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I. BACKGROUND

The Inter-American Commission on Human Rights has observed with concern and made reference on various occasions to the context of violence -that existed in Peru in 1990, a year which saw the abduction, torture and summary execution, and also forced disappearance, of a group of over twenty-one local people from Chumbivilcas province in the Department of Cuzco.

From the moment that the subversive groups Partido Comunista del Perú-Sendero Luminoso [Communist Party of Peru-Shining Path] (PCP-SL) and Movimiento Revolucionario Túpac Amaru [Túpac Amaru Revolutionary Movement] (MRTA) decided to take up arms in 1980, Peru moved into a situation of extreme violence for which these two groups were primarily responsible as they carried out criminal acts with the aim of controlling the towns by means of terror. Their practices violated the fundamental practices of international human rights law.

It is also true that the forces charged with ensuring internal security and combating the armed groups' terrorist activity used methods inconsistent with the values and principles of the international systems for protecting the fundamental rights and freedoms recognized by the states making up the international community, and the inter-American system in particular. The fact is that in their fight against terrorist subversion the security forces of the Peruvian State engaged in practices plainly contrary to human rights, chiefly torture and inhuman and degrading treatment, summary executions and the forced disappearance of persons, especially those who were suspected of being members of the irregular armed groups and, in many instances, persons unconnected with the activities of the terrorist groups.

The Commission considers that the terrorist groups' activities were in fact serious violations of the fundamental human rights basic to human dignity. However, at the same time it also takes the position that the Peruvian State, in its efforts to defeat terror-ist subversion, was not entitled to use methods that violated its international commitments.

This report deals with the case of twenty-one rural people from Chumbivilcas province in Cuzco Department who fell victim to an Army patrol between April 20 and 30, 1990. Thirteen were killed and no fewer than eight were held and subsequently disappeared. From information available to the Commission, it is also known that during the incident the patrol used torture and sexual violation of women.

The Commission considers this case to be important because the Peruvian Government first denied the facts or, in any event, attributed what happened to terrorist groups. It then later acknowledged the facts reported and blamed them on a group of 18 to 20 armed men. The Government even reported that according to information received from the Headquarters of the General Police in Santo Tomás (Chumbivilcas), on April 21, 1990, that Headquarters received a radio call from an 18 or 20-man Peruvian Army patrol that was operating in Chumbivilcas province.

It is also important because a commission was formed in the Peruvian Senate to investigate the events in Chumbivilcas and that committee determined that on the basis of its findings the facts had been sufficiently clarified to declare unidentified Peruvian Army personnel the perpetrators of the Chumbivilcas events.

II. PROCEEDINGS BEFORE THE COMMISSION

By letter of June 26, 1990, the Commission was informed of the torture and subsequent arbitrary execution of eleven residents of Chumbivilcas province, in Cuzco Department, and the arrest and disappearance of five more between April 20 and April 30, 1990. These facts were attributed to a Peruvian Army patrol from the Antabamba Countersubversion Base in the Department of Apurimac, which adjoins the Department of Cuzco.

This information had been gathered from various social organizations and NGOs of the area, and also from the Church in Sicuani.

By communications of July 4 and September 4, 1990, respectively, the petitioners provided the Commission with additional information. In the second of these communications it was noted that according to new information received by the area social organizations, the number of persons killed was thirteen, that the number who were arrested and subsequently disappeared was eight, including an eight-year-old girl, and that at least twenty-six persons had been tortured, including various women who were raped.

On March 17, 1992, the Commission transmitted to the petitioners the Peruvian Government's response, in which the Government stated, inter alia, that:

Patrols were sent out from the Antabamba, Apurimac Countersubversion Base into communities in Apurimac Department. The Antabamba base is located about 100 kilometers from the locality of Ranrapata in Cuzco Department, which is outside the radius of action of a foot patrol from said base; from the nature of the occurrences, they would seem to have been the work of subversives.

The report of operations carried out between April 5 and May 15, 1990, in the provinces of Antabamba and Chumbivilcas does not record any clash or military action in the locality of Ranrapata, Cuzco, since the Frente-4 and Fourth Military Region did not carry out any type of military operation in that zone.

On June 3, 1992, the Commission forwarded to the Peruvian Government a communication setting out the facts forming the subject of the investigation.

On June 8, 1992, the petitioners submitted to the Commission their comments on the Peruvian Government's response.

On July 6, 1990, the Government expanded its comments on the petitioners' complaint, stating, *inter alia*:

A. That after April 20, 1990, in the Yureneca, Tirani, Ucasahuí, Yavini and Ayaccasi areas of the Quiñota and Llusco districts of Chumbivilcas province, there were continuous killings, robberies, rapes and disappearances and other crimes committed by a group of 18 to 20 armed men; as a result of which the members of the rural communities went to the Headquarters of the General Police in Santo Tomás to report the happenings and request an investigation.

...

C. From the preliminary investigations made and the reports give by relatives of the victims and by the local residents, the 79 CPG [police authorities] in Sicuani determined that in the afternoon of April 21, 1990, the 18 to 20 armed men, mounted on horseback and wearing the traditional dress of the area, arbitrarily arrested the teacher Benita Mendoza Merma (whom they subsequently released after three days), then killed Hermene-gildo Jauja Salazar (50) in the community of Tirani; on April 26, 1990, at noon, they killed Marco Torres Salhua (32), Jesús Jauja Suyo (22), Marcos Huisa Llamacca (38), José Eugenio Huamani Charcahuana (28), Eustaqui Apfata Salhua (28), Zenón Huisa Pacco (22), Balbino Huamani Medina (60) and Julio Huamani Huisa at the foot of the Cerro Capullo (Narramapata) mountain, in the Quiñota district of Chumbivilcas province, using firearms to do so, as established by the autopsy required by law; on April 27, 1990, they moved into the community of Accacco, in the Palco Llusco sector, where they left behind in the home of Justino Carcahuana Chipa (41), one Instalaza grenade with its box; finally, on April 28, 1990, before heading out in the direction of Huacuyo, the armed men took with them a rifle, livestock, equipment, clothing and household goods, together with Telésforo Alférez Achinquipa (28), Toribio Achinquipa Pacco (38) and Gregorio Huisa Alcahuaman (22) as hostages.

D. In the morning of April 21, 1990, the radio operator on duty in the Santo Tomás General Police Headquarters received a radio call purporting to be from the base set up by the 18 or 20 Peruvian Army soldiers under the command of a captain who stated they were patrolling the Quiñota and Llusco area of Chumbivilcas province; this radio communication was not confirmed, presumably because it was from subversives who were moving through the different rural communities of Chumbivilcas province.

On September 9, 1994, the petitioners gave the Commission their comments on the Peruvian Government's observations.

In accordance with Article 50 of the American Convention, at its 90th regular session the IACHR approved Report 26/95 and forwarded it to the Government of Peru via a note of November 27, 1995. The Commission requested that within sixty days, the Peruvian State report what action it had taken on the recommendations contained in the report. On January 25, 1996, the Government of Peru requested an extension to reply to the Commission. The latter responded by granting the Government another 30 days, i.e., until February 27, 1996, to reply. The Government did not respond within the stipulated time period.

III. FACTS REPORTED

According to the information in the file, the facts reported as being in violation

of the American Convention on Human Rights are the following:

1. Facts connected with the personal security of the victims, their right to life and the right to personal liberty

The petitioners reported that between April 20 and 30, 1990, a Peruvian Army patrol from the Antambamba Countersubversion Base in Apurimac Department, under the command of an officer, seemingly a lieutenant, went into various communities in Chumbivilcas province, Cuzco Department, where it killed thirteen men who were first tortured. The individuals executed by the members of the Army patrol were identified as: Julio Apfata Tañire Otabirf (28), Balviono Huamaní Median (60), Zenón Huisa Pacco (20), Juan Huisa Pacco (22), Gregorio Alférez Triveño (2), Marcos Zacarías Huisa Llamoca (38), José Eusebio Huamaní Charcahuana (28), Jesús Jauja Suyo (22), Eustaquio Afata Salhua (20), Julio Huamaní Huisa (30), Marcos Torres Salhua (30), Hermengildo Jauja (60) and Víctor Huachaca Gómez.

The medical reports on the state of the cadavers refer in eleven cases to the presence of bodily injuries produced by blows, puncturing and cutting instruments and burning instruments. There were also holes made by the entry and exit of firearm bullets in the cadavers. In all cases, the cause of death was found to have been destruction of internal organs and internal hemorrhaging.

The complaints also stated that a further eight persons were taken by the patrol and are still in disappeared status. These persons have been identified as Quintín Alferez Ojuro (33), Telésforo Alferez Achinquipa, Gregorio Huisa Alcahuaman, Damasio Charcahuana Huisa, Toribio Achinquipa Pacco, Pedro Gómez, a man named Huamán and an unidentified girl of approximately eight years of age.

The complaint states that when these events occurred, the province of Chumbivilcas was not under the state of emergency and, therefore, was not subject to sweeps by the armed forces.

According to information from witnesses included in the file, the killing was done in the foot of the mountain known as the Cerro Capallullo. The soldiers put the people in a line and then detonated explosive devices and immediately thereafter sprayed them with bursts of submachine gun fire. The bodies were dumped in some natural gullies there.

The communications submitted by the petitioners indicate that as noted by the witnesses, the military patrol was headed by an officer, apparently a lieutenant, whom the men addressed as "Negro" or "Negrón".

2. Facts connected with the due judicial protection

When the Chumbivilcas events became known, various organization in the Department of Cuzco, including the Catholic Church in Sicuani province, called for a thorough investigation by the Government Attorney's office [FN1] and the Judicial Branch with a view to clarifying the facts and determining where criminal responsibility lay. The social organizations, the Catholic Church and human rights NGOs have made formal approaches to the Government Attorney's offices regarding the events in Chumbivilcas.

[FN1] Up till the entry into effect of the 1993 Constitution the Government Attorney's office--as an autonomous state agency--performed the dual role of holding responsibility for action under criminal law while also being the defender of democratic legality and of human rights. Currently, with the new Constitution, the Government Attorney's office is only responsible for criminal law action before the judicial authorities. Defense of democratic legality and of human rights has been entrusted to another autonomous organ created by the new Constitution, the Defender of the People.

The petitioners also stated that on April 27, 1990, the Chumbivilcas General Police Chief wrote a letter to the Trial Judge (Criminal Courts Judge) of the locality in which he referred to the Chumbivilcas residents having been killed by Peruvian Army personnel, but without specifying where the latter came from.

The petitioners further stated that on May 14, 1990, they submitted a petition to the Senior Public Prosecutor of Cuzco, requesting his intervention with the aim of ascertaining precisely what happened in Chumbivilcas where a group of persons was killed and improperly arrested by Army personnel supposedly based in the province of Antabamba in Apurimac Department.

On May 27, 1990, the Chumbivilcas Provincial Prosecutor submitted Report No/ 001-90-MP-FPMCH to the Senior Public Prosecutor concerning the events in question and informing him that he had instructed the Chief of the General Police to perform an investigation to clarify the facts and determine who was responsible.

On May 29, 1990, the Asociación Pro Derechos Humanos (Human Rights Association) submitted a complaint to the Government Prosecutor also requesting that he facilitate investigation of the crimes of qualified homicide and abuse of authority concerning the deaths of eleven persons and the arrest and abduction of eight, in the course of April 23, 24, 25 and 26, 1990, by Peruvian Army from the district of Antabamba, Cotabamba Province, Apurimac.

With a view to identifying the presumed perpetrators of the Chumbivilcas killing, the Provincial Prosecutor of Santo Tomás sent General Petronio Fernández Dávila (Chief of the Military Region) various letters requesting him to give the name of the Chief of the Haqira Military Base and of the presumed officer who was leading the military patrol involved. The Provincial Prosecutor asked that this officer be identified and provided the following description of him: "...civilian dress, colored with beard and mustache, 1.70 meters in height, addressed as "Lieutenant Negro or Negrón, Pedro or Julio", against whom there is reasonable evidence that he is the one responsible for the bloodshed and other crimes...".

The file shows that according to the police report of July 25, 1990, the Police as a result of their investigations, concluded that those responsible for the killing of the Chumbivilcas residents were the members of a Peruvian Army patrol. This police report places responsibility on Peruvian Army personnel based in the locality of Haqira, Cotamba, Apurimac. This conclusion is based on:

- a. The uniform appearance of those involved.
- b. The radio contacts in the name of the Haqira army base, recorded in the register of confidential occurrences of the Santo Tomás General Police Headquarters.
- c. The finding of an Instalaza grenade, cartridges for Instalaza, CAL.7.62 cartridges for FAL, of FAMF make, registered in the 79 CPN, Sicuani.

The petitioners further informed the Commission that, according to dossier No. 097-90 of the Chumbivilcas Provincial Prosecutor, it was established that the patrol responsible for the killing of the people in Chumbivilcas belonged to the Peruvian Army and was commanded by an officer with the rank of lieutenant. The Prosecutor accordingly asked the Chief of the Fourth Military Region for the name of the Haqira Military Base and the identity of the officer who was in command of the armed group that committed the crime.

The military commanders did not provide the information necessary for identifying those responsible. The government Attorney has not yet filed a complaint with the appropriate judicial authority.

IV. OBSERVATIONS OF THE PARTIES

1. Position of the Government

The Peruvian Government has sent the Commission two formal communications regarding the case in question. In the first it states that the acts forming the subject of the complaint were not carried out by the Peruvian Army, and that what happened seems more likely to have been the work of subversives. In the second, dated July 6, 1994, and expanding on the first, it introduces new elements by acknowledging that the deaths in Chumbivilcas province actually occurred, but at the same time stating concerning responsibility for same that "presumably... subversive elements were moving about among the different rural communities in the Chumbivilcas province in the Department of Cuzco."

The Commission has also noted the position of the Ministry of Defense concerning the Chumbivilcas events, as revealed in additional information provided by the petitioners. Thus, on June 11, 1990, the Ministry of Defense issued Report No. 2490, in which it states that the Joint Command had been informed that: "(1) the armed forces had not carried out operations in the province of Chumbivilcas in the Department of Cuzco."

On the same date, the Ministry of Defense sent a communication to the Chamber of Deputies, in which it denied that the armed forces had carried out operations in the Province of Chumbivilcas, in the Department of Cuzco.

2. Position of the petitioners

The petitioners have informed the Commission that, notwithstanding the fact that more than four years have elapsed since the events in question, the Peruvian Government is still asserting that even though they were identified as an Army patrol, the armed column responsible might conceivably have been made up of subversives.

In addition, the petitioners allege that although they have repeatedly and publicly complained on behalf of the victims' families and the different church institutions, and trade, rural and human rights organizations about the torture, summary executions and forced disappearances of the Chumbivilcas residents, their complaints have produced no results to date. The military authorities have systematically denied the facts and have not cooperated with the Government Attorney's office. The case has not been turned over to the judicial branch of investigation.

The petitioners maintain that more than four years have in fact passed since the events were reported, but they have not yet been explained. Those responsible have not been identified, neither has anyone been punished by the competent authorities, so that local remedies have proven ineffective.

They also state that the Peruvian Government, in its last response addressed to the Commission, suggests that those responsible for the killing of the Chumbivilcas people may have been subversives. The petitioners' reply to this argument of the Government's is that the Government has not demonstrated that it conducted any investigation or has any evidence that the possible perpetrators might have been subversives. On the contrary, the petitioners note that the Government has not been able to disprove any of the evidence they have submitted to the Commission.

The petitioners further maintain that the Peruvian Government has not provided any information regarding the disposition of the different complaints filed by the victims' relatives and the various organizations, both with the Government Attorney's office and with the judicial authorities, and that it has responded with evasions and in a confused manner to the complaint, resorting to unsubstantiated assumptions despite the fact that more than four years have elapsed since the Chumbivilcas events.

They note that the Government refuses to give the names of those responsible, and has even refused to provide this information to a parliamentary commission specially formed to investigate the events.

The Government's attitude, according to the petitioners, demonstrates its unreadiness to investigate the torture, summary execution and forced disappearances of the Chumbivilcas residents. They conclude that the lack of any impartial investigation by the competent authorities not only shows a lack of interest in ascertaining the facts in order to punish those responsible, but also reveals an intolerable predisposition in favor of letting those involved remain unpunished. The fact is that despite the prompt reporting of the unlawful execution of the citizens Julio Apfata Tañire Otabirf (28), Balviono Huamaní Median (60), Zenón Huisa Pacco (20), Juan Huisa Pacco (22), Gregorio Alférez Triveño (20), Marcos Zacarías Huisa Llamoca (38), José Eusebio Huamaní Charcahuana (28), Jesús Jauja Suyo (22), Eustaquio Afata Salhua (20), Julio Huamaní Huisa (30), Marcos Torres Salhua (30), Hermengildo Jauja (60) and Víctor Huachaca Gómez and the forced disappearance of Quintín Alférez Ojuro (33), Telésforo Alférez Achinquipa, Gregorio Huisa Alcahuaman, Damasio Charcahuana Huisa, Andrés Achinquipa Pacco, Pedro Gómez, a man named Huaman and an unidentified girl approximately eight years old to the different authorities charged with the administration of justice, and also despite having reported the facts to various political and military authorities, the investigations have not yet been completed neither has a final report been issued, except in the case of the Special Congressional Commission, as a result of the pertinent investigations.

Finally, they consider that the facts reported have not been absolutely disproved by the Peruvian Government. In support of their complaint, the petitioners have sent the Commission the conclusions of the Parliamentary Commission set up by the Congress of the Republic to investigate the Chumbivilcas events. Among its most important conclusions the Parliamentary Commission emphasizes that: ...

The Commission concludes that it has achieved a sufficient level of clarification concerning the facts investigated to enable it to declare unidentified elements of the Peruvian Army responsible for the mass murder of local people in the localities of the province of Chumbivilcas and Antabamba, between the territories of the Departments of Apurímac and Cuzco.

The Parliamentary Commission's report maintains that the statements taken as testimony agree in assigning responsibility to personnel of the Peruvian Army and states that: "... the armed group was apparently led by an officer, probably of the rank of lieutenant, its members bore arms of the same caliber, with half boots, water bottles, military boots, black sweaters and ski masks. They attempted to conceal this military gear by wearing ponchos over it.

Further on the report adds:

The group addressed the presumed officer by a military rank (the majority of the witnesses stated he was addressed as "Lieutenant") and used military language; they interrogated their captives about ownership of arms and the whereabouts of certain subversives they were looking for.

According to statements collected by the Parliamentary Commission, in the month prior to the events (March 1990) a patrol from the Haquira base had made a sweep through the area:

The Provincial Mayor of Chumbivilcas, Eusebio Villena Castro, declared that the Haquira military base was constantly sending patrols out into the mountain communities and that on repeated occasions they had checked out the districts of Quiñota, Llusco...

Moreover, regarding collaboration by senior army officers in the investigations of the Chumbivilcas events, one of the Congressional Commission's conclusions affirms that:

2. The Commission concludes that the chiefs of the Military--Political Commands of Ayacucho, General Petronio Fernández Dávila, and of Apurimac, Colonel Calle, failed to perform their functional and constitutional obligations in refusing to provide information on the identity of operations commanders responsible for common crimes. It is the Government Attorney's office that must evaluate and classify this behavior for the purpose of appropriate punishment, since it involves the shielding of individuals incriminated in criminal proceedings, an act that is classed as unlawful in our criminal justice system.

V. GENERAL CONSIDERATIONS

1. Concerning admissibility of the complaint

- Submission within the time limit stipulated

The complaint was submitted within the six-month time limit set in Article 46(b) of the American Convention on Human Rights and Article 38(1) of the Regulations of the Commission

- Requirements as to form

The complaint meets the requirements as to form for admissibility set in the American Convention on Human Rights and Regulations of the Commission

- No pending proceedings and res judicata requirement

The instant case is neither pending settlement in another procedure under an international governmental organization nor does it essentially duplicate a petition pending or already examined and settled by the Commission or by another international governmental organization.

- Exhaustion of domestic remedies

Article 46(1) of the Convention sets forth the conditions to be met for submission of a complaint to the Commission. The requirements include that the remedies under domestic jurisdiction must have been invoked and exhausted in accordance with the general principles of international law. The remedies under domestic jurisdiction of the States must be those appropriate and effective for accomplishing the purpose for which they are intended.

However, paragraph 2 of the same Article (Article 46(2)) specifies three exceptions to the prior invocation and exhaustion of domestic remedies, namely: (i) when the allegedly injured party has not been allowed access to the remedies under domestic law; (ii) when he has been prevented from exhausting them; and (iii) when there has been unwarranted delay in rendering a final judgment under said remedies.

If any of these three circumstances occurs, then the requirement to first exhaust domestic remedies will not be applicable.

This case was notified to the competent authorities of the domestic jurisdiction of the State concerned. The fact is, as already noted, various complaints were lodged with the Government Attorney's office on account of the dual role that office performed in the legal system established by the Peruvian Political Constitution of 1979, namely in its capacity as protector of citizens' rights and freedoms under the legal and constitutional systems, and in its accusatory role as agency responsible for initiating criminal

proceedings before the judicial authorities. Despite the fact that the Government Attorney's office has established that the events in Chumbivilcas, which took the form of torture followed by unlawful executions and forced disappearances, were attributable to a Peruvian Army patrol commanded by an officer with the rank of lieutenant, to date no move has been made to have the criminal justice authorities open an investigation. It should be noted that in accordance with current Peruvian criminal procedure and the organic law governing the Government Attorney's office, for the prosecutor--acting as the authority responsible for initiating criminal proceedings--to bring the matter before the Judicial Branch, three concurrent requirements have to be met: (i) the matter in question must be a crime; (ii) the time limit for instituting criminal proceedings must not have expired; and (iii) the persons allegedly responsible must have been identified. If the matter is a crime and criminal precedence are not statute barred but the person responsible has not been identified, the prosecutor is required to provisionally set the investigation aside. In the present case more than four years have elapsed and to date no proceedings have been instituted, among other reasons because the military authorities, who are subject to the Executive Branch, refuse to identify the officers responsible for the Chumbivilcas events.

In light of that stated in the preceding paragraph, the Commission considers that efforts to exhaust domestic remedies in connection with investigation of the events and identification of those responsible have proved ineffective and that the time which has elapsed without the Peruvian authorities taking action in the case amounts to an unwarranted delay in rendering a final judgment on said domestic remedies. Moreover, when it adopted laws 26479 and 26492, the Peruvian State unilaterally renounced its obligation to investigate and punish crimes that affect fundamental rights, as in this case with the right to life, in violation of the American Convention on Human Rights.[FN2] The Commission accordingly considers that the petition submitted meets the admissibility requirements set by the American Convention and the Commission's Rules of Procedure.

[FN2] Within a few days of enactment of Law 26479, the judge conducting the inquiry into the massacre in Barrios Altos in 1992, declared that Article 1 of the that law did not apply to that case because it was unconstitutional. The Peruvian State then passed a new law (No. 26492) purported to be an interpretation of the Amnesty Law. This law stated that the Amnesty Law was not unconstitutional and was not a breach of international human rights treaties and that its application was compulsory and not subject to judicial review.

2. Concerning the right to life, to humane treatment and to personal liberty

According to the American Declaration of the Rights and Duties of Man, the right to life is a fundamental right and if respect of this right by government authorities is not assured then the entire range of rights and freedoms detailed in the system for recognizing and protecting human rights would be rendered ineffective.

Article 1 of the American Declaration in fact specifies that "Every human being has the right to life, liberty and the security of his person". The right to life is the main right of a human being and this right therefore implies, in addition to the duty to respect it, an irrevocable duty on the part of states to protect it, as stipulated in Article 1(1) of the Convention under which the states undertake to respect and guarantee all the rights and freedoms recognized in it.

This is the context of Article 4 of the American Convention, which declares that "Every person has the right to have his life respected..." and at the same time lays down the prohibition to the effect that: "No one shall be arbitrarily deprived of his life".

This prohibition against arbitrary deprivation of human life is at the core of the right to life. The use of the term "arbitrarily" might appear to indicate that the Convention allows exceptions to the right to life, on the mistaken assumption that life may be taken in certain circumstances provided this is not done arbitrarily. However, quite the opposite is the case, since the intent of this clause is rather to seek to ensure strengthening of the conditions governing application of the death penalty by those states which have not yet abolished it, and at the same time, to serve as a guarantee to prevent summary executions.

The Convention's aim is to preserve the right to life at all times, and also the right to humane treatment. In actual fact, the States are not permitted to restrict these rights, even on grounds of existence of exceptional situations that jeopardize the life of the State or of the national community. This is expressly and unequivocally spelled out in Article 27(2) of the Convention concerning rights that may not be suspended during states of emergency:

Article 27

1. In time of war, public danger or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation...
2. The foregoing provision does not authorize any suspension of the following articles: Article 3 (Right to Juridical Personality); Article 4 (Right to Life); Article 5 (Right to Humane Treatment)...

When the events under investigation by the Commission occurred, the Political Constitution of 1979 was in effect in Peru; this Constitution restricted application of the death penalty to cases of high treason in the case of international war (Article 235).[FN3]

[FN3] The current Peruvian Constitution, in effect since December 31, 1993, has expanded the grounds for application of the death penalty, which is now permitted for the crimes of terrorism and high treason in both international wars and domestic conflicts.

In accordance with the provisions of the Peruvian Constitution and the international obligations forming part of the country's domestic law,[FN4] quite apart from the limitations imposed by the rules governing the death penalty and circumstance of legitimate defense in cases of armed conflicts or serious domestic disturbances jeopardizing the life and the other fundamental rights of persons, any execution carried out by State agents responsible for maintenance and preserving domestic order must be considered arbitrary.

[FN4] The State of Peru is an obligated party to the Geneva Conventions of 1949, and also to their Additional Protocols of 1977.

From analysis of the information submitted to the Commission, it is apparent that in the case of the Chumbivilcas events the Army Patrol acted outside of regular operating procedures that would reasonably have justified the use of force by means of its firearms. What in fact happened was a multiple homicide resulting from excessive use of the State's operating capability (a military patrol), without any authorization under the legislation in effect. The deaths caused were the outcome of arbitrary and unlawful use of force.

It must be emphasized that no province of the Department of Cuzco was under the state of emergency when the events occurred. This is an important point for reinforcing the principle that both the right to life

and the right to humane treatment are rights that must be respected at all times by state agents responsible for law enforcement and that there is no justification for violating them, not even in state of emergency.

In accordance with the reasoning set forth, the Commission considers that on the grounds of the torture followed by arbitrary executions carried out by the members of the Army patrol in Chumbivilcas province and involving the victims listed in the statement of facts, the Peruvian military authorities have violated the American Convention in that it recognizes and protects the right to life and humane treatment specified in Articles 4 and 5, respectively, which means that the State also failed to carry out its obligation to respect and guarantee these rights, an obligation that is enshrined in Article 1(1) of the American Convention.

Regarding the petitioners' complaint concerning the forced disappearance of eight persons, including a young girl, the Commission takes the following position:

The practice of forced or involuntary disappearance of persons has been qualified by the international community as a crime against humanity that violates fundamental human rights such as personal liberty, the right to humane treatment, the right to fair trial and to due process, and also including the right to life. Accordingly, on the basis of a petition by the Inter-American Commission on Human Rights, the General Assembly of the Organization of American States resolved in 1983:

To declare that the practice of forced disappearance of persons in America is an affront to the conscience of the Hemisphere and constitutes a crime against humanity.[FN5]

[FN5] Resolution 666 (XIII-0/83).

In reference to the practice of forced disappearance the Court has held that:

These cruel and inhuman practices constitute not only an arbitrary deprivation of liberty, but also an extremely serious hazard to the personal integrity, security and very life of the person concerned. They moreover place the victim in a state of absolute defenselessness with serious violation of his rights to a fair trial, protection against arbitrary arrest and due process.[FN6]

[FN6] Inter-American Commission on Human Rights: "Diez Años", p. 317.

The Inter-American Court of Human Rights, for its part, has observed that the forced disappearance of persons frequently entails "the execution of the detainees, in secret and without form of trial, followed by concealment of the cadaver with the aim of erasing any material trace of the crime and ensuring the impunity of those who committed it, which represents a brutal violation of the right to life recognized in Article 4 of the Convention.[FN7]

[FN7] Inter-American Court of Human Rights, Velásquez Rodríguez case, Judgment of July 27, 1988, para. 155.

The practice of forced disappearance is therefore, by definition, a cruel and inhuman practice that is offensive on a number of scores in that various legal rights are violated by it: personal liberty, right to

humane treatment and to a fair trial, due process, and the right to life itself. The Commission considers that forced disappearance has occurred when a person is arrested by State agents or with the acquiescence of same, with or without orders from a competent authority, and this arrest is then denied and no information is made available as to the destination or whereabouts of the detainee.

Accordingly, the following requirements have to be met for arrest followed by disappearance to be deemed to have occurred: (i) an arrest as described above must have been made; (ii) this arrest must have been carried out by State agents or by irregular groups (paramilitary or parapolice) acting with the acquiescence of the state authorities or under their operational control; and (iii) the holding of the victim must have been systematically denied by the authorities responsible for public order.[FN8]

[FN8] Inter-American Commission on Human Rights: "American Convention on Forced or Involuntary Disappearance of Persons", in "Revista del Instituto Interamericano de Derechos Humanos", July-December 1987, No. 6, p. 95.

According to the Commission's practice, an arbitrary or illegal arrest is deemed to have occurred when three different assumptions are satisfied, namely: (i) when the arrest is made without any valid legal grounds (totally illegal arrest); (ii) when it is carried out without observance of the forms required by law; and (iii) when it is inconsistent with the powers of arrest, i.e. when an arrest is made for purposes other than those specified and required by law (arrest for improper purposes); the Commission has also noted that arrest for improper purposes is in itself a punishment or penalty that also affects the democratic nature of the State and a violation of the principle of separation of powers in that it implies exercise by the administrative branch of powers assigned to the judicial authorities.[FN9]

[FN9] Inter-American Commission on Human Rights: Annual Report 1980-81, p. 118; Report on Chile (1985), p. 138, para. 100; Diez Años, p. 319; Report on Argentina (1980), p. 291, section A(a) and (b).

In the present case, it is apparent from the file that the citizens Quintín Alférez Ojuro, Telésforo Alférez Achinquipa, Gregorio Huisa Alcahuaman, Damasio Charcahuana Huisa, Toribio Achinquipa Pacco, Pedro Gómez, a man named Huamán, and the unidentified girl of about eight years of age, were arrested in an illegal and arbitrary fashion by the members of a Peruvian Army patrol between April 20 and April 30, 1990, in the province of Chumbivilcas. It is also evident from the file that notwithstanding the requests made by the rural organizations, the Catholic Church and the Government Attorney's office the military authorities have systematically refused to acknowledge responsibility for the facts reported, which clearly include charges of forced disappearance of the above-referred citizens.

Due account must also be taken of the constitutional provisions in effect at the time of the events, regarding personal liberty and the powers of the law-enforcement authorities concerning arrest of persons. The fact is that Article 2(20)(g) of the 1979 political Constitution specified that no one could be arrested without a written warrant from a judge setting out the reasons, or by the police in the case of crime detected in the act. In the present case, as can be inferred from the description of the facts, the persons concerned were arrested without any court order and without having been found committing any crime, since in all cases it is known that the military personnel arrested them on mere suspicion of being rural dwellers who were assisting the subversive groups, without having any evidence or reasonable indication that this suspicion was justified. Moreover, it must again be stressed that in the Chumbivilcas area no state of emergency had been formally declared that might have warranted arrest for questioning without any court order or detection of criminal activity in progress. In this respect, these arrests were arbitrary

and in violation of the rules designed to ensure due process in that none of the persons was brought before a competent court assuming that they were guilty of some crime.[FN10]

[FN10] Under Article 231 of the 1977 Constitution, the right to personal liberty could be restricted when a state of emergency was in force.

In accordance with the foregoing it can be concluded that in the present case there were arbitrary arrests of defenseless persons without any justification whatsoever, and that these arrests have been repeatedly denied by the military authorities, thus giving rise to a collective case of forced disappearance with violation of a set of rights possessed by all persons such as personal liberty, the right to humane treatment and due process, and even the right to life itself, the latter being presumed on the bases of the time that has elapsed without the persons in question reappearing.

On the grounds set forth in the preceding paragraphs, the Commission considers that both the right to personal liberty guaranteed by Article 7 of the American Convention, and the rights to life and humane treatment guaranteed by Articles 4 and 5 of the Convention, respectively, and also the provisions that recognize and guarantee due process as set forth in Article 8 of the Convention, have been violated by the military authorities of the Peruvian State, to the prejudice of the persons listed in this case as arrested and disappeared, the Peruvian Government authorities having failed to perform their obligation to respect and guarantee these rights, as set forth in Article 1(1) of the American Convention.

3. Concerning the duties to respect and guarantee the fundamental rights and regarding the right to effective judicial protection

Article 1 of the American Convention reads as follows:

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination...

In other words, the States have a duty to respect and to guarantee the fundamental rights. These duties of the States, to respect and to guarantee, form the cornerstone of the international protection system since they comprise the States' international commitment to limit the exercise of their power, and even of their sovereignty, vis-à-vis the fundamental rights and freedoms of the individual. The duty to respect entails that the States must ensure the effectiveness of all the rights contained in the Convention by means of a legal, political and institutional system appropriate for such purposes. The duty to guarantee, for its part, entails that the States must ensure the effectiveness of the fundamental rights by ensuring that the specific legal means of protection are adequate either for preventing violations or else for reestablishing said rights and for compensating victims or their families in cases of abuse or misuse of power. These obligations of the States are related to the duty to adopt such domestic legislative provisions as may be necessary to ensure exercise of the rights specified in the Convention (Article 2). As a corollary to these provisions, there is the duty to prevent violations and the duty to investigate any that occur since both are obligations involving the responsibility of the States. As the Inter-American Court of Human Rights notes in its judgment of July 29, 1988:

The State has the clear legal duty to prevent insofar as it reasonably can violations of human rights, to purposefully investigate with the means at its disposal such violations as may be committed within the sphere of its jurisdiction, in order to identify those responsible, to impose the pertinent penalties on them and to ensure adequate compensation for the victim.[FN11]

[FN11] Inter-American Court of Human Rights, Velásquez-Rodríguez case, Judgment of July 29, 1988, para. 174.

The same judgment further notes that the duty to investigate must be carried out in such a way that the truth of the facts reported is duly determined:

(the duty to investigate) must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.[FN12]

[FN12] Ibid., para. 177.

This set of obligations of the States is connected with the right to due judicial protection laid down in Article 25 of the American Convention, which specifies that anyone whose fundamental rights are affected by acts of authorities in the performance of their official duties is entitled to legal recourse before the competent courts, whether jurisdictional or administrative.

In the present case, the file held by the Commission shows that a set of proofs has been compiled that adequately demonstrate that between April 20 and April 30, 1990, a military patrol from the Antabamba Countersubversion Base in Apurimac Department moved into various areas where rural communities were located in the province of Chumbivilcas, Cuzco. During the period mentioned, the military patrol carried out various acts that violated the fundamental rights of the populations, including torture, summary executions and forced disappearances.

The military authorities, which report to the Executive Branch through the Ministry of Defense, and are obliged to give account of these facts and to identify those responsible so that they may be turned over to the Government Attorney's office and the judicial authorities, far from carrying out an organized investigation for these purposes have systematically denied the facts and have not provided the necessary information requested by the prosecutors in charge of the investigation. The concealment of information and the misleading information given out clearly show that the competent authorities of the Peruvian Executive Branch have not seriously investigated the facts reported.

Regarding this point, reference can again be made to the Inter-American Court of Human Rights' Judgment in the Velásquez-Rodríguez case, in which it is stated that:

... the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgment of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law.[FN13]

[FN13] Ibid., para. 138.

It is important to emphasize that, as detailed in the file, the facts were investigated by a Parliamentary Commission specially formed for the purpose, which determined that responsibility for the Chumbivilcas events lay with unidentified army personnel. In accordance with Peruvian constitutional and legislative provisions, the Parliamentary Commission's findings do not have judicial effect, since their purpose is basically political, for the purpose of activating the mechanisms of political control over the administrative authorities. However, from the probative standpoint these findings constitute a crucial element for assessing the facts and considering them from the legal viewpoint in an official and judicial investigation.

It must be clearly stated that while there definitely was a Parliamentary Commission that investigated what happened in Chumbivilcas and came close to determining the truth of the matter, this in no way relieves the Peruvian Government from its responsibility for having failed to provide key information for clarifying the facts and determining criminal responsibilities in public and impartial trial, as a result of which it failed to comply with the duty to respect and guarantee the fundamental rights set forth in Article 1 of the American Convention on Human Rights.

In Report 26/95, to which the Peruvian State did not respond within the 90 days the Commission granted to it for that purpose, the Commission concluded that the Peruvian Government had failed to comply with its obligation to respect and guarantee the fundamental rights and freedoms, an obligation that carries with it the duty to investigate abuses of these rights and freedoms and to punish those responsible, and had violated the right to due judicial protection, set forth in articles 1 and 25 of the American Convention on Human Rights.

VI. CONCLUSIONS

On the basis of what is set forth in this report the Commission concludes as follows:

That the case is admissible and the Commission is competent to examine same since it is a matter of violations by the Peruvian State of the following rights:

1. Right to life, to humane treatment and to personal liberty, recognized and guaranteed, respectively, by Articles 4, 5 and 7 of the American Convention on Human Rights, on the grounds of the torture followed by summary executions and forced disappearances suffered by Julio Apfata Tañire Otabirf (28), Balviono Huamaní Median (60), Zenón Huisa Pacco (20), Juan Huisa Pacco (22), Gregorio Alférez Triveño (20), Marcos Zacarías Huisa Llamoca (38), José Eusebio Huamaní Charcahuana (28), Jesús Jauja Suyo (22), Eustaquio Afata Salhua (20), Julio Huamaní Huisa (30), Marcos Torres Salhua (30), Hermengildo Jauja (60) and Victor Huachaca Gómez (tortured and executed), and Quintín Alférez Ojuro (33), Telésforo Alférez Achinquipa, Gregorio Huisa Alcahuaman, Damasio Charcahuana Huisa, Toribio Achinquipa Pacco, Pedro Gómez, a man named Huamán and an unidentified girl aged about eight years (tortured and disappeared).

2. The obligation to respect the rights and guarantees laid down in Article 1(1) of the American Convention, together with the right of the victims' families to due judicial protection, as provided for in Article 25 of the Convention, since the Peruvian Government has not initiated the different legal proceedings or involved the legal authorities competent to investigate the criminal events, but much to the contrary has acted counter to the pertinent legal procedures.

VII. RECOMMENDATIONS

Now therefore,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare that the Peruvian Government has violated the rights recognized by signature of the American Convention on Human Rights with respect to the right to life (Article 4) and the right to humane treatment (Article 5(1)), respectively, as consequence of the summary execution of the citizens Julio Apfata Tañire Otabirf, Balviono Huamaní Median, Zenón Huisa Pacco, Juan Huisa Pacco, Gregorio Alférez Triveño, Marcos Zacarías Huisa Llamoca, José Eusebio Huamaní Charcahuana, Jesús Jauja Suyo, Eustaquio Afata Salhua, Julio Huamaní Huisa, Marcos Torres Salhua, Hermengildo Jauja, and Victor Huachaca Gómez, which executions were carried out on April 26, 1990, in the province of Chumbivilcas, Department of Cuzco.
2. To declare that the Peruvian Government is responsible for the violation of the right to personal liberty, to life, to humane treatment and to the guarantees of due process recognized in Articles 7, 4, 5, and 8, respectively, of the American Convention on Human Rights, as a consequence of the unlawful deprivation of liberty followed by forced disappearance of the citizens Quintín Alférez Ojuro, Telésforo Alférez Achinquipa, Gregorio Huisa Alcahuaman, Damasio Charcahuana Huisa, Andrés Achinquipa Pacco, Pedro Gómez, a man named Huamán and an unidentified girl, in the district of Chumbivilcas, province of Sicuani, Department of Cuzco, between April 20 and April 30, 1990.
3. To further declare that in the instant case, the Peruvian State failed to reply to Report 26/95, approved in accordance with Article 50 of the American Convention, failed to comply with its obligation to respect the rights and guarantees established in Article 1(1) of the American Convention, and violated the right to judicial protection provided for in Article 25 of the American Convention.
4. To recommend to the Peruvian State, in light of the Commission's analysis of the instant case, that it conduct another investigation into the facts reported, to determine the whereabouts of the disappeared persons, and to identify and punish those responsible for the torture, summary execution and forced disappearance of the 21 residents of Chumbivilcas.
5. To recommend to the Peruvian Government that it pay fair compensation to the families of the victims.
6. To request the Peruvian Government to inform the Inter-American Commission on Human Rights of the measures taken pursuant to paragraphs 4 and 5 of these recommendations.
7. To publish this Report in the Annual Report to the General Assembly.