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Decided by:	Chairman: Professor Claudio Grossman; First Vice Chairman: Ambassador John S. Donaldson; Second Vice Chairman: Professor Carlos Ayala Corao; Members: Dr. Oscar Lujan Fappiano, Professor Robert Kogod Goldman, Dr. Jean Joseph Exume, Ambassador Alvaro Tirado Mejia.
Dated:	1 March 1996
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On October 17, 1991, the Inter-American Commission on Human Rights (hereinafter the Commission) received a petition reporting violation of the human rights of Fernando Mejía Egocheaga and of his wife Raquel Martín de Mejía. This petition requested that Peru be declared responsible for violation of the following rights recognized in the American Convention on Human Rights (hereinafter the Convention):

1. In regard to Fernando Mejía, right to personal liberty (Article 7), right to humane treatment (Article 5), and right to life (Article 4), all in connection with Article 1(1) of the Convention.
2. In regard to Raquel Mejía, right to humane treatment and right to privacy (Article 11), both in connection with Article 1(1) of the Convention.
3. In regard to both petitioners, the right of everyone to an effective domestic remedy that protects him against acts that violate his fundamental rights (Article 25).

I. BACKGROUND

Fernando Mejía Egocheaga and his wife Raquel were living in Oxapampa, in the Department of Pasco, at the time the events reported to the Commission took place.

Dr. Mejía Egocheaga was a lawyer, journalist and political activist. At the time of his death he was President of the Oxapampa Bar Association and also Chairman of the Provincial Committee of Izquierda Unida (United Left), a Peruvian political party. He was also a member of the Peruvian Journalists' Association and worked as a journalist on the paper "Campanaria Oxapampa", which he had founded and of which he was editor. As a lawyer, Dr. Mejía Egocheaga concentrated mainly on defending the rights to land of the most disadvantaged groups in Peru. Between 1982 and 1986 he was legal adviser to the "Pichis Palcazu" special project, a rural development initiative launched under the auspices of the Presidency of the Republic. In 1986 he represented the indigenous peoples of the Amuesha Community in a land conflict with the Catholic Church. In his political activity, Dr. Mejía Egocheaga planned to run for mayor of Oxapampa and later possibly to make a bid for a seat in Congress.

Mrs. Raquel Martín de Mejía was a teacher and worked as principal of a school for the handicapped in Oxapampa. She is presently living in Sweden, where she obtained political asylum in 1989.

In June 1989 some soldiers were killed by Sendero Luminoso (Shining Path) terrorists in Posuzo, a town not far from Oxapampa. A few days afterwards, about 100 military personnel from the "Batallón Nueve de Diciembre", based in Huancayo, were helicoptered into Oxapampa to conduct counterinsurgency operations in the region. These soldiers were billeted in the local Municipal Library.

II. FACTS REPORTED

According to the information provided by the petitioners to the Commission, the facts reported as violations of human rights protected by the Convention are stated to be those described in the following:

In the night of June 15, 1989, Oxapampa residents saw a yellow pickup truck belonging to the "Pichis Palcazu" government project parked in front of the bar. In it were Julio Arias Dorregaray, Subprefect of Oxapampa, Army officers and four soldiers. A witness who was there reported hearing Mr. Arias Dorregaray say to his companions: "it's time to go look for the lawyer".

The same night, at 10:05 p.m., a number of military personnel with their faces covered by ski masks and carrying submachine guns violently entered the home of Professor Aladino Melgarejo, who was the Secretary General of the Sindicato Unico de Trabajadores de la Educación Peruana (SUTEP--Peruvian Education Workers' Union) in Oxapampa and a member of Izquierda Unida. The soldiers made him leave the house, beat him and finally pushed him into a government-owned yellow pickup truck used for the "Pichis Palcazu" special project. The abduction of Professor Melgarejo was witnessed by his wife, Haydeé Verde, by his sister-in-law, Mrs. Nancy Verde de Nano and by the latter's husband, Mr. Hugo Nano.

According to the petitioners, the Army personnel in charge of the operation ordered Professor Melgarejo to drive them to the home of Dr. Fernando Mejía Egocheaga.

At 11:15 that night (June 15), a group of persons with their faces covered by ski masks and carrying submachine guns suddenly turned up at the Mejías' home and demanded to see Dr. Fernando Mejía Egocheaga. When he opened the door, six individuals wearing military uniforms went in and one of them struck Dr. Mejía with his weapon; then the one in charge of the operation ordered him into a yellow government-owned pickup. The events described were witnessed by his wife, Raquel Martín de Mejía.

That same night, about 15 minutes after the above-described events, a group of between six and ten military personnel with their faces concealed by black ski masks showed up at the Mejías' house again. One of them--the one who had been in charge of the abduction of Fernando Mejía--went into the house, apparently to ask Mrs. Mejía for her husband's identity documents.

While she was looking for them he followed her into the room and told her she was also considered a subversive. He then showed her a list containing a number of names and said that they were people who were members of the Movimiento Revolucionario Tupac Amaru (MRTA--Tupac Amaru Revolutionary Movement). When Mrs. Mejía moved closer to read it, he covered it so that she could only see two names: those of Fernando Mejía and Aladino Melgarejo.

Mrs. Mejía tried to explain to him that neither she nor her husband belonged to any subversive movements; however, without listening to her he began to spray himself with her perfumes and finally raped her. He then took her outside the house to see the man who had denounced her husband; this man

was lying face down in the back of the same pickup that had been used to abduct Fernando Mejía. Finally, the individual who had abused her sexually got into the pickup and drove off.

About twenty minutes later the same person returned to the Mejías' home, apparently with the intention of telling Mrs. Mejía that her husband might possibly be taken to Lima by helicopter the next day. He then dragged her into the room and raped her again. Raquel Mejía spent the rest of the night in a state of terror that the one who had assaulted her would come back and fearing for her safety and for her husband's life.

The next morning Mrs. Mejía went to the police station in Oxapampa to report the disappearance of her husband. The duty corporal told her that a person could not be reported as missing until after four days had elapsed. The station chief then suggested that she ask for information at the offices of the Republican Police, where she went and was advised to go to the Municipal Library where the troops of the "Batallón Nueve de Diciembre" had been billeted since their arrival in Oxapampa some days earlier.

When she got to the Municipal Library she saw a large number of soldiers lined up in front of the building and noted that they were wearing the same uniforms as the men who had abducted her husband and the man who had abused her sexually.

Also there was Professor Melgarejo's wife Haydeé, accompanied by a local lawyer, trying to find out about the disappearance of her husband. The two women talked with some soldiers who told them they were members of the "Batallón Nueve de Diciembre" and said that their commander was known as "Chito". Another soldier then came up and abruptly ordered them to go away. Mrs. Mejía recognized him as one of her husband's abductors.

Raquel Mejía and Haydeé Verde requested the assistance of the Mayor of Oxapampa, Mr. Eduardo Koch Muller, and of the Provincial Prosecutor of Oxapampa, Dr. Abraham Lino Obregón, but neither of them did anything to help the two women.

As a last resort, Mrs. Mejía went to the Bar Association, where Dr. Lora, a lawyer belonging to the association, prepared petitions for protection of civil rights and habeas corpus, which were immediately lodged with the examining magistrate, Dr. Johnny Macetas. Despite having received and sealed them, Dr. Macetas stated that he was busy with other cases and did not have time to investigate the disappearance of Fernando Mejía Egocheaga.

On June 16, 1989, members of the Permanent Congressional Commission sent a letter to the Minister of the Interior requesting information concerning Fernando Mejía and asking that he be freed. The Minister of the Interior never responded to that letter.

On June 17, César Barrera Bazán, a Member of Congress and a friend of Professor Melgarejo, went to Oxapampa to investigate the disappear-ances. The Army troops there refused to cooperate or to provide any information as to the fate of Mejía and Melgarejo.

In the morning of June 18, Raquel Mejía learned that Professor Melgarejo's body had been found on the bank of the Santa Clara River with another half-buried body alongside it.

Raquel Mejía, together with the acting judge and the secretary of the court with responsibility for the case, then went to the place in question and found there, at the foot of the column supporting the bridge, the beheaded corpse of Aladino Melgarejo and, alongside it, the body of her husband, Dr. Fernando Mejía. The latter showed clear signs of torture, cuts in the legs and arms and an open wound in the head apparently caused by a bullet. He had been severely beaten and the body was extensively swollen.

The body was taken to the municipal hospital where the requisite autopsy was performed. This confirmed that Fernando Mejía had been severely tortured and had died from a bullet in the head. It was also determined that he had died between 48 and 72 hours earlier.

On June 20, 1989, Raquel Mejía filed a deposition with the local police concerning the abduction and subsequent killing of her husband. Then, accompanied by Deputy César Barrera Bazán, she moved her husband's body from Oxapampa to Lima for burial there.

At the request of APRODEH (Asociación Pro Derechos Humanos--Human Rights Association) and of Raquel Mejía, on June 21, 1989, the Provincial Prosecutor of Oxapampa, Dr. Lino Obregón, ordered the local police to investigate the homicides of Fernando Mejía and Aladino Melgarejo.

On June 22, 1989, Dr. Lino Obregón inspected the area where the bodies of Mejía and Melgarejo had been found and discovered cartridges from bullets similar to those used by the Peruvian Army. He then immediately asked the Military Political Chief of the region to identify the officers of the "Batallón Nueve de Diciembre".

On three occasions, between June 28 and 30, 1989, Raquel Mejía received anonymous phone calls threatening her with death if she persisted with the investigation of the homicide of her husband.

On July 11, 1989, APRODEH and Raquel Mejía filed a criminal charge with the Office of the Attorney General of the Republic in respect of the crimes of homicide and abuse of authority against Fernando Mejía and Aladino Melgarejo, requesting that the Attorney General's office as the authority responsible for initiating criminal action would take the necessary steps to clear up the cases.

Two days later, the Office of the Attorney General forwarded the documents to Dr. Ramón Pinto Bastidas, Provincial Prosecutor of the Senior Prosecutor's Office in Junín, who ordered the Provincial Prosecutor in Oxapampa to investigate the homicides and submit an opinion to the investigating judge for the case.

Because she feared for her safety, Raquel Mejía left Peru in August 1989, going first to the United States and then to Sweden, where she was granted political asylum.

In November 1989, the Oxapampa Provincial Prosecutor, for reasons that are unknown, transferred jurisdiction for investigating the abduction and subsequent homicide of Fernando Mejía and Aladino Melgarejo to the Technical Police in La Merced, a city 200 km from Oxapampa.

On January 30, 1990, the Huancayo Permanent Military Court declared itself competent concerning the case and ordered the civil criminal judge in Oxapampa to halt any action on it. However, the military court did not draw up any charges or make any sort of investigation aimed at clearing up the matter.

One year later, in January 1991, the Head Provincial Prosecutor of Oxapampa filed a formal charge with the local criminal judge against Julio Arias Dorregaray, the former subprefect of the locality, and against unidentified members of the "Batallón Nueve de Diciembre" to the effect that they had committed the crime of homicide against Fernando Mejía and Aladino Melgarejo. Dorregaray fled from Oxapampa and his present whereabouts are unknown.

On two occasions, on May 6 and July 2, 1991, the Oxapampa criminal judge re-requested the Military Political Chief of Mantaro-Junín, General Luis Pérez, to identify the officers who took part in the "antisubversive campaign" in Oxapampa between June 13 and 17, 1989. According to the petitioners, the Army never responded to these requests.

The criminal court handling the case extended the investigation period to August 26, 1991 in order to ascertain the occurrence of the crimes detailed in the charge. According to the petitioners, the court has not taken any further action since then.

As a last resort, the petitioners reported that the Peruvian Government had published a list of Peruvians living abroad that included Raquel Mejía and had described those named in the list as subversives. The persons listed were in fact accused of supporting Sendero Luminoso (Shining Path) from their places of residence. The Government was accordingly calling for their extradition; if they did not return to Peru, the Government stated it would revoke their nationality.

In the particular case of Raquel Mejía, the list claimed that she was a member of an organization called "Movimiento Popular", from which she supported Sendero Luminoso. The Government had consequently filed criminal charges against her under the antiterrorist legislation in effect in Peru. After being formally charged, Mrs. Mejía could be brought before a "faceless court".

The petitioners allege that the charges against Raquel Mejía are absolutely unfounded. In support of their arguments, the petitioners attach copies of the opinions of the Lima Provincial Prosecutor and of the Senior Prosecutor for Terrorism which show there is no evidence to substantiate the charges against Raquel Mejía.

III. PROCESSING OF THE PETITION BEFORE THE COMMISSION

On January 25, 1992, the Commission began its consideration of the case and forwarded the pertinent parts of the petition to the Peruvian Government requesting additional information from it concerning the events reported, especially any other data that would enable the Commission to assess whether local remedies had been exhausted.

By memorandum of July 21, 1992, the Commission repeated its request for additional information to the Peruvian Government, observing that it was presuming the facts reported to be true, in accordance with the provisions of Article 42 of its Regulations.

On August 28, 1992, the Peruvian Government responded to the Commission's request for information by stating that the present petition was a reiteration of Case 10,466 in which Peru had already been condemned for violation of the human rights of Fernando Mejía and Aladino Melgarejo. It accordingly requested that the petition be declared inadmissible.

On December 17, 1992, the petitioners submitted their comments on the Government's reply, observing that the present petition was not a reiteration of Case 10.466 because it did not include a detailed statement of the events that occurred and of the violations of human rights to which Raquel Martín de Mejía had been subjected or the violation of the obligation to provide effective domestic remedies. On the grounds of these arguments they requested the Commission to dismiss the Peruvian Government's claims and declare the petition admissible.

On May 11, 1993, the petitioners submitted additional information to the effect that the Peruvian Government had published a list of approximately 50 Peruvians resident abroad that included Raquel Mejía. The persons on the list were stated to be subversives and, consequently, criminal proceedings had been instituted against them for alleged commission of acts of terrorism.

In its comments on the additional information submitted by the petitioners, the Peruvian Government repeated the arguments set forth in its reply of August 28, 1992, and requested that the case be declared inadmissible.

Pursuant to Article 50 of the American Convention, at its 90th regular session the Commission approved Report 25/95 and forwarded it to the Peruvian Government via a note dated November 22, 1995. The Commission asked that within 60 days, the Peruvian Government inform the Commission of the action it had taken on the recommendations contained in the Report. The Government did not reply within the stipulated time period.

IV. OBSERVATIONS OF THE PARTIES

A. Position of the Government

The Government observed that the present petition was a repetition of Case 10.466 in which the Commission had condemned the Peruvian State for violation of the human rights of Fernando Mejía Egocheaga and Aladino Ponce Melgarejo. It added that the report in question had been published in the Commission's Annual Report for the period May 1990 - February 1991.

Based on this argument, the Peruvian Government requested the Commission to declare the present case inadmissible in accordance with Article 39(1)(b) of its Regulations.

The Government failed to refute the petitioners' allegations as to the alleged repeated violation of Mrs. Raquel Martín de Mejía, the alleged failure to perform the obligation set forth in Article 1(1) of the Convention and to provide an effective remedy and judicial protection as referred to in Article 25 of the Convention. The Peruvian Government moreover also failed to present any argument in connection with the existence of criminal proceedings instituted against Mrs. Raquel Martín de Mejía on grounds of alleged commission of the crime of terrorism.

B. Position of the petitioners

Regarding admissibility of the case, the petitioners note that a petition in favor of Fernando Mejía and Aladino Melgarejo was in fact submitted to the Commission on September 25, 1989. However, they point out that Mrs. Mejía, her lawyer and the human rights organizations that were helping her never gave their consent to the submission of said petition. They add that since the Peruvian Government did not respond to the Commission's requests for information, the Commission, on the basis of Article 42 of its Regulations, presumed that the facts reported were correct and in its 83/90 Report declared the Peruvian State responsible.

The petitioners consider that the case should be declared admissible for two reasons:

1. Article 44 of the Convention must not be interpreted in such a way as to prevent victims of human rights violations from making a full presentation of the questions of fact and law underlying their case, especially when a petition filed earlier was submitted without their consent or, in case of death, without the consent of their surviving relatives and when the report prepared by the Commission is based on presumptions that do not include a detailed account of the events that took place and of the persons responsible for them.
2. The present petition sets out human rights violations that were not considered in Case 10.466. In point of fact, the petitioners note that the Report 83/90 does not include violation of the right to an

effective remedy in connection with Fernando Mejía Egocheaga nor the violations of the rights to humane treatment, privacy and an effective domestic remedy of Raquel Mejía.

For the reasons set forth, the petitioners request the Commission to reject the arguments used by the Peruvian Government and to declare the case admissible.

Regarding the alleged human rights violations, the petitioners request the Commission to declare Peru's international responsibility for the violation of the rights to personal liberty (Article 7), to humane treatment (Article 5) and to life (Article 4) of Fernando Mejía, in connection with the obligation assumed under Article 1(1), all of which rights are protected by the American Convention on Human Rights. They further call upon the Commission to establish that the repeated sexual abuse to which Raquel Martín de Mejía was subjected violated the provisions of Articles 5 (right to humane treatment) and 11 (right to privacy) in connection with Article 1(1) of the said international Convention and that Peru is internationally responsible.

Finally, the petitioners allege that the Peruvian State failed to respect and guarantee the right of Fernando and Raquel Mejía to an effective domestic recourse for protection against acts that violated their fundamental rights (Articles 1 and 25 of the Convention).

The petitioners base the Peruvian State's international responsibility for violation of human rights protected by the American Convention on the following points:

1. The existence of proof by witnesses and circumstantial evidence that demonstrate the involvement of members of the Peruvian Army in commission of the crimes denounced. These proofs also indicate that the crimes in question were not committed by guerrillas.
2. The facts reported fit in perfectly with the pattern of abuses committed by the Peruvian military and their modus operandi in previous situations.

The petitioners indicate that the following pieces of evidence serve to fully demonstrate the responsibility of members of the Peruvian Army in the abduction, torture and death of Fernando Mejía and in the repeated violation of his wife Raquel Martín de Mejía:

- a. Members of the "Batallón Nueve de Diciembre" arrived in Oxapampa a few days before the events denounced took place, for the purpose of carrying out an antisubversive campaign. They were in that city on the night that Fernando Mejía was abducted and Raquel Mejía was raped more than once. They were in the area where the bodies of Mejía and Melgarejo were found.
- b. Raquel Mejía identified the vehicle that was used in the abduction of her husband as a yellow pickup truck belonging to the Government that was normally used for the activities of the "Pichis Palcazu" special project. This truck was seen on the night of the abductions in front of the Oxapampa bar with military personnel in the back. Both Hugo Nano and his wife Nancy Verde, who were there when Professor Melgarejo was abducted, recognized that the yellow pickup belonged to the government project. In addition, the way in which the two men were abducted and the similarity of their abductors indicate that the disappearances were part of a coordinated plan in which the same government owned vehicle was used.
- c. The FAL 7.62-mm cartridges found near the bodies of Mejía and Melgarejo link the Peruvian military with the commission of the crimes in question. These are the type of bullets normally fired by assault rifles used by the Peruvian Army.
- d. The men who abducted Fernando Mejía and the one who repeatedly raped his wife Raquel were wearing military uniforms. Although they kept their faces concealed with ski masks, at no time did these men attempt to hide that they belonged to the Peruvian Army. When Raquel Mejía went to the Municipal

Library the next day she observed that the uniform worn by the soldiers billeted there was the same as that worn by the men who forced their way into her house, abducted her husband and sexually abused her.

e. The abductors operated at night with total impunity. They moved around in a large group of over six persons, openly seized Fernando Mejía and put him in a truck that was parked in a public street without hiding their presence or their actions. The individual who sexually abused Raquel Mejía forced his way into her house on two occasions, accompanied each time by a number of soldiers. Only Army personnel could have acted with such freedom and impunity in those days, especially bearing in mind that there was a sizable military presence in Oxapampa then.

Secondly, the petitioners point out that the abduction and subsequent homicide of Fernando Mejía and the repeated sexual abuse to which Raquel Mejía was subjected are consistent with the modus operandi of Peruvian Army personnel in the commission of other serious human rights crimes. The general characteristics of the methods employed are as follows:

- a. the abductions are carried out at night in the victims' own homes;
- b. the persons heading up the operations usually abduct more than one person at a time. In this case, Fernando Mejía and Aladino Melgarejo were taken on the same night, with only minutes between the two abductions;
- c. the abductors wear military uniforms with ski masks to conceal their features;
- d. the victims are taken, tortured and finally executed without any trial or due process.

As their concluding point, the petitioners note that the Peruvian Government has published a list of Peruvians living abroad that includes Raquel Mejía, and has classified the persons on the list as subversives. In Raquel Mejía's case, the list names her as a member of an organization known as "Movimiento Popular", from which she is alleged to support Sendero Luminoso. On these grounds the Government has instituted criminal proceedings against her for alleged commission of -the crime of terrorism. After the formal charge, Mrs. Mejía can be tried before a Faceless Court.

The petitioners allege that the charges against Raquel Mejía are absolutely unfounded since there is no evidence that demonstrates her criminal liability.

V. GENERAL CONSIDERATIONS

A. Competence of the Commission and formal requirements for admissibility

The Inter-American Commission on Human Rights is competent to consider this case since it is a matter of violations of human rights recognized in the American Convention on Human Rights in its Articles 4, 5, 7, 11, 1 and 25.

As regards formal compliance with the formal requirements for admissibility, the present petition meets the conditions laid down in Article 46(c) and (d) of the American Convention and in Article 32 of the Commission's Regulations. However, for a petition to be considered admissible it must also satisfy the conditions contained in Articles 46(a) and (b) and 47 of the Convention and 37, 38 and 39 of the Commission's Regulations.

1. Duplication of proceedings

The Peruvian Government has pointed out in its observations that the present case constitutes a repetition of another petition brought before the Commission earlier and which the Commission covered in its Report 83/90 that was published in its Annual Report for the year 1990-1991.

Article 47 of the American Convention reads as follows:

The Commission shall consider inadmissible any petition or communication submitted under Articles 44 or 45 if:

...

d. the petition or communication is substantially the same as one previously studied by the Commission or by another inter-national organization.

Similarly, Article 39 of the Commission's Regulations stipulates that:

1. The Commission shall not consider a petition in cases where the subject of the petition:

...

b. essentially duplicates a petition pending or already examined and settled by the Commission or by another governmental inter-national organization of which the State concerned is a member.

Article 47 of the Convention and Article 39 of the Regulations adopt the principle of *res judicata* in the context of the conditions for admissibility of a petition. This principle means that no State can be submitted afresh to scrutiny by the Commission in the case of petitions that have already been examined by it or when they are subject to another international human rights protection body.

Other international instruments such as the Additional Protocol of the Civil and Political Rights Covenant and the European Convention on Human Rights set similar conditions for admissibility. In this connection, the Human Rights Committee, for instance, has pointed out that the said principle must be considered a limit to the admissibility of petitions that include "the same petition concerning the same individual submitted by the same or by any other with capacity to act...before the international organ".[FN1]

[FN1] Fanali v. Italy, Selección de Decisiones del Comité de Derechos Humanos adoptadas con arreglo al Protocolo Facultativo, Volume 2, page 109.

Case 10.466 was initiated as a consequence of an individual petition that denounced the following facts:

On June 15, 1989, in Oxapampa, Department of Cerro de Pasco, Army personnel arrested, tortured and killed Messrs. Fernando Mejía Egocheaga... and Aladino Melgarejo.. [O]n June 18 their bodies were found near the Santa Clara River, in Oxapampa. The bodies showed evident signs of cruel tortures and numerous wounds caused by bullets and piercing and cutting weapons...

The Commission repeatedly requested additional information from the Peruvian Government on the facts that prompted the petition. In 1990, after the Government had failed to respond to the communications sent by the Commission, the latter adopted Report 83/90, assuming the truth of the facts reported in the petition and establishing the Peruvian State's responsibility for violation of the right to personal liberty (Article 7) and of the right to life (Article 4). The Commission further declared that:

...the Peruvian Government has not met its obligations concerning the human rights and guarantees required by Article 1(1) of the American Convention...

In the concluding part of Report 83/90, the Commission made the following recommendations to the Peruvian State:

- a. Make an exhaustive, quick and impartial investigation of the facts denounced, in order to identify those responsible and bring them to justice so that they may receive the punishments such serious conduct calls for.
- b. Adopt the necessary measures to prevent the commission of similar acts in the future.
- c. Redress the consequences of the situation brought about by the violation of the rights stated and pay fair compensation to the injured parties.

As recounted, through Report 83/90 the Commission pronounced on the human rights violations which Dr. Fernando Mejía Egocheaga suffered, establishing the Peruvian State's liability for the commission of said violations. Accordingly, in application of the principle laid down in Article 47 of the Convention and 39 of the Regulations, the Commission is not competent to examine these questions raised anew in the petition under study.

The petitioners have stated that the Commission must pronounce on the violations suffered by Dr. Mejía because Case 10,466 was brought before it without the knowledge and consent of his family and Report 83/90--prepared in accordance with Article 42 of the Commission's Regulations--lacked a full statement of the questions of fact and law underlying it.

Article 44 of the Convention and Article 26(1) of the Commission's Regulations specify, in similar terms, that "any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party".

In this connection it has been interpreted that unlike what is laid down in other human rights protection systems, whether regional or universal, the inter-American system makes a distinction between a petitioner and a victim.[FN2] This distinction derives from the broad language used in the above-mentioned articles according to which, on the one hand, nongovernmental organizations or groups of persons are considered to be petitioners, and on the other, no connection at all is required between the victim and the nongovernmental organization, group of persons or individual who submits the petition.[FN3] It can therefore be concluded that active legitimation in the case of petitions to the Commission is characterized by breadth of definitions and flexibility.

[FN2] M. Pinto, *La denuncia ante la Comisión Interamericana de Derechos Humanos*, Buenos Aires, Editores del Puerto, 1993, p. 35.

[FN3] *Idem supra*, p. 35

As a corollary, it must also be noted that the victim's consent to a petition is not a requirement either.[FN4] The Commission has stated in this respect that:

...a person who denounces an act that is in violation of human rights to the Inter-American Commission on Human Rights does not require authorization from the victim...[FN5]

[FN4] *Idem supra*, p. 35.

[FN5] Resolution No. 59/81, Case 1954, IACHR Annual Report 1981-1982, OEA/Ser.L/V/II.57, doc. 6 rev. 1, pp. 95-99.

On the basis of the foregoing, the Commission has to reject the first argument presented by the petitioners.

Concerning the second of said arguments, with regard to the disappearance and subsequent death of Fernando Mejía, the petition submitted by the petitioners does not add, in general terms, elements different from those considered by the Commission in Report 83/90 in connection with Case 10.466. The fact is that both petitions set out the manner in which the victim was abducted by Army personnel and the subsequent finding of his body bearing evident signs of torture.

For these reasons, the Commission must also reject the second of the arguments brought forward by the petitioners as grounds for reconsideration of the human rights violations suffered by Dr. Fernando Mejía.

The principle set forth in Articles 47 of the Convention and 39(1) of the Commission's Regulations, however, must be interpreted restrictively and only in relation to those assumptions in which the petition is limited to "the same petition concerning the same individual". This means that its application does not extend to alleged human rights violations concerning which the Commission or another similar organization has not yet given its opinion, even when they are included in a petition that also contains other questions that by their nature are inadmissible.

The present petition includes, besides the violations of Fernando Mejía's human rights, alleged violations of Convention-protected rights of his wife, Mrs. Raquel Martín de Mejía. Regarding the latter, contrary to the Peruvian Government's assertion, the Commission is competent to pronounce on this occasion.

Accordingly, and as regards the admissibility requirement stipulated in Articles 47 of the Convention and 39(1) of the Regulations, the Commission considers that it lacks competence to reassess the human rights violations suffered by Fernando Mejía. It does not, however, consider itself blocked from pronouncing on the alleged violation of Articles 25 (right to effective domestic recourse), 5 (right to humane treatment), 11 (right to privacy) and 8 (right to due process), in respect of Raquel Martín de Mejía.

2. Exhaustion of local remedies

Article 46(1)(a) of the Convention specifies that for a petition or communication submitted to the Commission in accordance with Articles 44 or 45 of the Convention to be admissible, the remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law.

The Inter-American Court of Human Rights, concerning the exhaustion of domestic remedies rule has stated that:

Generally recognized principles of international law indicate, in the first place, that this is a rule whose invocation may be expressly or tacitly renounce by a State entitled to invoke it, a point that has already been recognized by the Court on an earlier occasion (see Viviana Gallardo et al. case, Decision of November 13, 1981, No. G 101/81. Series A para 26). Secondly, the exception of nonexhaustion of domestic remedies, to be timely, must be filed in the initial stages of the proceedings; if this is not done, tacit renunciation of use of same by the State concerned can be presumed.[FN6]

[FN6] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Preliminary Exceptions, Judgment of July 26, 1987, Series C No. 1, para. 88.

On applying these principles to the present case, the Commission observes that the Peruvian State omitted to file the exception to exhaustion of domestic remedies. The fact is that after January 25, 1992, when the Commission began the processing of the petition, the Peruvian State had various opportunities to indicate whether the petitioners had met the said admissibility requirement. This being so, the Commission assumes that the Peruvian State renounced filing of the exception and accordingly concludes that it is not obliged to give a ruling on this question.

B. Considerations on the substance of the case

1. Presumption of facts

The Peruvian State had various opportunities to provide information to the Commission concerning the facts denounced. However, in all its communications it limited itself to maintaining the inadmissibility of the case without in any instance discussing the detailed arguments submitted to the Commission by the petitioners, and which were transmitted by the Commission to the Government in due form, in compliance with the rules of its Regulations.

Article 42 of the Commission's Regulations specifies that:

The facts reported in the petition whose pertinent parts have been transmitted to the government of the State in reference shall be presumed to be true if, during the maximum period set by the Commission under the provisions of Article 34, paragraph 5, the government has not provided the pertinent information, as long as other evidence does not lead to a different conclusion.

Reaffirming the provisions of the said article, the Inter-American Court of Human Rights has 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." [FN7]

[FN7] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgment of July 29, 1988, Series C No. 4, para. 138.

Accordingly the presumption of acceptance of the facts of a petition derives not only from the assumption that a State which fails to appear before an international organ whose competence it recognizes accepts such facts, but also from the tacit message conveyed when, having appeared, said State does not provide the information required or its responses are evasive and/or ambiguous.

The principles of general international law under which a State cannot evade the jurisdiction of an international agency that it has accepted, have been incorporated into the Statute of the International Court of Justice, Article 53 of which reads:

1. When one of the parties does not appear before the Court, or abstains from defending its case, the other party may request the Court to decide in its favor.

2. Before handing down its decision, the Court must ensure not only that it possesses jurisdiction in accordance with the provisions of Articles 36 and 37, but also that the petition is well founded in terms of facts and law.

According to the above article, the ICJ must seek to preserve the interests of the parties in dispute. Within the sphere of the American Convention, however, Article 42 of the Regulations must be interpreted in light of the basic purpose of the Convention, i.e. protection of human rights.[FN8]

[FN8] Inter-American Court of Human Rights, Restrictions to the Death Penalty (Arts. 54(2) and 4(4) of the American Convention on Human Rights, Consultative Opinion C-3/83 of September 8, 1983, Series A, No. 3 para. 50.

The Commission considers that the petitioner must provide sufficient information to enable it, firstly, to make the admissibility assessment referred to in Articles 46 and 47 of the Convention and in the pertinent articles of its Regulations and secondly, to assess the version of the facts presented in accordance with the provisions of Article 32 of its Regulations.

As a result, the Commission can only declare inadmissible a petition in which the Government has omitted to provide information when the petitioner has manifestly and evidently failed to meet the requirements for admissibility, unless additional new information provides sufficient evidence to confirm admissibility.

Regarding the substance of a case brought before the Commission, the Commission considers that a simple failure to appear on the part of a State or failure by it to supply information do not in and of themselves transform the facts denounced into truth. Rather, they need to be analyzed in light of certain criteria that make it possible to establish whether, in terms of Article 42 of the Commission's Regulations, there is "other evidence" that might lead to "a different conclusion" from that presented by the petitioner. These evaluation criteria are consistency, credibility and specificity.[FN9]

[FN9] These criteria were set implicitly by the Inter-American Court of Human Rights in the Velásquez Rodríguez case. Examination of consistency is the logical and rational exercise of scrutinizing the basic information provided by the petitioner in order to establish that there is no contradiction between the facts and/or the evidence submitted. The credibility of the facts is determined by assessing the (continue) (Continuation) version submitted, including its consistency and specificity, in the evaluation of the proofs submitted and taking into account public or well-known facts and other information that the Commission considers pertinent. Specificity, for its part, is deduced as a corollary of the preceding two criteria.

The ICJ, regarding the provisions of Article 53 of its Statute, has specified that in analyzing a matter submitted for its consideration the Court must assure itself, by whatever means it deems appropriate, that the facts alleged by the petitioners are well founded.[FN10]

[FN10] Corfu Channel Case [Assessment of Compensation] [1949] ICJ 248.

The Commission considers that in determining, in a concrete case, whether the facts alleged are well founded, failure to appear on the part of the State cannot oblige the petitioners to satisfy a standard of

proof equivalent to that which would have been initially required if the State had appeared. If this were to be so, the petitioner would be in the position of being able to bring additional proofs and/or to contest the Government's response. As a result, when the State does not appear or omits to provide information concerning the alleged facts, the Commission, in order to make a decision must limit itself to the arguments and proofs offered by the petitioner and other elements available to it that will enable it to decide the matter.

In the present case, since the Peruvian Government has not discussed the facts presented by the petitioners, the Commission has considered the version presented by them and, after establishing that it meets the criteria of consistency, credibility and specificity, has decided:

a. To presume the facts relating to the repeated violation of Raquel Mejía by Peruvian Army personnel to be true

The petitioners have presented a detailed and consistent version in which they state the date on which and place in which the events occurred, noting that the individual responsible was wearing Peruvian Army fatigues and was accompanied by a large number of soldiers. Another point alleged is that, at the time the acts denounced occurred, Raquel Mejía was living in an area under state of emergency legislation. In such areas the military customarily assume control of the population and set themselves up as the supreme authority, even above the duly elected and constituted civil authorities. As a consequence, they commonly perpetrate numerous human rights violations in these areas.

The credibility of the version presented by the petitioner is corroborated, in the Commission's views, by various reports of intergovernmental and nongovernmental bodies that document numerous rapes of women in Peru by members of the security forces in emergency areas and in which the specific case of Raquel Mejía is mentioned and described as representative of this situation.

In fact the Special Rapporteur against Torture appointed by the United Nations Human Rights Commission,[FN11] in his report for 1992, noted that in Peru, in the areas under the state of emergency, military personnel frequently resorted to sexual abuse.[FN12] Similarly, in the section on Peru in his 1993 report, he stated that "...abundant information was also received about the practice of rape and sexual aggression frequently undergone by women in the context of the security forces' campaign against the insurgent groups... In the areas under state of emergency...rape seems to be used as a form of intimidation or punishment against groups of civilians suspected of collaborating with the insurgent groups..."[FN13] ...Sexual abuse and rape appear... to be customary in the areas under state of emergency."[FN14]

[FN11] At its 41st Session, the Human Rights Commission approved Resolution 1985/33, by which it resolved to appoint a Special Rapporteur to examine the questions relating to torture.

[FN12] U.N., E/CN.4/1993/26, para. 355.

[FN13] U.N., E/CN.4/1994/31, paras. 431 and 432.

[FN14] Idem supra, para. 429.

Amnesty International, for its part, has stated that in Peru the military personnel who operate in conflict areas have broad powers and their actions are not usually subject to any type of authorization. Back in 1986 Amnesty International had already received information on different cases of sexual abuse against women in emergency areas. In this connection, government spokesmen commented that rapes are to be expected when troops are operating in rural areas, so criminal proceedings should not be instituted to punish this type of abuse.[FN15] It is not therefore surprising that women living in areas subject to emergency legislation report being victims of sexual abuse by soldiers, who generally act with absolute

impunity.[FN16] In another report on Peru, Amnesty International denounced the existence of an extended practice of rapes committed by military personnel in different incursions into rural communities.[FN17]

[FN15] Amnesty International, Women in the Front Line -Human Rights Violations against Women-, March 1991, p. 20.

[FN16] Idem supra, p. 20.

[FN17] Amnesty International, Peru: Human Rights in a Climate of Terror, London, 1991, p. 7.

In addition, Human Rights Watch, in a study on sexual abuse against women in Peru, has reported that rape is a common practice in that country.[FN18] Since the start of the counterinsurgency campaign against the armed groups, rape has become a terrible reality for women. According to this report, soldiers use sexual abuse as a weapon for punishing, intimidating, coercing, humiliating and degrading women. For a woman, living in a certain area implies running the risk of being raped, commonly for being suspected of belonging to one or the other insurgent movement. While there are no statistics on the number of rapes attributable to the security forces, Human Rights Watch reports that local groups say the number is very high. [FN19]

[FN18] Citing the reports on the Practice of Human Rights in different countries published by the U.S. Department of State in 1990 and 1991. The 1990 report refers to reliable information documenting sexual abuses committed by military personnel in Peru. It further notes that the number of rapes committed by the security forces in the emergency zones is so large that it can be stated to be common practice, supported--or at least winked at--by the military chiefs. The report for 1991 also indicates that cases are continuing of sexual abuses by the security forces in the emergency zones.

[FN19] Human Rights Watch, Americas Watch and the Women's Rights Project, Untold Terror: Violence Against Women in Peru's Armed Conflict. pp. 2 and 3.

The above-mentioned report documents more than 40 cases of sexual abuse against women in Peru between 1989 and 1992. Among these, the case of Raquel Martín de Mejía is described as a classic instance.[FN20] In addition, the March 11, 1993, number of "Caretas" magazine, in an article on sexual violence in Peru, includes a detailed description of Mrs. Mejía's case. This article also states that in a letter dated March 2, 1993, sent to President Alberto Fujimori of Peru, a group of 23 United States senators expressed their concern about the rapes committed by the security forces and the police. "The case... specifically mentioned by the U.S. senators in their letter... is that of Raquel Mejía. Her husband was killed by military personnel, who also raped her, according to her report".[FN21]

[FN20] Idem supra, pp. 41 et se.

[FN21] Caretas, Violencia Sexual, March 11, 1993, pp. 26 et seq.

The petitioners have furnished circumstantial evidence that makes it possible to establish the responsibility of military personnel in the abduction, torture and killing of Fernando Mejía. They have also established the close relationship between the human rights violations committed against Dr. Mejía and the indignities suffered by his wife Raquel.

As the Commission has been informed, at the time the events reported took place, members of the "Batallón Nueve de Diciembre" were in Oxa-pampa conducting a counterinsurgency campaign. Both Professor Melgar-ejo's family and Raquel Mejía herself have repeatedly stated that the persons who came to their homes were wearing military uniforms and had their faces concealed by ski masks. When Mrs. Mejía went to the Municipal Library the day after the events, she observed that the uniform of the soldiers billeted there was the same as that worn by the individuals who forced their way into her house.

In addition, the petitioner and the members of the Melgarejo family have all reported that the military personnel used a yellow government-owned pickup for transportation that was normally assigned to the "Pichis Palcazu" special project.

Moreover, the FAL 7.62-mm cartridges found near the bodies of Mejía and Melgarejo point to the Peruvian Army, since they are the bullets normally used in the Army's assault rifles.

Finally, as a result of the investigations performed in January 1991 the Head Provincial Prosecutor of Oxapampa filed a formal charge in the local criminal court against Julio Arias Dorregaray, the former subprefect of the locality, and against unidentified members of the "Batallón Nueve de Diciembre" in respect of commission of the crime of homicide against Fernando Mejía and Aladino Melgarejo.

The Commission considers that the acts against the husband of Raquel Mejía are closely connected with the sexual abuse that she underwent since they took place the same night and were perpetrated by the same individuals. On these grounds, the circumstantial evidence provided, while not directly pertaining to the case in question, is sufficient, in the Commission's view, to presume the responsibility of troops of the Peruvian Army in the commission of the abuses against Raquel Mejía.

b. To presume the nonexistence of effective domestic recourses that would permit remedies for the human rights violations suffered by Fernando and Raquel Mejía

The petitioners have provided the Commission with a detailed and concise version of the judicial remedies pursued to obtain redress for the human rights violations undergone by Fernando Mejía. The affirmations made in the petition have been sufficiently documented by sub-mission of copies of the different legal proceedings instituted. It is important to note that in Peru the opening of criminal proceedings and of investigations to clarify commission of a crime of a criminal nature are an exclusive monopoly of the Government Attorney's office. Private individuals may only have a limited involvement in the instituting--filing of a petition--and initiating of a criminal trial because Peruvian criminal procedure does not include provision for a private plaintiff, as found in other Latin American legislations.

As noted in the petition, the Peruvian State has failed to properly investigate the abduction and subsequent homicide of Dr. Mejía. Notwithstanding the opening of criminal proceedings by the Oxapampa Provincial Prosecutor, the chief individual involved had fled the area. To this circumstance was added the difficulties created by the Army itself, which refused to identify the officers who took part in the counterinsurgency actions between June 13 and 17, 1989, in the locality.

The credibility of the petitioners' petition is supported by the Commission's own assessments, the Commission having repeatedly raised the problem of impunity in Peru through inclusion of recommendations in reports on individual cases[FN22] or in its special reports. In this respect it is apposite to cite certain of the Commission's observations:

One element that has been particularly disturbing to the Commission is that, up till 1990, no member of the security forces had been tried and punished for involvement in human rights violations. The fact that no one had been sanctioned was an indictment not only of the authors of very serious human rights

violations, but also of the Peruvian State organs charged with enforcing the law. Not only do those guilty of serious human rights violations go unpunished, but there are no effective measures taken to defend the rights of the affected parties.[FN23]

[FN22] In 1988, the Commission adopted fourteen individual cases in which the Peruvian State's responsibility for serious human rights violations was established. In 1989 it adopted two such cases, and in 1990 and 1991 fifty-one, and then a further five in the course of 1992 and 1993.

[FN23] Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.83, doc. 31, March 12, 1993, para. 26.

Moreover,

In cases of human rights violations by National Police and Armed Forces personnel, the question of competent jurisdiction for trying and punishing those alleged responsible has frequently been raised. The military courts have always claimed authority to try military and police personnel, on the grounds that such acts committed in the performance of their official duties. As a result, there have been very few cases in which the guilty parties were determined, and even fewer in which police or military personnel whose guilt has been established by a military court have actually been punished.[FN24]

[FN24] Annual Report of the Inter-American Commission on Human Rights, 1993, OEA/Ser.L/V/II.85, doc. 8, February 11, 1994, page 545.

Raquel Mejía informed the Commission that when, on June 20, 1989, she filed her declaration with the Oxapampa police concerning the abduction and subsequent homicide of her husband, she did not report the sexual abuse to which she had been subjected because:

[I was] fearful that the violations committed against my person would have caused me to be ostracized and exposed me to greater danger or physical harm...

Furthermore, it has been noted that there are not in Peru any effective domestic remedies through which a victim of sexual abuse by members of the security forces can obtain an impartial investigation of the events and punishment of those guilty. This situation is aggravated in the emergency zones since the exercise of authority in them is under the control of the same individuals who perpetrate serious human rights violations and because the military courts assume jurisdiction in cases where a member of the security forces is the accused party. As a result, in virtually no case are individuals accused of sexual abuse and other serious human rights violations convicted.

The Commission observes that the reasons given by the petitioner for not submitting a petition in the domestic courts are supported by different documents published by intergovernmental bodies and nongovernmental organizations which expressly note that women who have been victims of sexual abuse by members of the security forces or police have no means open to them for obtaining a remedy for the violations of their rights.

The U.N. Special Rapporteur against Torture observes in this connection that "it is reported... that those guilty of [rape and other sexual abuses] were rarely brought to trial even in those cases where complaints were filed with competent authorities. The military courts took no action in these cases and failed to place the accused at the disposal of the civil courts, as they were required to do by law. This situation of

impunity together with other factors such as the difficulty of submitting evidence or society's attitude to the victims meant that a large percentage of these cases were never even reported".[FN25]

[FN25] U.N., *idem supra*, Note 13 para. 433.

Amnesty International has stated that despite the existence of a large number of cases of sexual violations in emergency areas, to date no member of the security forces operating in those areas has been tried for rape; neither have effective investigations been made following complaints submitted by women who have been victims of sexual abuse by soldiers.[FN26]

[FN26] Amnesty International, *idem supra*, Note 15, p. 22.

Human Rights Watch, for its part, has observed that despite the widespread incidence of sexual abuse in Peru, very few police and even fewer members of the security forces have been tried for this abuse, even in cases where complaints were filed with the appropriate authorities. On the contrary, the evidence gathered demonstrates that the police and armed forces protect those guilty of these violations and grant them promotions, thereby implicitly tolerating the commission of these crimes.[FN27]

[FN27] Human Rights Watch, *idem supra*, Note 19, p. 3.

Human Rights Watch also maintains that it is practically impossible to prove a charge of rape against a member of the security forces. The emergency legislation specifies that crimes committed in the "performance of duty" fall under military jurisdiction, in accordance with the Code of Military Justice. Although sexual abuse is a common crime--and not one of the so-called "duty crimes"--there have been no rape cases in which the ordinary courts have exercised jurisdiction.[FN28]

[FN28] *Idem supra*, p. 4.

Women who have been raped by members of the security forces do not report these assaults for two reasons: public humiliation and the perception that those responsible will never be punished. In addition, they are usually threatened with reprisals against themselves or their families if they do report them.[FN29]

[FN29] *Idem supra*, p. 5.

Finally, the response given by President Fujimori himself when questioned about the many sexual abuses perpetrated by military personnel in the emergency zones is of particular importance:

In cases where women have been raped, I hope investigations are being carried out. There is a regrettable tradition of impunity in Peru.[FN30]

[FN30] The New York Times, Rapists in Uniform: Peru Looks the Other Way, April 29, 1993.

c. To presume that the Peruvian Government had no grounds for instituting criminal proceedings against Raquel Mejía charging her with committing the crime of terrorism

The petitioners have submitted to the Commission various pieces of evidence to the effect that criminal proceedings have been opened against Raquel Mejía for alleged commission of the crime of terrorism. This evidence includes a copy of a list published by the Government of various Peruvian nationals residing abroad and who, allegedly, contribute from their places of residence to supporting the activities of Sendero Luminoso in Peru. This list, headed "The Organizations and their Leaders", includes the name of Raquel Mejía and states that she belongs to an organization called "Movimiento Popular" through which she collaborates with Sendero Luminoso from Sweden.

In addition, the petitioners have provided the Commission with a copy of an opinion issued by the Lima Provincial Prosecutor in which the Prosecutor, besides stating that proceedings have been instituted against Mrs. Mejía and that a warrant has been issued for her arrest, states that "[r]egarding those accused of proselytizing in favor of the PCP-SL,[FN31] notwithstanding the large number of people involved and the time that has elapsed, our Diplomatic Mission has not been able to send us a report on the activities that the accused have carried out or are presently carrying out..."

[FN31] PCP-SL = Partido Comunista Peruano-Sendero Luminoso (Peruvian Communist Party = Shining Path).

Recording those listed, who include Raquel Mejía, the Prosecutor stated: "... the evidence that would provide the basis for formulation of the charge has not to date been assembled, which means that their participation in the events under examination cannot for the moment be established."

Notwithstanding the Provincial Prosecutor's opinion, the Lima Senior Prosecutor for Terrorism filed a formal indictment against Raquel Mejía for belonging to an organization abroad--identified as Movimiento Popular--that provides support to the Shining Path group. The indictment charges her with alleged commission of the crime of terrorism against the State and recommends that she be condemned to 20 years imprisonment plus payment of a sum of money as civil reparation for the State.

The Commission does not have information on the final verdict in this case; however, in accordance with the Peruvian antiterrorist legislation, the accused should in this instance be tried by means of oral proceedings by a "faceless court".

2. Questions raised

Once the Commission has established the facts of the present petition, it must proceed to ascertain whether they amount to violations of any of the rights protected by the American Convention. In particular, the Commission must establish:

1. Whether the sexual abuses to which Raquel Mejía was subjected constitute violation of the rights to humane treatment (Article 5) and to privacy (Article 11), in connection with the obligation set forth in Article 1(1).

2. Whether the impossibility of effective domestic recourse to remedy the violations of Fernando and Raquel Mejía's human rights constitutes a violation of the right to due process (Article 8) and to judicial protection (Article 25), all in connection with the obligation contained in Article 1(1).

3. Whether the groundless instituting of criminal proceedings for terrorism in the absence of the accused constitutes a violation of the right to due process (Article 8), in connection with the obligation contained in Article 1(1).

3. Analysis

a. The repeated sexual abuse to which Raquel Mejía was subjected constitutes a violation of Article 5 and Article 11 of the American Convention on Human Rights

Current international law establishes that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by the State or as a result of failure by the State to prevent the occurrence of this crime, constitutes a violation of the victims' human rights, especially the right to physical and mental integrity.

In the context of international humanitarian law, Article 27[FN32] of the Fourth Geneva Convention of 1949 concerning the protection due to civilians in times of war explicitly prohibits sexual abuse.[FN33]Article 147[FN34] of that Convention which lists acts considered as "serious offenses" or "war crimes" includes rape in that it constitutes "torture or inhuman treatment".[FN35] The International Committee of the Red Cross (ICRC) has declared that the "serious offense" of "deliberately causing great suffering or seriously harming physical integrity or health" includes sexual abuse.[FN36]

[FN32] Article 27, insofar as it concerns us, reads: Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats, thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honour, in particular, against rape, enforced prostitution or any form of indecent assault...

[FN33] Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992), May 5, 1994, p. 17.

[FN34] Article 147 reads: Serious offenses are those that involve one or more of the following acts, "if committed against persons or property protected by the present Convention: ... torture or inhuman treatment, including ... wilfully fact of causing great suffering or serious injury to body or health ..."

[FN35] Final Report..., *Idem supra*, Note 34, p. 17.

[FN36] ICRC, *Aide Mémoire* (Dec. 3, 1992) cited in T. Meron, *Rape as a Crime under International Humanitarian Law*, 87 *AJIL* 426.

Moreover, Article 76[FN37] of Additional Protocol I to the 1949 Geneva Conventions expressly prohibits rape or other types of sexual abuse. Article 85(4), [FN38] for its part, states that when these practices are based on racial discrimination they constitute "serious offenses". As established in the Fourth Convention and Protocol I, any act of rape committed individually constitutes a war crime. [FN39]

[FN37] Article 76, entitled "Protection of Women", specifies that: 1. Women shall be afforded special respect and protected in particular against rape, forced prostitution and any other form of indecent assault.

[FN38] Article 85(4) states that: ... The following acts will be considered serious offenses under the present Protocol when committed intentionally and in violation of the Conventions or the Protocol: ... (c)

The practices of apartheid and other inhuman and degrading practices, based on racial discrimination, that entail an outrage against personal dignity.

[FN39] Final Report ..., *idem supra*, Note 34, p. 17.

In the case of noninternational conflicts, both Article 3[FN40] common to the four Geneva Conventions and Article 4(2) [FN41] of Protocol II additional to the Conventions, include the prohibition against rape and other sexual abuse insofar as they are the outcome of harm deliberately influenced on a person.[FN42] The ICRC has stated that the prohibition laid down in Protocol II reaffirms and complements the common Article 3 since it was necessary to strengthen the protection of women, who can be victims of rape, forced prostitution or other types of abuse.[FN43]

[FN40] Article 3 states: The following are prohibited, at any time and in any place...

"(a) Attacks against life and bodily integrity, especially homicide in all its forms, mutilations, cruel treatment, torture and ordeals; ... (c) Attacks against personal dignity ..."

[FN41] Article 4(2) of Protocol II, for its part, states: 1. All persons who are not participating directly in the hostilities, or have ceased to participate in them, whether or not deprived of their liberty, shall be entitled to respect of their persons, their honor, their religious convictions and practices.... 2. The following shall be prohibited at all times and in all places with respect to the persons referred to in paragraph 1:

(a) Attacks against the life, health and physical and mental integrity of persons, in particular homicide and cruel treatments such as torture... (e) Attacks against personal dignity, especially humiliating and degrading treatment, rape, forced prostitution and any form of indecent assault;

[FN42] Final Report ..., *idem supra*, Note 34, p. 18

[FN43] ICRC Commentary on the Additional Protocols of 8 June, 1977 to the Geneva Conventions of 12 August 1949, Yves Sandoz, Christophe Swinarski, Bruno Zimmerman, eds. (Geneva: Martinus Nijhoff Publishers, 1987) 1375. Quoted in D. Thomas and R. Ralph, *idem supra*, Note 30, p. 95.

Article 5 of the Statute of the International Tribunal established for investigating the serious violations of international humanitarian law committed in the territory of the former Yugoslavia, considers rape practiced on a systematic and large scale a crime against humanity.[FN44]

[FN44] United Nations: Secretary General Report on aspects of establishing an international tribunal for the prosecutions of persons responsible for serious violations of International Humanitarian Law committed in the territory of the former Yugoslavia, 32 I.L.M., 1159, 1173, 1174 (1993).

In the context of international human rights law, the American Convention on Human Rights stipulates in its Article 5 that:

1. Every person has the right to have his physical, mental and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment...

The letter of the Convention does not specify what is to be understood by torture. However, in the inter-American sphere, acts constituting torture are established in the Inter-American Convention to Prevent and Punish Torture, which states:

...torture will be understood to be any act performed intentionally by which physical and mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as a personal punishment, as a preventive measure, as a penalty or for any other purpose. Torture will also be understood to be application to a person of methods designed to efface the victim's personality or to diminish his physical or mental capacity, even if they do not cause physical pain or mental anguish.[FN45]

[FN45] See Article 2 of the Convention.

The following will be guilty of the crime of torture:

- a. Public employees or officials who acting in that capacity order, instigate, induce its commission, commit it directly or, when in a position to prevent it, do not do so.
- b. Persons who, at the instigation of the public officials or employees referred to in paragraph 1, order, instigate or induce its commission, commit it directly or are accomplices in its commission.[FN46]

[FN46] See Article 3 of the Convention.

Accordingly, for torture to exist three elements have to be combined:

1. it must be an intentional act through which physical and mental pain and suffering is inflicted on a person;
2. it must be committed with a purpose;
3. it must be committed by a public official or by a private person acting at the instigation of the former.

Regarding the first element, the Commission considers that rape is a physical and mental abuse that is perpetrated as a result of an act of violence. The definition of rape contained in Article 170 of the Peruvian Criminal Code confirms this by using the phrasing "[h]e who, with violence or serious threat, obliges a person to practice the sex act..." The Special Rapporteur against Torture has noted that sexual abuse is one of the various methods of physical torture.[FN47] Moreover, rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community.[FN48] In this connection, the above-mentioned Special Rapporteur has stated that, particularly in Peru, "...rape would appear to be a weapon used to punish, intimidate and humiliate." [FN49]

[FN47] U.N. Doc. E/CN.4/1986/15, para. 119.

[FN48] D. Blair, *Recognizing Rape as a Method of Torture*, 19 N.Y.U. Rev.L & Soc. Change 821, 854.

[FN49] U.N., *idem supra*, Note 13, para. 431.

Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.[FN50]

[FN50] D. Blair, *idem supra*, Note 49, p. 855.

Raquel Mejía was a victim of rape, and in consequence of an act of violence that cause her "physical and mental pain and suffering". As she states in her testimony, after having been raped she "was in a state of shock, sitting there alone in her room". She was in no hurry to file the appropriate complaint for fear of suffering "public ostracism". "The victims of sexual abuse do not report the matter because they feel humiliated. In addition, no woman wants to publicly announce that she has been raped. She does not know how her husband will react. [Moreover], the integrity of the family is at stake, the children might feel humiliated if they know what has happened to their mother".

The second element establishes that for an act to be torture it must have been committed intentionally, i.e. to produce a certain result in the victim. The Inter-American Convention to Prevent and Punish Torture includes, among other purposes, personal punishment and intimidation.

Raquel Mejía was raped with the aim of punishing her personally and intimidating her. According to her testimony, the man who raped her told her that she, too, was wanted as a subversive, like her husband. He also told her that her name was on a list of persons connected with terrorism and, finally, warned her that her friendship with a former official in the previous government would not serve to protect her. On the second occasion, before leaving he threatened to come back and rape her again. Raquel Mejía felt terrorized not only for her own safety but also for that of her daughter who was sleeping in another room and for the life of her husband.

The third requirement of the definition of torture is that the act must have been perpetrated by a public official or by a private individual at the instigation of the former.

As concluded in the foregoing, the man who raped Raquel Mejía was member of the security forces who had himself accompanied by a large group of soldiers.

Accordingly, the Commission, having established that the three elements of the definition of torture are present in the case under consideration, concludes that the Peruvian State is responsible for violation of Article 5 of the American Convention.

The petitioners have also asserted that the sexual abuse suffered by Raquel Mejía violates the provisions of Article 11 of the Convention.

Said article specifies that a State must guarantee everybody protection of their honor and dignity, within the framework of a broader right, namely the right to privacy. The relevant parts of paragraphs 1 and 2 of this article read as follows:

1. Everyone has the right to have his honor respected and his dignity respected.
2. No one may be the object of arbitrary or abusive interference with his private life...

The Special Rapporteur against Torture has stated that "Rape is a particularly base attack against human dignity. Women are affected in the most sensitive part of their personality and the long-term effects are perforce extremely harmful, since in the majority of cases the necessary psychological treatment and care will not and cannot be provided." [FN51]

[FN51] U.N., *idem supra*, Note 12, para. 580.

The Commission considers that sexual abuse, besides being a violation of the victim's physical and mental integrity, implies a deliberate outrage to their dignity. In this respect, it becomes a question that is included in the concept of "private life". The European Court of Human Rights has observed that the concept of private life extends to a person's physical and moral integrity, and consequently includes his sex life.[FN52]

[FN52] See *X and Y vs. The Netherlands*, Application 8978/80, Series A. No. 167.

For the Commission, therefore, the rapes suffered by Raquel Mejía, in that they affected both her physical and her moral integrity, including her personal dignity, constituted a violation of Article 11 of the Convention, responsibility for which is attributable to the Peruvian State.

Article 1(1) of the Convention states:

The State 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.

The Inter-American Court of Human Rights has interpreted this article as establishing two obligations for the States Parties to the Convention: that of respecting the rights and freedoms recognized in it and that of ensuring their free and full exercise to individuals under their jurisdiction.[FN53] According to the Court, any form of exercise of public power that violates the rights protected by the Convention is unlawful. Thus, when an organ or agent of the public authority violates any of these rights, this is a violation of the obligation to "respect", and consequently a violation of Article 1(1).[FN54]

[FN53] Inter-Am. Ct. of H.R., *Velásquez Rodríguez Case*, *idem supra*, Note 7, paras. 165 and 166.

[FN54] *Idem supra*, para. 169.

On the basis of these considerations, the Commission concludes that since the Peruvian State omitted to respect the rights to humane treatment and to protection of her honor and dignity of Raquel Mejía, the State is in violation of the obligation contained in Article 1(1).

b. The impossibility for Raquel Mejía to access domestic recourses for remedying the violations of her husband's human rights and of her own constitutes a violation of Article 25 and 8(1), in relation to Article 1(1) of the Convention

Article 25 and 8(1) of the Convention respectively provide as follows:

Article 25

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention...

2. The States Parties undertake:

- a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State;
- b. to develop the possibilities of judicial remedy; and
- c. to ensure that the competent authorities shall enforce such remedies when granted.

Article 8

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

The Commission has had opportunity to pronounce on the interpretation of these articles in previous cases in which the scope of the right to effective recourse in the context of the provisions of the American Convention was established. [FN55]

[FN55] See in particular Reports 28/92, Argentina and 29/92, Uruguay, Report of the IACHR 1992-1993, OEA/Ser.L/V/II.83, Doc. 14 of March 12, 1993.

Concerning Article 1(1), the Commission, citing the Inter-American Court of Human Rights in the Velásquez Rodríguez case, has stated:

the second obligation of the States Parties is that of "ensuring" the free and full exercise of the rights recognized in the Convention to all persons subject to their jurisdiction... Consequently, the States must prevent, investigate and punish any violation of the rights recognized by the Convention... The Court expanded this concept in various subsequent paragraphs of the same judgment, for example: "The decisive factor is to determine whether a particular violation of the rights recognized by the Convention has taken place with the support or the tolerance of the public authorities or whether the latter have acted in such a way that the violation has occurred without any prevention or with impunity". "The State has the juridical duty to prevent, to the extent it reasonably can, human rights violations, 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, apply to them the appropriate penalties and ensure adequate compensation for the victim"; "... if the State apparatus acts in such a way that the violation remains unpunished and the victim's full rights are not restored to him to the extent possible, it can be affirmed that the State has failed to perform its duty to ensure free and full exercise of said rights to all persons under its jurisdiction". Regarding the obligation to investigate, the Commission notes that this must be "...for a purpose and be assumed by the State as a specific juridical duty and not as a simple matter of management of private interests that depends on the initiative of the victim or his family in bringing suit or on the provision of evidence by private sources, without the public authority effectively seeking to establish the truth..."[FN56]

[FN56] Report No. 28/92, Argentina, idem supra, 40.

The obligation contained in Article 1(1) is a necessary corollary of the right of every individual to recourse to a tribunal to obtain judicial protection when he believes he has been a victim of violation of any of his human rights. If this were not so, the right to obtain effective recourse set forth in Article 25 would be absolutely without content.

In this connection, the Inter-American Court of Human Rights has observed as follows:

[In the terms of the Convention] the States Parties undertake to make effective judicial recourses available to human rights violations victims (Article 25), recourses that must be substantiated in accordance with the rules of due process (Article 8(1)), all within the general obligation on the same States to ensure the free and full exercise of the rights recognized in the Convention to all persons under their jurisdiction (Article 1(1)).[FN57]

[FN57] Inter-American Court of Human Rights, Velásquez Rodríguez Case, *idem supra*, Note 6, para. 91

The Commission considers that the right to a recourse set forth in Article 25, interpreted in conjunction with the obligation in Article 1(1) and the provisions of Article 8(1), must be understood as the right of every individual to go to a tribunal when any of his rights have been violated (whether a right protected by the Convention, the constitution or the domestic laws of the State concerned), to obtain a judicial investigation conducted by a competent, impartial and independent tribunal that will establish whether or not a violation has taken place and will set, when appropriate, adequate compensation.

In this way, when a human rights violation is the outcome of an act classified as criminal, the victim is entitled to obtain from the State a judicial investigation that is conducted "purposefully with the means at its disposal... in order to identify those responsible [and] apply to them the appropriate penalties..."

Purposeful investigation, in the Commission's view, implies that the competent State authority "will develop the possibilities of judicial remedy",[FN58] i.e. that it will undertake the investigation "as a specific juridical duty and not as a simple matter of management of private interests that depends on the initiative of the victim or of his family in bringing suit or on the provision of evidence by private sources, without the public authority effectively seeking to establish the truth..." Thus, the obligation to investigate purposefully means in practice that the State will act with due diligence, i.e. with the existing means at its disposal, and will endeavor to arrive at a decision.[FN59] However, when the State has performed its obligation to diligently investigate the matter, the fact that the investigation does not produce a positive result or the decision is not favorable to the petitioner does not per se demonstrate that the latter has not had access to a recourse.[FN60] According to Article 25 of the Convention, the right to judicial protection includes the obligation of the State to guarantee the enforcement of any remedy when granted.[FN61]

[FN58] See Article 25(2) (b).

[FN59] See Article 25(2)(a).

[FN60] Inter-American Court of Human Rights, Velásquez Rodríguez Case, *idem supra*, Note 6, paras. 177 and 67.

[FN61] See Article 25(2)(c).

In this way, within the context of the Convention the term "recourse" must be understood in a broad sense and not be limited to the meaning that this word has in the legal terminology of the States' procedural legislation.

The American Convention requires the States to offer effective recourses to human rights violations victims. The formal existence of such recourses is not sufficient to demonstrate their effectiveness; to be effective, a recourse must be adequate and efficacious. Adequate means that the function of the recourse

in a State's domestic legal system must be appropriate for protecting the juridical situation affected. A recourse is efficacious when it is capable of producing the result for which it was designed.[FN62]

[FN62] *Idem supra*, paras. 63, 64 and 66.

Whether the existence or not of an effective recourse is established in a concrete case and taking into consideration the special features of each legislation, the Commission understands that, in those States where determination of the civil reparation of injury caused by an unlawful act is subject to establishment of same in a criminal trial, the instituting of criminal action and the subsequent furthering of the proceedings by the State is the adequate recourse required by the victim.

In the case under analysis, the Commission, on the basis of the facts reported, presumed that Raquel Mejía had not had access to an effective recourse that would have remedied the human rights violations suffered by her. As established, Raquel Mejía did not file a complaint with the domestic courts since practice in Peru is that this type of act involving State agents is not investigated while moreover those who report them run the risk of reprisals.

The Peruvian State's failure to give the victim access to a judicial investigation conducted by an independent and impartial tribunal made it, in practice, materially impossible for her to exercise her right to obtain compensation. The fact is that, in Peruvian law, the obtaining of civil compensation for injuries resulting from an unlawful act in the criminal category is subject to establishment of the crime by means of criminal proceedings.[FN63]

[FN63] Article 3 of the Peruvian Code of Criminal Procedure specifies that: When in the course of civil proceedings reasonable indications are brought to light of commission of a crime calling for official prosecution, the judge shall inform the representative of the Government Attorney's office so that the pertinent criminal proceedings may be instituted. In this case, the judge shall suspend the civil proceedings, if he considers that the criminal judgment may influence the decision to be handed down in the civil case.

For this reason, in the concrete case of Raquel Mejía, the Peruvian State's failure to guarantee her right to an effective recourse, besides constituting a violation of her right to judicial protection, also constituted a violation of her right to go to a tribunal that would determine whether she was entitled to compensation for injuries suffered as a result of the sexual abuse to which she was subjected.[FN64]

[FN64] Article 8 of the Convention provides, in this connection, that "Every person has the right to a hearing... by a competent tribunal... for the determination of his rights... of a civil ... nature."

The American Convention establishes a distinction between the petitioner and the victim. While the term "petitioner" refers to the person with active legitimation to file a petition with the system, the word "victim" refers to individuals who have been impacted by violation of their rights. The Commission understands that, in cases where the right to life is violated, omission by the State to provide effective recourses affects the family of the dead person and, therefore, makes them into indirect "victims" of the violation of the right to judicial protection defined in a broad sense, i.e. including the right to compensation.

The Commission has presumed that the Peruvian State omitted to guarantee the right to an effective recourse in the case of Fernando Mejía. In his case, adequate recourse was judicial investigation by the State through initiation of criminal proceedings and, once the existence of an unlawful act was established, determination of compensation for the injuries caused to the victim. While the pertinent criminal proceedings were instituted, the behavior of the State organs, namely the Government Attorney's office, the judge assigned to the case and the Peruvian Armed Forces in delaying or obstructing the investigation, rendered the recourse inefficacious in practice.

The State's failure to provide for a thorough investigation in the case of Fernando Mejía affected his wife's right to an effective recourse and, according to Peruvian law, the fact that the existence of an unlawful act was not established through criminal proceedings prevented Raquel Mejía's access to a tribunal to determine whether compensation was due to her.

On the basis of the analysis made above, the Commission concludes that the Peruvian State, in not offering effective recourses to Raquel Mejía in both the case of the homicide of her husband and in connection with the violations of her own rights, constituted violation of the rights set forth in Articles 1(1), 8(1) and 25 of the Convention.

c. The groundless instituting of criminal proceedings for terrorism against Raquel Mejía constitutes a violation of the right to due process (Article 8), in conjunction with the obligation contained in Article 1(1)

Raquel Mejía has been tried for the alleged commission of the crime of terrorism under the provisions of Decree-Law No. 25.475 that establishes the penalty for the crimes of terrorism and the procedures for preliminary and full investigation and trial proceedings in respect of such crimes:

Article 13 of this Decree-Law, insofar as it concerns us, reads as follows:

The following rules shall be observed for the preliminary investigation and proceedings in respect of the crimes of terrorism to which this Decree-Law refers:

a. Once the charge has been filed by the Government Attorney's office, the detainees shall be placed at the disposition of the Criminal Judge, who shall issue the order to open the investigation with warrant of arrest, within 24 hours, with adoption of the necessary security measures... Likewise, prior questions, prejudicial issues, exceptions and any other related matters are to be resolved in the judgment.

d. Upon completion of the preliminary investigation the dossier shall be forwarded to the President of the respective court, who will forward the findings to the Chief Senior Prosecutor who, in his turn, shall assign the Senior Prosecutor who is to draw up the indictment...

e. Once the documents with the indictment are returned, the President of the Superior Court shall appoint the members of the Special Court to hear the case, who shall include the Judicial District members, on a rotating and secret basis, under liability.

h. In terrorism cases, no challenges will be permitted against the judges assigned or other justice officials.

On the basis of the above-cited article, once a petition has been filed the judge must order opening of proceedings and the arrest of the accused individual. In this way, a person is obligatorily brought before the court and even placed under arrest without establishing whether there is sufficient evidence of the existence of a crime and of the individual's guilt in the commission of it.[FN65] The individual is further prevented from introducing a prior question, for example questioning the actual existence of the crime or asserting the absence of criminal liability on the part of the accused.[FN66] According to Article 13, these

exceptions will be resolved in the final judgment, i.e. after the hearing of the case has been completed. Upon completion of the preliminary investigation, the judge must forward the dossier to the Superior Court, even when there is no evidence of the accused's guilt; once the Senior Prosecutor has been appointed, he must draw up an indictment, without needing to establish whether there are grounds for proceeding with the case. As a result, application of this Decree-Law in practice can mean that an individual can be deprived of liberty or made subject to criminal proceedings even if at any stage in such proceedings it is established that there is not evidence of his guilt.

[FN65] Article 77 of the Code of Criminal Procedure specifies that: Once the petition is received, the examining magistrate shall only open the investigation if the alleged perpetrator has been identified and criminal action is not time-barred. The case record shall specify the reasons and bases...

[FN66] According to Article 5 of the Peruvian Code of Criminal Procedure, this exception is classified as "of Nature of Action" and applies when "the act denounced does not constitute a crime or is not actionable under criminal law".

Article 8 of the American Convention sets the requirements to be met in the various stages of proceedings to be able to speak of true and appropriate judicial guarantees.[FN67] The Inter-American Court of Human Rights has observed that:

[FN67] Inter-Am. Ct. of H.R. Judicial Guarantees in States of Emergency (Article 27(2), 25 and 8 of the American Convention on Human Rights), Consultative Opinion O-C9/87 of October 6, 1987, Series A N° 9, para. 27.

[Article 8] recognizes the so-called "due legal process", which encompasses the conditions to be met in order to ensure adequate defense of those whose rights and obligations are under judicial consideration. [FN68]

[FN68] *Idem supra*, para. 28.

This Article includes different rights and guarantees flowing from a common juridical asset or good and which considered as a whole constitute a single right not specifically defined but whose unequivocal purpose is definitely to ensure the right of everyone to a fair trial.[FN69]

[FN69] See European Court of Human Rights, *Golder Case*, Judgment of February 21, 1975, Series A, No. 18, para. 28, in regard to Article 6 of the European Convention on Human Rights, which contains substantially the same rights and guarantees as Article 8 of the American Convention.

In this connection, paragraphs 1 and 2 of Article 8 specify that:

1. Every person has the right to a hearing, with due guarantees... by a competent, independent and impartial tribunal... in the substantiation of any accusation of a criminal nature made against him...
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven...

Impartiality presumes that the court or judge do not have preconceived opinions about the case sub judice and, in particular, do not presume the accused to be guilty. For the European Court, the impartiality of the judge is made up of subjective and objective elements.[FN70] His subjective impartiality in the specific case is presumed as long as there is no evidence to the contrary. Objective impartiality, on the other hand, requires that the tribunal or judge offer sufficient guarantees to remove any doubt as to their impartiality in the case.[FN71]

[FN70] On this point the European Court has developed extensive case law. By way of examples, see Piersack Case, Judgment of October 1, 1982, Series A, No. 53 and De Cubber Case, Judgment of October 26, 1984, Series A, N° 86.

[FN71] See Saint-Marie Case, Judgment of December 16, 1992, Series A, No. 253, para. 50; Piersack Case, Judgment of October 1, 1982, Series A, N° 53, para. 30.

The principle of innocence constructs a presumption in favor of a person accused of an offense, according to which he is considered innocent as long as his criminal liability is established by a firm judgment. As a result, in order to establish the criminal liability of an accused person the State has to prove his guilt beyond all reasonable doubt.

The presumption of innocence is related, in the first place, to the spirit and attitude of the judge who has to investigate the criminal charge. He must approach the case without prejudices and under no circumstances must he presume the accused guilty.[FN72] On the contrary, his task is to construct an accused's criminal liability on the basis of assessment of the evidence on hand.

[FN72] In this connection, see European Commission on Human Rights, Case 9037/80, X. vs. Switzerland, decision of May 5, 1981, D.R. 24, p. 224.

In this context, another elementary concept of criminal processal law, the objective of which is to preserve the principle of innocence, is the burden of proof. In criminal proceedings, the onus probandi does not lie with the accused; on the contrary, it is the State that has to demonstrate the accused's guilt. Modern doctrine accordingly maintains that "the accused does not need to prove his innocence, which has already been constructed by the presumption protecting him, but rather the accuser has to fully construct his position, leading to certainty that a punishable act was committed.[FN73]

[FN73] Maier, Julio B.J., *El derecho procesal penal argentino*, Buenos Aires, Editorial Hammurabi, 1989, p. 271. Also in this connection, the European Commission on Human Rights has pointed out that the burden of proof, in the context of a criminal case, lies with the Government Attorney's office and the existence of doubt benefits the accused. See Human Rights Commission, *Austria v. Italy*, Report of March 30, 1963, Y.B. of the European Convention on H.R., Vol. VI, p. 782.

The essential thing is therefore that the judge who hears the case is free of any prejudice concerning the accused's guilt and affords him the benefit of the doubt, i.e. does not condemn him until he is certain or convinced of his criminal liability, so that all reasonable doubt that the accused might be innocent is removed.

The Inter-American Court of Human Rights has stated that:

There are many ways in which a State can violate... the Convention. In this latter case, it can do so... by enacting provisions that are inconsistent with the requirements of its obligations under the Convention.[FN74]

[FN74] Inter-Am. Ct. of H.R., Certain powers of the Inter-American Commission on Human Rights (Arts. 41, 42, 46, 47, 50 and 51 of the American Convention on Human Rights), Consultative Opinion OC-13/93 of July 16, 1993, Series A, No. 13, para. 26.

Accordingly, when there is a law that is contrary to the Convention, according to the Court:

The Commission is competent, under... Articles 41 and 42 of the Convention, to qualify any domestic legislation of a State Party as in violation of the obligations said State Party has assumed in ratifying or acceding to it... [FN75]

[FN75] *Idem supra*, Concluding part 1.

Therefore:

As a consequence of such qualification, the Commission can recommend to the State that it repeal or amend the legislation in question and for this purpose it is sufficient that said legislation has come to its knowledge by whatever means, whether or not it has been applied in a concrete case. This qualification and recommendation can be made by the Commission directly to the State (Article 41(b)) or in the reports referred to in Articles 49 and 50 of the Convention.[FN76]

[FN76] Inter-Am. Ct. of H.R., International responsibility for enactment and application of laws that violate the Convention (Articles 1 and 2 of the American Convention on Human Rights), Consultative Opinion OC-14/94 of December 9, 1994, para. 39.

The Commission, based on the power granted it by Articles 41 and 42 of the Convention and in accordance with the interpretation of same by the Court, observes that Article 13 of Decree-Law 25.475 is incompatible with the obligations assumed by the Peruvian State on ratifying the Convention.

The fact is that, pursuant to Article 8 of the Convention, it has recognized the right of everyone accused of an offense to a fair trial. This right includes, *inter alia*, the right to be heard by an impartial tribunal and to be presumed innocent until legally proved to be guilty.

For the Commission, Article 13 of Decree-Law 25.475, regardless of its application in a particular case, does not guarantee the right to a fair trial.

In the first place, it reserves the burden of proof and creates, in practice, a presumption of guilt that places on the accused the burden of proving his innocence. The decree in fact requires the investigating magistrate to institute criminal proceedings and arrest the accused on the basis of the existence of a petition alone and requires him to forward the case to the Superior Court, without ascertaining in either

case whether there is sufficient evidence to warrant proceeding with it; it further prevents the accused from defending himself by recourse to prior questions, even ones that would apparently demonstrate that he is not guilty or that no offense was committed and, finally it generates an obligation for the Senior Prosecutor to indict the accused, even when there is not sufficient evidence for such a step.

Secondly, Article 13 does not guarantee the impartiality of the court. In establishing the legal obligation to open proceedings and indict, the decree places the tribunal in the position of considering the accused guilty, even before assessing the evidence at hand.

The Commission accordingly observes that Article 13 of Decree-Law 25.475, by omitting to guarantee free and full exercise of the right to a fair trial contained in Article 8 of the Convention is incompatible with the obligation set forth in Article 1(1) of same.

In the case of Raquel Mejía, the application of this law in the proceedings constitutes, in the Commission's opinion, a violation of her right to be heard by an impartial tribunal and to be presumed innocent. The fact is that, as is evident from the evidence produced, once she was accused of alleged commission of the crime of terrorism, the examining magistrate opened the case and issued a warrant for her arrest. Once the preliminary investigation was completed, he forwarded the dossier to the Lima Provincial Prosecutor who, despite stating that, Raquel Mejía "...the indications that would warrant formulation of the indictment have not been proven to date, which means that her participation in the events investigated cannot be established for the moment..." forwarded the case to the Superior Court. That Court proceeded to appoint the Supreme Prosecutor who, in compliance with the provisions of Article 13 of Decree-Law 25.475, charged Raquel Mejía with the crime of terrorism and asked for the penalty of 20 years imprisonment, without even considering whether there was any evidence of the criminal liability.

In Report 25/95, to which the Peruvian State did not reply within the 60 days given to it by the Commission, the latter concluded that the Peruvian State had violated its obligation to respect and guarantee the fundamental rights and freedoms, an obligation which implies the duty to investigate abuses of those rights and freedoms and to punish those responsible, and the right to judicial protection, provided for in Articles 1 and 25 of the American Convention on Human Rights.

VI. CONCLUSIONS

The Commission, on the basis of the considerations analyzed in this report, formulates the following conclusions:

1. In application of Articles 47 of the Convention and 39 of its Regulations:
 - a. it declares the petitions concerning the human rights violations suffered by Fernando Mejía inadmissible;
 - b. it declares the petitions concerning the human rights violations suffered by Raquel Mejía admissible.
2. In regard to the petitions considered admissible it concludes that:
 - a. the Peruvian State is responsible for the violation of the right to humane treatment (Article 5) and the right to protection of honor and dignity (Article 11) of Raquel Mejía and of the general obligation to respect and guarantee the exercise of these rights contained in the Convention (Article 1(1)).

- b. the Peruvian State is responsible for the violation of the right to an effective recourse (Article 25), the right to due process (Article 8) and of the general obligation to respect and guarantee the exercise of these rights contained in the Convention (Article 1(1)).
- c. Article 13 of Decree-Law 25.475 is incompatible with the right to a fair trial protected by Article 8 of the Convention and, in consequence, constitutes a violation of the general obligation contained in Article 1(1) of same.
- d. the application of the said article in the specific case of Raquel Mejía constitutes a violation of her right to presumption of innocence and to be heard by an impartial tribunal (Article 8(1) and (2)).

VII. RECOMMENDATIONS

Therefore, the Commission, in consideration of its analysis and of the law, hereby agrees:

1. To declare that the Peruvian State is responsible for violating the right to humane treatment, the right to protection of one's honor and dignity, the right to a fair trial and the right to judicial protection guaranteed, respectively, in Articles 5, 11, 8 and 25 of the American Convention, and its general obligation to respect and guarantee the exercise of those rights, under Article 1.1 of the Convention.
2. To recommend to the Peruvian State that it conduct a thorough, rapid and impartial investigation into the events in the kidnapping, torture and subsequent murder of Fernando Mejía, in order to identify those responsible and, where appropriate, impose the appropriate punishment.
3. To recommend to the Peruvian State that it conduct a thorough, rapid and impartial investigation of the sexual abuse of which Raquel Mejía was the victim, in order to identify the perpetrators so that they may be punished in accordance with the law, and that it pay the injured party a fair compensation.
4. To recommend to the Peruvian State that it abolish or amend Article 13 of Decree Law 25.475, so that it guarantees everyone's right to a fair trial.
5. To recommend to the Peruvian State that it drop the criminal proceedings against Raquel Mejía for the alleged crime of terrorism, inasmuch as it has failed to guarantee her right to a fair trial.
6. To publish this Report in the Annual Report to the General Assembly.