, 1997. It also claimed that the appointed defense counsel, the Captain of the Army’s Legal Services, FMC, was not in fact present at those hearings.

184. The **State** indicated that the alleged victim did not object to the judge or request his removal. It confirmed that JRH’s participation in the proceedings was minimal, consisting only of

¹⁵⁶ Cf. Statement of Colonel M before the Examining Judge of September 22, 1994 (evidence file, folio 33). The statement indicates that it took place “with the assistance of [...] Legal Counsel of the Army of Peru Major S.J. - Army of Peru [JRH].”

two specific actions¹⁵⁷ that were merely procedural and had no bearing on the proceedings or on the final decisions regarding the conviction imposed on the alleged victim; therefore, there was no violation of Article 8(1) of the Convention. It asked the Court to declare that it did not infringe Article 8(2)(e) of the Convention either, given that the Commission did not describe any facts that derive in that violation.

185. In addition, the State indicated that the crime of failure to obey a lawful order had been previously incorrectly classified as offense against the duty and dignity of the service. The change was due to a provision of the Military Code of Justice of the time (Article 616), which was not questioned by the alleged victim or the Commission. It also specified that the alleged victim had the opportunity to defend himself from the beginning of the investigation all the way up to its conclusion. Moreover, it claimed that said reclassification had not affected the rights of the accused, given that it was made based on the same facts included in the Final Report of the Military Judge and the accusation of the Military Prosecutor's Office. Based on the foregoing, the State asked the Court to declare that it was not responsible for the violation of Articles 8(2)(b) and 8(2)(c) of the Convention.

C.2. Considerations of the Court

C.2.1. Right to an impartial and independent judge

186. The right to be tried by an impartial judge or court is a fundamental guarantee of due process.¹⁵⁸ In other words, the person on trial must have the assurance that the judge or court presiding over his case brings to it the utmost objectivity.¹⁵⁹ This Court has established that impartiality requires that the judge who intervenes in a particular dispute should approach the facts of the case lacking any subjective prejudice and, at the same time, offering sufficient guarantees of an objective nature that inspire the necessary trust and confidence in the parties to the case and in the citizens of a democratic society.¹⁶⁰ The impartiality of a court requires that its members have no direct interest in, a pre-established viewpoint on, or a preference for one of the parties, and that they are not involved in the dispute.¹⁶¹ The judge must appear as acting without being subject to any influence, inducement, pressure, threat or interference, direct or indirect,¹⁶² and only and exclusively in accordance with —and on the basis of— the law.¹⁶³

187. In the instant case, it can be inferred from the case file that Mr. JRH acted as legal counsel for Mr. Rosadio Villavicencio during the statement given as part of the investigation by the National Police of Peru, and he also acted as advisor to the person who accused Mr. Rosadio Villavicencio, his hierarchical superior Colonel M, during his statement. Subsequently, Mr. JRH was the judge who summoned the alleged victim and other individuals,¹⁶⁴ and also took the alleged victim's

¹⁵⁷ These actions were: 1) Regarding the issuing of the order of March 12, 1995, he ordered the reception of the statements of the alleged victim and other persons, and 2) in the proceedings of June 20, 1995, he took the alleged victim's statement, assisted by a legal secretary; however the alleged victim only answered one question regarding his personal information, he did not answer any other question because he indicated that his legal counsel was in Lima and that he would not sign the corresponding minutes.

¹⁵⁸ Cf. *Case of Herrera Ulloa v. Costa Rica. Preliminary Objections, Merits, Reparations and Costs*. Judgment of July 2, 2004. Series C No. 107, para. 171, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 385.

¹⁵⁹ Cf. *Case of Herrera Ulloa v. Costa Rica*, para. 171 and *Case of Amrhein et al. v. Costa Rica, supra*, para. 385.

¹⁶⁰ Cf. *Case of Herrera Ulloa v. Costa Rica*, para. 171 and *Case of Amrhein et al. v. Costa Rica, supra*, para. 385.

¹⁶¹ Cf. *Case of Palamara Iribarne v. Chile. Merits, Reparations and Costs*. Judgment of November 22, 2005. Series C No. 135, para. 146, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 385.

¹⁶² Principle 2 of the United Nations' Basic Principles on the Independence of the Judiciary.

¹⁶³ Cf. *Case of Aritz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 5, 2008. Series C No. 182, para. 56, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 385.

¹⁶⁴ Cf. Order of the Permanent Military Judge of March 12, 1995. Appendix to the petitioner's submission of comments of December 8, 2012 (evidence file, folios 87 and 88).

discovery statement.¹⁶⁵ Furthermore, he issued the definitive detention order;¹⁶⁶ thus, in deciding on the legal status of the alleged victim, he assessed the statement of the facts and cautioned that the accused recognized having received money from drug traffickers and distributing it among the codefendants.¹⁶⁷

188. The Court considers that by having participated in the investigation by the National Police of Peru as legal counsel of Mr. Rosadio Villavicencio and as advisor to his hierarchical superior, that Judge should not have heard the alleged victim's subsequent prosecution in the military criminal jurisdiction. This constitutes in and of itself a violation of the right to an impartial judge, given that his previous intervention as legal counsel of the accused and advisor to the accuser objectively raises doubts on whether at the time of hearing the subsequent proceedings he had already adopted a position shaped or influenced by his previous contact with those individuals and the information received from them. His participation definitely did not offer sufficient guarantees of an objective nature to inspire the necessary trust of the parties in the judge's impartiality. Therefore, the Court considers that the State violated Mr. Rosadio Villavicencio's right to be heard by an impartial tribunal, in violation of Article 8(1) of the Convention, in relation to Article 1(1) thereof. Moreover, the Court calls to mind that it already decided on the violation of Article 8(2)(e) of the Convention in the ordinary criminal proceedings.

189. Finally, regarding the other claims made by the Commission and the representative, the Court considers that by having declared that the proceedings against Mr. Rosadio Villavicencio were heard by a judge who lacked impartiality, the proceedings had defects from the very beginning, which means that Mr. Rosadio Villavicencio did not have access to the judicial guarantees set forth in Articles 8(2)(b) and 8(2)(c) of the Convention.

C.3. Conclusion on the military criminal proceedings

190. In view of the foregoing, the Court concludes that in the military criminal proceedings the State did not guarantee that Mr. Rosadio Villavicencio be heard by an impartial tribunal, in violation of Article 8(1) of the Convention, in relation to Article 1(1) thereof. Moreover, the Court deems it unnecessary to decide on the alleged violations to the guarantees established in Articles 8(2)(b) and 8(2)(c) of the Convention.

¹⁶⁵ Cf. Discovery statement of retired intelligence lieutenant Jorge Rosadio Villavicencio of June 20, 1995 (evidence file, folios 89 and 90). Appendix 1 to the State's brief of March 3, 2017.

¹⁶⁶ Cf. Order of the Permanent Military Judge of August 9, 1995, that issued the definitive order against Mr. Jorge Rosadio Villavicencio. Appendix 7. (File containing evidence to facilitate adjudication, folios 3997 and 3998).

¹⁶⁷ Cf. "Tarapoto, August 9, 1995.- Having seen; having received the discovery statement of retired Intelligence Lieutenant Jorge Rosadio Villavicencio, and assessing the statement of the facts included in pages 79 to 82, the accused recognizes having received money from drug traffickers and having distributed it among the codefendants; therefore, in adjudging on his legal status in conformity with Article 524 of the Military Code of Justice, DECIDES THAT: a definitive detention order shall be issued against the accused, retired Intelligence Lieutenant Jorge Rosadio Villavicencio, security measure that he will serve at Juanjuí prison (National Penitentiary Institution of Juanjuí); given that the accused is currently serving the same measure imposed in the ordinary jurisdiction, where he was processed for the crime of illicit drug trafficking. He will be brought before the Military Court, as many times as required, with prior notification to the ordinary jurisdiction for the pertinent purposes.- Notify the Prosecutor, the accused and his defense counsel. Tr and Reg. Names and signatures of the Permanent Military Judge JRH and the legal secretary, O. Raúl Medina Navarro."

VIII.4 RIGHT TO PERSONAL LIBERTY (ARTICLE 7 OF THE CONVENTION)

A. Arguments of the Commission and the parties

191. The **Commission** indicated that it does not have the decision that ordered the initial preventive detention in the ordinary and military jurisdictions, to be able to confirm the original reasons for the detention and whether procedural goals were sought. However, in the ordinary jurisdiction, in response to the alleged victim's request for unconditional release, the authorities merely indicated that the alleged victim did not fully demonstrate his innocence under the terms of Article 201 of the Code of Criminal Procedure, and pointed out the seriousness of the crime and the indications of liability. Regarding the criminal military jurisdiction, it noted that on August 9, 1995, the Permanent Military Judge of Tarapoto issued a definitive detention order for the alleged victim because "he recognized having received money from drug traffickers" and he was serving the detention order issued in the ordinary jurisdiction. The Commission concluded that no individual reasons were provided for the preventive detention in the ordinary or criminal jurisdictions; rather, it was based on the existence of indications of liability and the seriousness of the crime, which constitute an advanced sentence and not a precautionary measure. Therefore, it concluded that the State violated Articles 7(3) and 8(2) of the Convention.

192. Moreover, the Commission indicated that the duration of Mr. Rosadio Villavicencio's preventive detention of over three years and six months was excessive,¹⁶⁸ violating the principle of reasonableness set forth in Article 7(5) of the Convention, and that it constituted an advanced sentence that could be applied in the event of conviction, which infringes the principle of presumption of innocence enshrined in Article 8(2) of the Convention. According to the Commission, there is no evidence of a periodic review having been performed *ex officio* regarding the need to continue the preventive detention. As for the remedies filed by Mr. Villavicencio requesting his unconditional release, a review was not performed either.

193. Lastly, since the judicial remedies filed did not result in a timely and effective review of the reasons for and duration of the preventive detention, the State also violated Articles 7(6) and 25 of the Convention.

194. The **representative** agreed with that indicated by the Commission.

195. The **State** indicated that, regarding the Commission's claim that it did not have the document that initially ordered the preventive detention, it is making a late request for access to evidence to include that controversy until now in the case before the Court. The preventive detention had adequate grounds and has not been questioned by the opposing party.

196. Regarding the decisions in the ordinary criminal proceedings that denied the request for unconditional release of Mr. Rosadio Villavicencio, those had adequate grounds and considered the applicable laws.¹⁶⁹

¹⁶⁸ From September 14, 1994 to June 30, 1998, date on which the Supreme Council of Military Justice signed his conviction.

¹⁶⁹ According to the State: i) In order No. 62 of February 9, 1995, the Judge of Mixed First Instance declared inadmissible the request for unconditional release submitted by Mr. Rosadio Villavicencio, considering that set forth in Article 201 of the Code of Criminal Procedure. That article indicates the requirement that must be confirmed in order to grant unconditional release (the suspect's innocence); it makes no reference to other measures in favor of release of the suspect such as a hearing or release on bail, which are expressly recognized in the Code of Criminal Procedure. In the case at hand, it was evident that the compliance requirement was not fully confirmed; therefore, it was appropriate to deny his request for unconditional release, and ii) Regarding the order of April 24, 1995, which decided on the remedy filed against the order of February 9, 1995, both the Commission and the victim assumed that the situation of Mr. Rosadio Villavicencio and the codefendants was identical. For the State, it is justifiable to provide different grounds when there are differences between the codefendants. Furthermore, the opposing party seems to suggest that the seriousness of the

197. Moreover, regarding the reasons for the definitive detention order issued in the military criminal jurisdiction on August 9, 1995, the State claimed that, in conformity with Articles 524 and 525 of the Code of Military Justice, a definitive detention order must have grounds and must refer to the evidence whereby the existence of a crime was proven and that the accused is responsible for that crime, both of which were met. In the case of Mr. Rosadio Villavicencio he was already detained as per an order issued in the ordinary jurisdiction; therefore, the order of the military jurisdiction being questioned did not cause him further injury.

198. Lastly, regarding the length of time that the alleged victim was in preventive detention, the State claimed that the legal bodies in the ordinary and in the criminal jurisdictions duly applied both domestic and international regulations. Moreover, the alleged victim did not file any remedies in the military jurisdiction and did not file a writ of habeas corpus before the constitutional court.

B. Considerations of the Court

199. In the instant case, the controversy consists of determining whether: (i) the preventive detention of Mr. Rosadio Villavicencio was arbitrary; (ii) during the preventive detention periodic reviews were performed by the judicial authorities on the reasons for its adoption; and (iii) whether the legal remedies filed permitted a review without delay of the reasons for and duration of the preventive detention.

B.1. Arbitrariness of preventive detention

200. The **Court** recalls the principle of liberty of the defendant while his criminal liability is being determined. According to this Court's jurisprudence, preventive detention is the most severe measure that can be applied to the person accused of a crime; therefore, its application must have an exceptional nature, since it is limited by the principles of lawfulness, presumption of innocence, need, and proportionality, all of which are strictly necessary in a democratic society.¹⁷⁰ Furthermore, the judicial decision that restricts an individual's personal liberty by means of preventive detention must provide the reasons for said detention and confirm, in the specific case, the existence of sufficient indications to reasonably assume the individual's criminal behavior and that the detention is strictly necessary.¹⁷¹ Thus, it cannot be based on the mere suspicion or personal perception of the accused individual belonging to a specific illicit group.

201. Moreover, "the restriction of liberty of a detained person [...]" can only be motivated by a legitimate purpose, namely: "to ensure that he does not interfere with the proceedings or evade the action of justice."¹⁷²

202. In this regard, the Court has indicated that, as a general rule, the accused should be free while a decision is made on their criminal liability.¹⁷³ because the latter enjoys the legal status of innocence. This means that he or she should be treated by the State in a manner consistent with the status of a person who has not been convicted.¹⁷⁴

offense was not a pertinent criteria when evaluating a change in the status of restriction of liberty, even though Article 135 of the Code of Criminal Procedure establishes as grounds for the issue of a detention order that the potential penalty to be imposed exceeds four years of imprisonment, which could be a possibility for the junior officers but would definitely not be the case for Mr. Rosadio.

¹⁷⁰ Cf. *Case of Tibi v. Ecuador, Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 7, 2004. Series C No. 114, para. 106, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 353.

¹⁷¹ Cf. *Case of Pacheco Teruel et al. v. Honduras. Merits, Reparations and Costs*. Judgment of April 27, 2012. Series C No. 241, para. 106, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 353.

¹⁷² Cf. *Case of Acosta Calderón v. Ecuador, supra*, para. 111, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 357.

¹⁷³ Cf. *Case of López Álvarez v. Honduras*, para. 67, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 367.

¹⁷⁴ Cf. *Case of J. v. Peru. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 27, 2013. Series C No. 275, para. 157, and Case of Amrhein et al. v. Costa Rica, supra*, para. 367.

203. Regarding the arbitrariness referred to in Article 7(3) of the Convention, the Court has established that no one shall be subject to arbitrary arrest or imprisonment for reasons and by methods which, although classified as legal, may be considered incompatible with respect for the fundamental human rights of the individual because, among other things, they are unreasonable, unpredictable or lacking in proportionality.¹⁷⁵ In this regard, the arbitrariness mentioned in Article 7(3) of the Convention has its own legal content, which requires analysis only in cases of detentions considered unlawful. However, this means that the domestic law, the applicable procedures and the corresponding general principles, expressed or implied therein, must also be compatible with the Convention.¹⁷⁶ Thus, the principle of “arbitrariness” must not be equated with “contrary to the law,” but must be interpreted more broadly to include elements of inappropriateness, injustice and unpredictability.

204. The Inter-American Court has indicated that, without prejudice to the legality of a detention, in each case an analysis must be made of the compatibility of the legislation with the Convention, on the understanding that the law and its application must respect the requirements listed below to ensure that the deprivation of liberty is not arbitrary:¹⁷⁷ i) that the purpose of the measures that deprive or restrict liberty is compatible with the Convention; ii) that the measures adopted are appropriate to achieve the desired purpose sought; iii) that they are necessary, in the sense that they are absolutely essential to achieve the purpose sought and that, among all possible measures, there is no less burdensome measure in relation to the right involved, that would be as suitable to achieve the proposed objective. Hence, the Court has indicated that the right to personal liberty means that any limitation of this right must be exceptional,¹⁷⁸ and iv) that the measures are strictly proportionate,¹⁷⁹ so that the sacrifice inherent to the restriction of the right to liberty is not exaggerated or excessive compared to the advantages obtained from this restriction and the achievement of the purpose sought.¹⁸⁰ Any restriction of liberty that is not based on a justification that meets the above criteria will be arbitrary and will thus violate Article 7(3) of the Convention.¹⁸¹

205. Based on the above, the Court will now examine: (i) the detention orders in the ordinary criminal and military criminal jurisdictions; (ii) the responses to the requests for unconditional release in the ordinary criminal jurisdiction, and (iii) the duration of the preventive detention.

B.1.1 Regarding the detention orders

i. Regarding the detention order in the ordinary criminal jurisdiction

206. Firstly, in the instant case, on September 28, 1994, the Judge of Mixed First instance issued a detention order against Mr. Rosadio Villavicencio and opened an investigation for the crime against public health due to illicit drug trafficking, preparation, storage, transport for large-scale sales of basic cocaine paste, possession of a small amount of cocaine hydrochloride, and holding money in foreign currency derived from drug trafficking, causing injury to the State of Peru. In its

¹⁷⁵ Cf. *Case of Gangaram Panday v. Surinam. Merits, Reparations and Costs*. Judgment of January 21, 1994. Series C No. 16, para. 47, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 355.

¹⁷⁶ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, paras. 92 and 96, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 355.

¹⁷⁷ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 93, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 356.

¹⁷⁸ Cf. *Case of Ricardo Canese v. Paraguay. Merits, Reparations and Costs*. Judgment of August 31, 2004. Series C No. 111, para. 129, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 356.

¹⁷⁹ Cf. *Case of Ricardo Canese v. Paraguay, supra*, para. 129, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 356.

¹⁸⁰ Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador, supra*, para. 93, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 356.

¹⁸¹ Cf. *Case of García Asto and Ramírez Rojas v. Peru*. Judgment of November 25, 2005. Series C No. 137, para. 128, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 356.

decision, the judge did not include the reasons for the need to issue the precautionary measure based on any of the legitimate purposes permitted by the Convention, that is, to ensure that the accused does not interfere with the proceedings or evade the action of justice.

ii. Regarding the definitive detention order in the military criminal jurisdiction

207. Secondly, on August 9, 1995, the Permanent Military Judge of Tarapoto issued a definitive detention order¹⁸² against Mr. Rosadio Villavicencio in the military criminal jurisdiction, considering that "the accused recognized that he received money from drug traffickers and distributed it among the codefendants." It also indicated that the security measure would be served at the National Penitentiary Institution of Juanjuí, where he was detained at the time, serving the measure imposed in the ordinary jurisdiction, in which he was tried for the crime of illicit drug trafficking, and would remain available to the Military Court as many times as required.¹⁸³ The Permanent Military Judge of Tarapoto does not mention at any time the need to issue a precautionary measure for Mr. Rosadio Villavicencio because there are indications that he would interfere with the proceedings or evade justice.

208. In this regard, the State claimed that Mr. Rosadio Villavicencio was detained as per the order issued in the ordinary jurisdiction, so the definitive detention order did not cause him further injury. Although it is true that at the time that the Permanent Military Judge of Tarapoto decided to issue a definitive detention order against Mr. Rosadio Villavicencio he was serving a preventive detention decreed in the ordinary jurisdiction, since an imprisonment order was being issued, the judge had the duty to provide grounds for that decision, which did not occur in this case.

iii. Conclusion regarding the preventive detention orders

209. Consequently, the Court declares that, by having failed to provide sufficient and specific grounds for a legitimate purpose compatible with the Convention when the preventive detention of Mr. Rosadio Villavicencio was ordered, neither of the resolutions analyzed (ordinary and military jurisdictions), the State violated his right to not be subjected to arbitrary detention, in violation of Articles 7(1) and 7(3) of the Convention, in relation to Article 1(1) thereof.

B.1.2 Regarding the lack of periodic review of the detention

210. The Court has indicated that a preventive detention or imprisonment must be subject to periodic review, so that it is not prolonged when the reasons for its adoption no longer exist. In this order of ideas, the judge does not have to wait until the moment of acquittal for a detained person to regain his freedom, but must periodically assess whether the reasons, need and proportionality of the measure persist, and whether the period of detention has exceeded the limits imposed by law and reason. Whenever it appears that the preventive detention does not satisfy these conditions, release must be decreed, without prejudice to the continuation of the corresponding proceedings.¹⁸⁴

211. It can be inferred from the file that during the period from September 23, 1994, to March 4, 1999, (four years and six months), the authorities did not perform a review of the preventive detention imposed on the alleged victim. Thus, it did not verify whether it was suitable to maintain that measure, whether it sought purposes compatible with the Convention or if it met the principle of proportionality. Consequently, the detention of Mr. Rosadio Villavicencio during that period was

¹⁸² In spite of its name -definitive detention- it constitutes a preventive detention because it was issued at the beginning of the proceedings against Mr. Jorge Enrique Rosadio Villavicencio, and on November 29, 1996, the public hearing was held before the Permanent War Council of the Sixth Judicial Military Area, in which the alleged victim was sentenced to 16 months of prison.

¹⁸³ Cf. Definitive detention order issued by the Permanent Military Judge of August 9, 1995 (evidence file, folio 407).

¹⁸⁴ Cf. *Case of Bayarri v. Argentina, supra*, para. 76, and *Case of Amrhein et al. v. Costa Rica, supra*, para. 362.

arbitrary, in violation of Articles 7(1) and 7(3) of the Convention, in relation to Article 1(1) thereof, to his detriment.

212. Lastly, regarding the alleged violation of Articles 7(6) and 25 of the Convention, there is no evidence in the instant case that Mr. Rosadio Villavicencio filed any other remedy, such as a writ of habeas corpus, apart from the request for unconditional release that was decided on February 9, 1995, by the Judge of Mixed First Instance, in order to seek his release. This decision, in which the judge answered the controversy raised but omitted providing reasons based on procedural goals, was already analyzed under Article 7(3) of the Convention and the Court finds no reasons to declare an additional violation of Article 7(6) of the Convention.

B.2. Duration of the preventive detention

213. In cases involving preventive detention in the context of criminal proceedings, the Court has emphasized that this rule imposes time limits on the duration of such detention and, consequently, on the powers of the State to ensure the purposes of the proceedings through this precautionary measure. When the term of preventive detention exceeds what is reasonable, the State may limit the freedom of the accused with other less harmful measures that ensure his appearance at trial, other than deprivation of liberty.¹⁸⁵

214. Apart from its effects on the right to personal liberty, the Commission and the Court have indicated that the improper use of preventive detention can affect the principle of presumption of innocence contained in Article 8(2) of the Convention. In this regard, the importance of the criteria of reasonableness has been emphasized, since depriving an individual of liberty beyond a reasonable term for the purposes that justify the detention would be tantamount to an advanced sentence,¹⁸⁶ making it a punitive measure and not a precautionary measure, distorting its nature and thus violating Article 8(2) of the Convention.¹⁸⁷

215. In the instant case, Mr. Rosadio Villavicencio was held in preventive detention from September 5, 1994, to March 5, 1999,¹⁸⁸ a period of four years and six months. The Court notes that the conviction imposed in the ordinary criminal jurisdiction was 6 years of imprisonment, which ended on September 4, 2000.¹⁸⁹ This means that the alleged victim was held in preventive detention during three fourths of the prison sentence ordered. In this regard, the Court considers that the period during which he was held in preventive detention without his legal situation being resolved violated both the reasonableness and proportionality of the term required by Article 7(5) of the Convention, given that it became a punitive measure rather than precautionary since it covered most of the term of the sentence imposed in the end. The foregoing also demonstrates that preventive detention constituted an advanced sentence, thus infringing the right to presumption of innocence enshrined in Article 8(2) of the Convention.

216. Consequently, the Court concludes that the State violated Articles 7(1), 7(3), 7(5) and 8(2) of the Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Rosadio Villavicencio, by keeping him in preventive detention during an excessive term.

¹⁸⁵ Cf. *Case of Bayarri v. Argentina*, *supra*, para. 70, and *Case of Amrhein et al. v. Costa Rica*, *supra*, para. 361.

¹⁸⁶ Cf. *Case of Suárez Rosero v. Ecuador. Merits*. Judgment of November 12, 1997. Series C No. 35, para. 77, and *Case of Pollo Rivera et al. v. Peru. Merits, Reparations and Costs*. Judgment of October 21, 2016. Series C No. 319, para. 122.

¹⁸⁷ Cf. *Case of Bayarri v. Argentina*, *supra*, paras. 110 and 111, and *Case of Arguelles et al. v. Argentina*, *supra*, para. 131.

¹⁸⁸ According to the information submitted by the Commission, the representative and the State, Mr. Rosadio Villavicencio was imprisoned until March 4, 1999, when he obtained the benefit of study or work release.

¹⁸⁹ Cf. Order of September 28, 2001, of the Mixed Chamber of the Supreme Court of Justice of San Martín (evidence file, folios 3248 to 3250).

C. General conclusion

217. Based on the foregoing, the Court concludes that the State is responsible for the violation of Mr. Rosadio Villavicencio's right to not be subjected to arbitrary detention contained in Articles 7(1) and 7(3) of the Convention, in relation to Article 1(1) thereof, in both of the resolutions analyzed (ordinary and military jurisdictions); the right to decide on his request for unconditional release, by failing to provide sufficient grounds that it sought a legitimate purpose compatible with the Convention, and by failing to perform a periodic review of the need to maintain the precautionary measure. Furthermore, the Court considers that the period during which Mr. Rosadio Villavicencio was held in preventive detention, without his legal situation being resolved, violated the reasonableness and proportionality of the term required by Article 7(5) of the Convention, as well as the right to presumption of innocence set forth in Article 8(2) of the Convention, in relation to Article 1(1) thereof. Lastly, the Court did not find the State responsible for the violation of Article 7(6) of the Convention, in relation to Article 25 thereof.

IX. REPARATIONS (Application of Article 63(1) of the American Convention)

218. Pursuant to the provisions of Article 63(1) of the Convention,¹⁹⁰ the Court has held that every violation of an international obligation which results in harm creates a duty 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.¹⁹¹ This Court has also established that reparations must have a causal nexus with the facts of the case, the alleged violations, the proven damages, as well as the measures requested to repair the resulting damages. Therefore, the Court must observe such coincidence in order to adjudge and declare according to law.¹⁹²

219. Accordingly, in conformity with the violations of the Convention declared in this judgment, the Court will proceed to examine the petitions made by the Commission and the parties in light of the tenets established in its jurisprudence in connection with the nature and scope of the obligation to make reparations¹⁹³ and thus adopt the measures required to redress the damage. In this regard, even though the judgment constitutes in and of itself a way of reparation,¹⁹⁴ considering the damages caused to the victims, the Court will establish other measures.

A. Injured party

220. The Court, under the terms of Article 63(1) of the Convention, holds as an injured party anyone who has been declared the victim of violation of a right recognized therein. Therefore, the Court considers that Jorge Enrique Rosadio Villavicencio is the injured party.

¹⁹⁰ Article 63(1) of the Convention provides 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."

¹⁹¹ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*. Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Rodríguez Revolorio et al. v. Guatemala. Preliminary Objection, Merits, Reparations and Costs*. Judgment of October 14, 2019. Series C No. 387, para. 137.

¹⁹² 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 Rodríguez Revolorio et al. v. Guatemala, supra*, para. 139.

¹⁹³ Cf. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs*, paras. 25 to 27, and *Case of Rodríguez Revolorio et al. v. Guatemala, supra*, para. 140.

¹⁹⁴ Cf. *Case of Neira Alegría et al. v. Peru. Reparations and Costs*. Judgment of September 19, 1996. Series C No. 29, para. 56, and *Case of Valenzuela Ávila v. Guatemala. Merits, Reparations and Costs*. Judgment of October 11, 2019. Series C No. 386, para. 228.

B. Measures of restitution requested: Elimination of the disciplinary sanction and criminal records

221. The **Commission** did not refer to this item. The **representative** requested: (i) the elimination of the disciplinary sanction from the record of the military career of Mr. Rosadio Villavicencio, as well as the elimination of the criminal records in both the military and ordinary jurisdictions, and (ii) restitution of the victim to his military career, with the ranks that would correspond to him to this date, taking into account the academic qualifications and in accordance with the applicable domestic law. Lastly, it clarified that this is not limited solely to the restitution of his military career but also includes the reimbursement of all lost wages, plus interest.

222. The **State** reiterated that all judicial guarantees and judicial protection have been respected, that the administrative proceedings are valid and it would not be applicable to eliminate the disciplinary sanction or the criminal records of Jorge Enrique Rosadio Villavicencio. Regarding the restitution of the military career requested by the representative, Peru considers that the retirement of Mr. Jorge Enrique Rosadio Villavicencio occurred legally. Furthermore, the Commission did not request this measure as a recommendation in the Report on the Merits.

223. Firstly, in this judgment the **Court** declared that the State violated the rights of Mr. Rosadio to be informed previously and in detail of the accusation, and to be notified, without delay, of the charges brought against him in the ordinary criminal proceedings, military criminal proceedings and disciplinary proceedings. Moreover, in relation to the *disciplinary military proceedings*, the State also violated his right to a defense counsel, right to a hearing, the duty to provide adequate grounds and the right to defend oneself (*supra* para. 161). Regarding the *ordinary criminal proceedings*, the Court considered that Peru violated Mr. Rosadio Villavicencio's right to adequate legal counsel (*supra* para. 180). Finally, regarding the military criminal proceedings, the Court declared that the State violated the principle of *ne bis in idem*, and it also failed to guarantee that Mr. Rosadio Villavicencio be judged by an impartial court.

224. Therefore, given the characteristics of the case, and as this Court has done on previous occasions,¹⁹⁵ it orders the State to adopt all necessary judicial, administrative or other measures to annul the convictions that were issued in the ordinary criminal, military criminal and disciplinary proceedings, in all respects, and to remove the legal or disciplinary, criminal or military records that exist against him as a result of such proceedings, within six months from the notification of this judgment.¹⁹⁶

225. The Court notes that, in this case, at the time of issue of this judgment, Mr. Jorge Enrique Rosadio Villavicencio had already served his total sentence and is free. The Court shall take this aspect into account when issuing a decision regarding the pecuniary and nonpecuniary damages.

226. Secondly, regarding the request for restitution to the military career, the representative did not provide to the Court suitable and sufficient evidence to make such determinations; therefore, the Court considers that it does not have the evidence necessary to order a measure of reparation of that nature.

¹⁹⁵ Cf. *Case of Cantoral Benavides v. Peru. Reparations and Costs*. Judgment of December 3, 2001. Series C No. 88; *Case of Herrera Ulloa v. Costa Rica, supra*; *Case of Palamara Iribarne v. Chile, supra*; *Case of Kimel v. Argentina, supra*; *Case of Tristán Donoso v. Panama. Preliminary Objection, Merits, Reparations and Costs*. Judgment of January 27, 2009. Series C No. 193; *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207; *Case of López Mendoza v. Venezuela. Merits, Reparations and Costs*. Judgment of September 1, 2011. Series C No. 233; *Case of Norín Catrimán et al. (Leaders, Members and Activist of the Indigenous Mapuche People) v. Chile. Merits, Reparations and Costs*. Judgment of May 29, 2014. Series C No. 279, and *Case of Álvarez Ramos v. Venezuela. Preliminary Objection, Merits, Reparations and Costs*. Judgment of August 30, 2019. Series C No. 380.

¹⁹⁶ Cf. *Case of Zegarra Marín v. Peru*, para. 202; *Case of Ruano Torres et al. v. El Salvador*, para. 211; *Case of García Cruz and Sánchez Silvestre v. Mexico*, para. 73; *Case of Maldonado Ordóñez v. Guatemala*, para. 127.

227. Notwithstanding the foregoing, the Court considers it reasonable to assume that the victim would have continued in the Army if the proceedings to which he was subjected had not occurred. This aspect will be considered when the pecuniary and nonpecuniary damages are established below.

C. Measures of satisfaction requested: Publication of the judgment

228. The **Commission** made no comment regarding this measure.

229. The **representative** requested the Court to order the State to publish the official summary of the judgment in the 'El Peruano' Official Newspaper, and in a newspaper of nationwide circulation, the place of residence of Jorge Enrique Rosadio Villavicencio, and the publication of the judgment, in its entirety, on the websites of the State of Peru, the Ministry of Defense and the Army of Peru.

230. The **State** pointed out that if the Court were to order this measure, it would make the corresponding publication, following the terms set forth by the Court, as it has done in other cases.

231. The **Court** considers that, as it has ordered in other cases,¹⁹⁷ the State must publish, within six months from the notification of this judgment: a) the official summary of this judgment, prepared by the Court, one time only, in the Official Newspaper in a legible and adequate font size; b) the official summary of this judgment, prepared by the Court, one time only, in a newspaper of nationwide circulation, in a legible and adequate font size, and c) this judgment, in its entirety, which shall be made available during one year, in an official State website that is accessible to the public. The State shall immediately inform this Court when it makes each of the publications ordered, regardless of the term of one year to submit the report in conformity with operative paragraph 24 of this judgment.

D. Other measures requested

232. The **Commission** requested the Court to order the State to establish guarantees of non-repetition, legislative, administrative or other measures to ensure that: i) the principle of presumption of innocence and other guarantees of due process be respected during administrative sanctioning proceedings; ii) the principle of *ne bis in idem* be respected, so as to prevent multiple judgments for the same facts in the exercise of the punitive power of the State, both in the administrative and criminal jurisdictions; and iii) the application of preventive detention abides by the standards declared in the Report on the Merits, so that it does not constitute a punitive measure; specifically, that it has procedural purposes and that its duration is strictly necessary to achieve such purposes.

233. The **representative** requested that the State be ordered to:

- i) "investigate and, if applicable, sanction the behavior of public servants in cases of procedural and investigative irregularities" against the victim. Also, to "[e]nsure that the persons involved in the investigation, including victims, witnesses and justice agents, have adequate security guarantees" and to "publicly disseminate the results of these proceedings";
- ii) "perform a public act of acknowledgment of responsibility"; and
- iii) provide training on human rights to instructors, officials and recruits "on the dignity of the person and the right to physical, mental and moral integrity, and the limits established by those rights on the training and command of military instructors."

234. The **State** did not refer to the measures requested by the Commission. Regarding the investigation requested by the representative, it indicated that in this case there is no violation of

¹⁹⁷ Cf. *Cantoral Benavides v. Peru*, *supra*, para. 79, and *Case of Rodríguez Revolorio v. Guatemala*, *supra*, para. 157.

judicial guarantees or the right to judicial protection, and that this measure was not recommended by the Commission. Regarding the request for a public act of acknowledgment of responsibility, it claimed that if the Court declares any violation of the Convention, the issuing of the judgment and the reparations that may be ordered therein would be sufficient and adequate, so this order would not be necessary. Lastly, regarding the trainings requested by the representative, it claimed that it has been duly complying with its international obligations regarding the implementation of human rights courses and programs within the armed forces. Based on the foregoing, it pointed out several trainings provided by the Center for International Humanitarian Law and Human Rights of the Ministry of Defense of Peru, and requested that the measures requested by the representative not be ordered.

235. Regarding the measures of non-repetition requested by the Inter-American Commission, the **Court** does not consider pertinent to order them, given that there is no causal nexus between them and the violations declared in the instant case, considering that the Court did not find a violation of Article 2 of the Convention, or that the violations declared had a structural cause or were part of a general context.

236. Regarding the request to order human rights training for instructors and recruits that are in the military service, the Court notes that it has already ordered the State of Peru to carry out permanent training on human rights to those officers, as well as other persons in charge of justice administration, in the cases of *La Cantuta*,¹⁹⁸ *Anzualdo Castro*,¹⁹⁹ *Osorio Rivera*²⁰⁰ and *Espinoza Gonzales*.²⁰¹ In this regard, by recalling that training, as a system of continuous education, must be permanent in order to fulfill its goal, the Court considers it unnecessary to order once again the implementation of training and education programs, which is already subject to the monitoring of compliance with judgments in the aforementioned cases.

237. Lastly, regarding the requests of the representative to perform a public act of acknowledgment of responsibility and to investigate the behavior of public servants related to the procedural and investigative irregularities against the victim, the Court considers that the issuing of this judgment and the reparations ordered in this chapter are sufficient and adequate to redress the violations suffered by the victim and does not consider it necessary to order those measures.

E. Compensation

E.1. Pecuniary damages

238. The **Commission** requested the Court to order the State to provide comprehensive reparation to the victim through monetary compensation that includes the material damages caused.

239. The **representative** indicated that, regarding lost wages, the amount that he stopped receiving from the lieutenant rank to the Brigade General rank in the Army of Peru, calculated from the date of the incident, September 5, 1994, to date, plus interest, amounts to PEN 2,000,000.00 (two million Peruvian soles) approximately. Regarding consequential damages, it indicated that taking into account that the victim suffered the loss of exercise of his professional calling, the deprivation of that value as part of his patrimony and expectations, and considering the academic level reached and the time elapsed since the facts occurred, it is necessary to assess the placement that he had in the merit order of the Third Position of the Cavalry Arms ("Tercer Puesto del Arma de Caballería") in the intermediate level, for promotion to the immediately

¹⁹⁸ Cf. *Case of La Cantuta v. Peru*, para. 240.

¹⁹⁹ Cf. *Case of Anzualdo Castro v. Peru*, para. 193.

²⁰⁰ Cf. *Case of Osorio Rivera and family v. Peru*, para. 274.

²⁰¹ Cf. *Case of Espinoza González v. Peru*, para. 327, and *Case of Tarazona Arrieta et al. v. Peru*, para. 186; *Case of the Miguel Castro Castro Prison v. Peru*, para. 452.

superior rank of Captain of the Army of Peru; therefore, it considers that the victim had the project of reaching the highest level in the Army of Peru, and that currently he could hold the rank of Brigadier General of the Army of Peru, with a salary of approximately PEN 15,000.00 per month, plus the benefits and interest calculated for the 23 years elapsed since the damage occurred, the compensation amount proposed is PEN 2,000,000.00.

240. The **State** indicated that the representative did not provide sufficient reasons to argue why to date the alleged victim would hold the rank of Brigadier General of the Army of Peru. It noted that the representative did not provide any certificate or diploma certifying that Jorge Enrique Rosadio Villavicencio had completed the course for promotion mentioned in the brief containing pleadings, motions and evidence. Furthermore, it emphasized that there are no objective elements to provide sufficient grounds that Mr. Rosadio Villavicencio would have reached the rank of Brigadier General of the Army, and no documents were attached either certifying that the alleged victim was registered in the course for promotion to the rank of Captain of the Army of Peru. As for the consequential damages, the State indicated that the representative did not provide the expenses that Jorge Enrique Rosadio Villavicencio would have incurred; therefore, it requested that it be considered not confirmed.

241. The **Court** has developed in its jurisprudence that pecuniary damages encompass the loss of or detriment to the victim's income, the expenses incurred as a result of the facts and the monetary consequences that have a causal nexus to the facts of the case.²⁰²

242. Regarding lost wages and the alleged truncated promotion within the Army, the evidence provided by the representative comprises the victim's certificates of study at the Army Intelligence Training Center. It is not possible to infer elements from this evidence to determine that, had the violations established in this judgment not occurred, Mr. Rosadio Villavicencio would have been promoted to the rank of Brigadier General in the Army of Peru. Nevertheless, the Court considers it reasonable to presume that the victim would have continued in the Army had it not been for the proceedings that he was subjected to. Therefore, in conformity with the specific circumstances of the case, the Court establishes that the compensation for lost wages shall be USD 110,000.00 (one hundred and ten thousand US dollars), to be delivered to the victim in this case.

243. As for consequential damages, the representative did not provide any evidence or background that would allow to perform a reasonable estimate of the amount that the victim may have disbursed as a result of the violations of his rights confirmed in the instant case. However, the Court considers it reasonable to presume that the victim incurred in expenses during the time that he was detained; therefore, the Court sets the compensation for consequential damages at USD 1,000.00 (one thousand US dollars), which shall be delivered to the victim in this case.

E.2. Nonpecuniary damages

244. The **Commission** asked the Court to order the State to provide monetary compensation for the nonpecuniary damages caused.

245. The **representative** claimed that the distress endured by the victim and the pain and suffering caused during more than 18 years will extend over the rest of his life, given that the State of Peru derailed his life project, he suffered the unlawful and arbitrary loss of his personal liberty, and physical and psychological mistreatment that will mark him for the rest of his life. He was unlawfully subjected to the distress of unnecessary and irregular administrative and judicial proceedings on facts that he did not commit, on charges related to the hierarchy of command of officers and authorities whose reputation and trajectory were later found to be doubtful; he was retired from the position of Officer of the Army of Peru and exposed to social scorn by having

²⁰² Cf. *Case of Bámaca Velásquez v. Guatemala. Reparations and Costs*. Judgment of February 22, 2002. Series C No. 91, para. 43, and *Case of Rodríguez Revolorio et al. v. Guatemala, supra*, para. 166.

served an undeserved prison term of 54 months. Therefore, the victim considers that the compensation amount should be set by the Court.

246. The **State** considered that such infringement has not been proven, nor is this a grave human rights violation or intended infringement of any core human right explicitly included and protected by Article 27 of the Convention. Moreover, the alleged physical and psychological mistreatment of the victim has not been previously claimed in other stages of these supranational proceedings; thus, it is definitely not part of the controversy in the instant case.

247. The **Court** has developed in its jurisprudence the concept of nonpecuniary damages, and it has established that it “may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as non-monetary alterations in their living conditions.”²⁰³

248. Regarding nonpecuniary damages, the Court takes into consideration that Mr. Rosadio Villavicencio was declared victim of the violation of his right to judicial guarantees and right to personal liberty. These violations resulted in two sentences already served that had different psychological, social and emotional effects, which was confirmed by the statement given by the victim in the public hearing before this Court.²⁰⁴

249. As a result of these violations, the Court orders, in equity, a compensation for nonpecuniary damages and damage to the life project of the victim the amount of USD 20,000.00 (twenty thousand US dollars).

F. Costs and expenses

250. The **Commission** did not refer to this point. The **representative** indicated that the alleged victim incurred in various expenses related to the judicial proceedings such as hiring attorneys, transport expenses, tickets and per diem of the attorneys, lodging in the city of Lima, among other administrative expenses (telephone, printing, photocopies, etc.), which due to their nature are not documented. Therefore, they asked the Court to assume, as it has been done other cases, that the expenses incurred amount to approximately USD 2,000.00. It clarified that these expenses do not include any future expenses to be incurred during the rest of the proceedings before the Inter-American Court.

251. The **State** noted that the representative does not have any receipts or proof to support the claimed expenses; therefore, it asked that these be considered not proven.

²⁰³ 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 Rodríguez Revolorio et al. v. Guatemala, supra*, para. 171.

²⁰⁴ During the hearing, Mr. Jorge Enrique Rosadio Villavicencio expressed “the consequences and impact on his personal life, work life, family life and social environment” of the facts denounced, indicating that “in the personal aspect, I [have become] somewhat insecure, based on the fact that it was in the press several times, in newspapers of nationwide circulation, that I was a corrupt intelligence officer, which marked me before society and this had repercussions in my personal life;][...] in my work life, because I was quickly fired from any jobs I was able to get, [or] they found out that I had criminal and judicial records, so I ended up getting fired; otherwise, I had maybe one year working for a company and they began checking my background and I already knew that they would find so I would resign. Therefore, this strongly affected me economically and emotionally, which has prevented me from being able to have a family [...]. In the social sphere, well... for example, since I studied at Leoncio Prado Military School, they hold annual gatherings to which I had to stop going because I truly felt bad. It was similar with friends from military school, since I was no longer able to attend those gatherings. Now, the worst part is that even though the State already authorized the annulment of the judicial and criminal papers in 2006, in 2016 I was offered an important position with a mining company and I was later told that I had judicial records, meaning that they had not been erased; therefore, from all of the job positions that I applied for, I was unable to get anything [...]. I [l]ost many opportunities because of this.” (Statement given by Jorge Rosadio Villavicencio during the public hearing at the Inter-American Court, held on February 6, 2019).

252. The **Court** reiterates that, in accordance with its jurisprudence,²⁰⁵ costs and expenses form part of the concept of reparation established in Article 63(1) of the Convention, insofar as the activities carried out by the victims to obtain justice, at both the domestic and international levels, entail disbursements that must be compensated when the international responsibility of the State has been declared in a judgment. Regarding the reimbursement of costs and expenses, the Court shall determine a reasonable amount, which includes expenses before the authorities in the domestic jurisdiction as well as those incurred in 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 can be made based on the principle of equity and taking into account the expenses indicated by the parties, if and when the amount is reasonable.²⁰⁶

253. In the instant case, the body of evidence does not include any proof of the costs and expenses incurred by the victims or the representative. However, the representative provided an approximate amount of the expenses allegedly incurred. Based on the foregoing, the Court orders the State to reimburse a total amount of US 2,000.00 (two thousand US dollars) for costs and expenses of the representative César Villacorta Spinner. This amount shall be paid directly to the alleged victim's representative in this case.

G. Reimbursement of expenses to the Victims' Legal Assistance Fund

254. In the instant case, through the order of September 17, 2018, the President of the Court granted economic support, through the Victims' Legal Assistance Fund, to cover the travel expenses and lodging necessary for the victim to assist the public hearing and provide his statement, accompanied by his legal representative.

255. On June 4, 2019, a report of the expenses charged to the Legal Assistance Fund was provided to the State, as set forth in Article 5 of the Rules of Procedure of the Court regarding the functioning of that fund. Thus, the State had the opportunity to submit its observations regarding the expenses made in the instant case, which amounted to USD 2,283.84.

256. On June 7, 2018, the State submitted its observations to the State report. It claimed that the receipts for transport services, lodging and meals were not included, as proof of the expenses for those concepts by the two individuals covered by the fund. It also asked the Court to explain how it arrived at the amount of USD 100 assigned to the victim and to the representative, respectively, for terminal expenses.

257. In relation to the State's objections, the Court confirmed that the aforementioned report did include the receipts for airplane tickets and lodging. Regarding the lack of documentation to prove the amounts spent on meals and terminal expenses, the Court reiterates that, since the beginning of the Fund's functioning, it established the policy to give the persons covered by the Fund a fixed amount for those concepts, based on the OAS reference tables for travel subsistence allowance (per diem) and terminal expenses applicable to the place of origin of the declarants and to the city of San José, Costa Rica, without requiring them to submit receipts to demonstrate the expenses made. This is because those tables reflect the amounts that, according to the OAS, would be reasonably disbursed by a person on meals and terminal expenses at those places. As indicated, the process of asking for receipts from the beneficiaries of the Legal Assistance Fund for the per diem received would represent serious obstacles to its correct and expedite application.

²⁰⁵ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs*. Judgment of August 27, 1998. Series C No. 39, para. 79, and *Case of Rodríguez Revolorio et al. v. Guatemala, supra*, para. 179.

²⁰⁶ Cf. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs, supra*, para. 82, and *Case of Valenzuela Ávila v. Guatemala, supra*, para. 257.

258. Without detriment to the above, in view of the request made by the State of Peru, the Court clarifies that in the instant case, the amount of USD 100 for terminal expenses given to Mr. Rosadio Villavicencio and his legal representative, respectively, correspond to USD 15 for the departure from Peru, USD 35 for transport from the airport in Costa Rica to the hotel, USD 35 departure from Costa Rica, and USD 15 for the return to Peru, to the starting point.

259. Based on the violations declared in this judgment and the fact that the requirements for access to the Legal Assistance Fund were met, the Court orders the State to reimburse the Fund the amount of USD 2,283.84 for the expenses incurred. This amount must be reimbursed within six months of notification of this judgment.

H. Method of compliance with the payments ordered

260. The State shall make the payments for pecuniary and nonpecuniary damages established in this judgment directly to Mr. Rosadio Villavicencio, within one year of notification of this judgment.

261. If the beneficiary is deceased or dies before he receives the respective compensation, this shall be delivered directly to his heirs, in accordance with the applicable domestic law.

262. The State shall comply with its pecuniary obligations by payment in United States dollars or the equivalent in Peruvian currency, using for the respective calculation the exchange rate in effect in the New York Stock Exchange the day before the payment.

263. 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 established time frame, the State shall deposit the said amounts in their favor in a deposit account or certificate in a solvent Peruvian financial institution, in United States dollars, and in the most favorable financial conditions 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 interest accrued.

264. The amounts allocated in this judgment as compensation shall be delivered to the person indicated in full, as established in this judgment, without any deductions derived from possible taxes or charges. In the event that the State incurs in arrears, including in the reimbursement of expenses to the Victims' Legal Assistance Fund, it shall pay interest on the amount owed, corresponding to the banking interest on arrears in Peru.

X OPERATIVE PARAGRAPHS

265. Therefore,

THE COURT

DECIDES,

unanimously,

1. To reject the State's preliminary objection regarding the alleged lack of exhaustion of domestic remedies, under the terms of paragraphs 19 and 20 of this judgment.

2. To reject the State's preliminary objection regarding the alleged "fourth instance," under the terms of paragraphs 24 and 25 of this judgment.

3. To reject the State's preliminary objection regarding the alleged infringement of the right to defend itself, under the terms of paragraphs 29 and 30 of this judgment.

DECLARES:

unanimously, that:

4. The State is responsible for the violation of Article 8(4) of the American Convention in relation to the ordinary criminal proceedings and military criminal proceedings, pursuant to paragraphs 87 to 120 of this judgment.

5. The State is responsible for the violation of the right to receive prior notification in detail of the charges against him, enshrined in Article 8(2)(b) of the Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Rosadio Villavicencio, in the ordinary criminal proceedings, military disciplinary proceedings and military criminal proceedings, pursuant to paragraphs 125 to 137 of this judgment.

6. The State is responsible for the violation of the right to be assisted by legal counsel, enshrined in Articles 8(2)(d) and 8(2)(e) of the Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Rosadio Villavicencio, in the disciplinary proceedings, pursuant to paragraphs 142 to 145 of this judgment.

7. The State is responsible for the violation of the right to a hearing and the right to defend oneself, enshrined in Articles 8(1) and 8(2)(c) of the Convention, to the detriment of Mr. Rosadio Villavicencio, in the disciplinary proceedings, pursuant to paragraphs 146 to 163 of this judgment.

8. The State is responsible for the violation of the duty to provide grounds, enshrined in Article 8(1) of the Convention, to the detriment of Mr. Rosadio Villavicencio, in the disciplinary proceedings, pursuant to paragraphs 154 to 156 of this judgment.

9. The State is responsible for the violation of the right to be assisted by legal counsel and the right to defend oneself, enshrined in Articles 8(2)(c) and 8(2)(e) of the American Convention, in relation to Article 1(1) thereof, in the ordinary criminal proceedings, to the detriment of Mr. Rosadio Villavicencio, pursuant to paragraphs 173 to 179 of this judgment.

10. The State is responsible for the violation of the right to be judged by an impartial tribunal, enshrined in Article 8(1) of the Convention, in relation to Article 1(1) thereof, in the military criminal proceedings, to the detriment of Mr. Rosadio Villavicencio, pursuant to paragraphs 186 to 189 of this judgment.

11. The State is responsible for the violation of Articles 7(1), 7(3), 7(5) and 8(2) of the Convention, in relation to Article 1(1) thereof, to the detriment of Mr. Rosadio Villavicencio, pursuant to paragraphs 199 to 217 of this judgment.

12. The State is not responsible for the violation of Article 8(4) of the American Convention, in relation to the ordinary criminal proceedings and the disciplinary proceedings, pursuant to paragraphs 110 to 116 of this judgment.

13. The State is not responsible for the violation of Article 8(4) of the American Convention, in relation to the military criminal proceedings and the disciplinary proceedings, pursuant to paragraphs 117 to 119 of this judgment.

14. The State is not responsible for the violation of the right to presumption of innocence enshrined in Article 8(2) of the Convention, in the disciplinary proceedings, pursuant to paragraphs 146 to 157 of this judgment.

15. The State is not responsible for the violation of Article 9 of the Convention, in the disciplinary proceedings, pursuant to paragraphs 158 and 159 of this judgment.

16. The State is not responsible for the violation of the duty to provide grounds enshrined in Article 8(1) of the Convention in relation to the judgment of June 19, 1997, by the Second Criminal Chamber of the Supreme Court of Justice, in the ordinary criminal proceedings, pursuant to paragraphs 165 to 169 of this judgment.

17. The State is not responsible for the violation of the right be assisted by legal counsel, enshrined in Article 8(2)(e) of the Convention, in relation to the military criminal proceedings, pursuant to paragraphs 186 to 190 of this judgment.

18. The State is not responsible for the violation of Articles 7(6) or 25 of the Convention, pursuant to paragraph 212 of this judgment.

AND ESTABLISHES:

unanimously that,

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

20. The State shall, within six months from notification of this judgment, adopt all necessary judicial, administrative or other measures to annul the convictions issued in the ordinary criminal, military criminal and disciplinary proceedings, in all respects, and to remove the legal or disciplinary, criminal or military records that exist against him as a result of such proceedings, pursuant to paragraphs 223 to 227 of this judgment.

21. The State shall, within six months of the notification of this judgment, make the publications indicated in paragraph 231 of this judgment, pursuant to the terms indicated therein.

22. The State shall pay, within the established terms, the amounts determined in paragraphs 241 to 243, 247 to 249, 252 and 253 of this judgment as compensation and reimbursement of costs and expenses, under the terms indicated in the aforementioned paragraphs.

23. The State shall reimburse the Victims' Legal Assistance Fund of the Inter-American Court of Human Rights the amount spent during the processing of this case, pursuant to paragraph 259 of this judgment.

24. The State shall, within one year of notification of this judgment, submit to the Court a report on the measures adopted to comply therewith.

25. The Court will monitor full compliance with this judgment, in exercise of its authority and in compliance with its obligations pursuant to the American Convention on Human Rights, and shall declare this case closed when the State has fully complied with all the measures ordered herein.

DONE in San Jose, Costa Rica, on October 14, 2019, in the Spanish language.

IACtHR. *Case of Rosadio Villavicencio v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of October 14, 2019.

Eduardo Ferrer Mac-Gregor Poisot
President

Eduardo Vio Grossi

Humberto Antonio Sierra Porto

Elizabeth Odio Benito

Eugenio Raúl Zaffaroni

L. Patricio Pazmiño Freire

Ricardo C. Pérez Manrique

Pablo Saavedra Alessandri
Registrar

So ordered,

Eduardo Ferrer Mac-Gregor Poisot
President

Pablo Saavedra Alessandri
Registrar