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| Institution: | Inter-American Commission on Human Rights |
| File Number(s): | Report No. 112/00; Case 11.099 |
| Session: | Hundred and Ninth Special Session (4 – 8 December 2000) |
| Title/Style of Cause: | Yone Cruz Ocalio v. Peru |
| Doc. Type: | Report |
| Decided by: | Chairman: Helio Bicudo; First Vice-Chairman: Claudio Grossman; Second Vice-Chairman: Juan E. Mendez; Commissioners: Marta Altolaguirre, Robert K. Goldman, Peter Laurie, Julio Prado Vallejo. |
| Dated: | 4 December 2000 |
| Citation: | Cruz Ocalio v. Peru, Case 11.099, Inter-Am. C.H.R., Report No. 112/00, OEA/Ser.L/V/II.111, doc. 20, rev. (2000) |
| Represented by: | APPLICANT: Centro de Estudios y Accion para la Paz |
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I. SUMMARY

1. By petition submitted to the Inter-American Commission on Human Rights (hereinafter “the Commission”) by the non-governmental organization Centro de Estudios y Acción para la Paz (“CEAPAZ”) on December 15, 1992, it was alleged that the Republic of Peru (hereinafter “Peru,” “the State,” or “the Peruvian State”) violated the human rights of Mr. Yone Cruz Ocalio, by detaining him, by members of the Police, on February 24, 1991, and then disappearing him. The State alleges that Mr. Cruz Ocalio was not detained by police or military forces. The Commission concludes that Peru violated, in his person, the rights set forth at Articles 7, 5, and 8 of the American Convention on Human Rights (hereinafter the “Convention” or the “American Convention”), in conjunction with Article 1(1), and it makes recommendations to the Peruvian State.

II. PROCESSING BEFORE THE COMMISSION

2. On January 4, 1993, the Commission opened the case, forwarded the pertinent parts of the complaint to the Peruvian State, and requested that it provide information within 90 days. The State answered on June 8, 1993. On May 26, 1999, both parties were asked to provide the Commission with updated information on the case, and were informed that the Commission was making itself available to try to reach a friendly settlement. On July 13, 1999, the petitioner answered that it would be willing to pursue a friendly settlement, subject to the State assuming certain commitments. The State, on July 14, 1999, ratified earlier arguments and stated it did not consider it advisable to pursue a friendly settlement. Accordingly, the Commission considered the possibility of reaching a friendly settlement to have been exhausted.

III. POSITIONS OF THE PARTIES

A. The petitioner

3. The petitioner notes that Mr. Yone Cruz Ocalio, married and father of two children, who was a worker at the “La Soledad” farm was detained on February 24, 1991, at approximately 9:00 a.m., by members of the National Police, at the Tulumayo agricultural station, Aucayacu, province of Leoncio Prado, department of Huánuco, Peru. Petitioner further states that after being detained, Mr. Cruz Ocalio was taken to the Tulumayo military base, and that he then disappeared.

4. Petitioner notes that in response to Mr. Cruz Ocalio’s detention, several remedies were pursued, before the Executive, the Judiciary, and the Public Ministry. It further indicates that as regards the Executive, communications were sent to the Minister of Defense, to the Chairman of the Joint Chiefs of Staff of the Armed Forces, to the General Commander of the Peruvian Army, to the Chief of the Political-Military Command of Huánuco, and to the Chief of the Tulumayo Military base. Petitioner indicates that as regards the Judiciary, a writ of habeas corpus was filed on April 15, 1991, before the Investigative Judge of Leoncio Prado, on which no ruling had been made. It notes that in terms of the Public Ministry, the parents of Mr. Cruz Ocalio reported the incident to the First Provincial Prosecutor of Leoncio Prado and also to the Superior Prosecutor of Huánuco, and to the Attorney General of Peru. Petitioner indicates that notwithstanding all of the initiatives taken, Mr. Cruz Ocalio continued disappeared.

B. The State

5. The State answered on June 8, 1993, and communicated that the Ministry of Defense of Peru had declared that “citizen Yone Cruz Ocalio has not been detained by the forces of order that operate in Aucayacu.”

6. On August 29, 1994, Peru informed the Commission that the Ministry of Interior of Peru had reported as follows:

... as the corresponding investigations related to the supposed detention of citizen Yone Cruz Ocalio were carried out, it has been determined that he has not been detained by members of the National Army or the National Police of Peru, from the police antidrug base in the jurisdiction of Tingo María.

... as the book of persons detained and of incidents, kept in this office, has been reviewed, no information has been found regarding Yone Cruz Ocalio, indicating that he was not the subject of intervention or investigation by this police antidrug base.

7. On September 17, 1998, the State asked the IACHR to declare the petition inadmissible.

IV. ANALYSIS

A. Considerations on admissibility

The Commission now analyzes the admissibility requirements of a petition established in the American Convention.

a. Subject-matter jurisdiction, personal jurisdiction, and jurisdiction based on time and place of the events

8. The allegations in this case describe facts that would be violative of several rights recognized and enshrined in the American Convention that took place within the territorial jurisdiction of Peru when the obligation to respect and guarantee the rights established therein were in force for the State.^[FN1] Therefore, the IACHR has subject-matter jurisdiction, personal jurisdiction, and jurisdiction based on when and where the alleged violations took place, so as to be able to take cognizance of the merits in the case.

[FN1] The Peruvian State deposited the instrument of ratification of the American Convention on July 28, 1978.

b. Exhaustion of domestic remedies

9. The fact that the first stages of the process, i.e., within the first 90 days that it was given to provide information about the facts alleged, the State did not present any objection on grounds of failure to exhaust domestic remedies, will be sufficient for the Commission to consider the requirement established at Article 46(1)(a) of the Convention to have been met.

10. The Commission recently decided, together, a group of 35 cases that involved 67 persons disappeared in various departments of Peru during the period from 1989 to 1993, and analyzed in detail the general phenomenon of disappearances in Peru. In those reports the Commission notes that habeas corpus was the adequate remedy in cases of disappearance for trying to find a person presumably detained by the authorities, to inquire into the legality of the detention, and, if possible, to secure his or her release. The IACHR also concluded that for the purposes of admissibility of complaints before this body, it was not necessary to file a habeas corpus remedy--or any other--for the purpose of exhausting domestic remedies, since from 1989 to 1993 there was a practice or policy of disappearances ordered or tolerated by various public authorities that rendered the habeas corpus remedy totally ineffective in cases of disappearance. In those reports the Commission found as follows:

As stated earlier, the relatives of the victims applied on numerous occasions to various judicial, executive (military), and legislative authorities to locate the victims and secure their release. These efforts usually included writs of habeas corpus; complaints to the Attorney General, the Chief Prosecutor in San Martín, the Special Attorney for Human Rights in San Martín, the Office of the Special Ombudsman, and the Offices of the Provincial Prosecutors; and appeals to the Ministry of Defense, the Army High Command, the Office of the Inspector General of the Army,

the Political-Military Commander in Chief, and the commanding officers at the military bases concerned. Despite all these efforts, the victims were never located and never reappeared.

All these procedures and appeals by the relatives of the victims proved fruitless, because the same people who had allegedly brought about the disappearances and who hid the evidence played a key part in the results of the investigations. None of the writs of habeas corpus was successful in any of the cases. Likewise, the complaints filed with the offices of the government prosecutors led to little more than a request for information from the military, who would deny the detention. The cases were then shelved without ever being brought before the competent court of the first instance. It should be added that generally the Peruvian Government's replies to the Commission denying responsibility for the disappearances are based precisely on photocopies, sent to the Commission, of official communications in which the military itself denies having carried out the arrests.

[T]he Commission considers it important to provide certain clarifications regarding the exhaustion of domestic remedies in connection with the forced disappearances in Peru. In this regard, it should be noted that the Inter-American Court of Human Rights has held, in connection with the exhaustion of domestic remedies, that, "in keeping with the object and purpose of the Convention and in accordance with an interpretation of Article 46 (1)(a) of the Convention, the proper remedy in the case of the forced disappearance of persons would ordinarily be habeas corpus, since those cases require urgent action by the authorities" (and it is) "the normal means of finding a person presumably detained by the authorities, of ascertaining whether he is legally detained and, given the case, of obtaining his liberty." Thus, when a writ of habeas corpus is presented in the case of persons who were detained and then disappeared, and nothing comes of it because the victims are not located, those are sufficient grounds for finding that domestic remedies have been exhausted.

However, the Court has also ruled that domestic remedies must be effective, that is, they must be capable of producing the results for which they were intended, and that if there is proof of a practice or policy, ordered or tolerated by the government, the effect of which is to prevent certain persons from availing themselves of internal remedies that would normally be available to all others, resorting to those remedies becomes a senseless formality, so that the exceptions to the exhaustion of domestic remedies provided for in Article 46(2) of the Convention would be fully applicable.

In its analysis of the substance of the case, set forth in section VI below, the Commission finds that, during the period in which the alleged events took place, there existed in Peru a practice or policy of disappearances, ordered or tolerated by various government authorities. For that reason, and given that that practice rendered writs of habeas corpus completely ineffective in cases of disappearances, the Commission finds that, for purposes of admissibility of complaints before this Commission, it was not necessary to attempt the habeas corpus remedy--or any other--in order to exhaust domestic remedies. Consequently, the Commission considers that the rule regarding exceptions to the exhaustion of domestic remedies established in Article 46(2) of the Convention is fully applicable.[FN2]

[FN2] IACHR, Report N° 51/99, Case 10.471 and others (Peru), Annual Report 1998, para. 58 to 63. See also, IACHR, Reports Nos. 52/99, 53/99, 54/99, 55/99, 56/99, and 57/99 (Peru), Annual Report 1998.

11. The Commission considers the foregoing considerations to apply fully to this case, since it is a complaint of a forced disappearance alleged to have taken place in 1991, which has been imputed to the Peruvian police. This disappearance would have occurred at the time (1989-1993) when the Commission determined, according to the material quoted above, that there was a practice or policy of disappearances ordered or tolerated by various public authorities that rendered the habeas corpus remedy completely ineffective in disappearance cases; accordingly, the Commission determined that for the purposes of admissibility of complaints to the Commission, it was not necessary to seek to pursue the habeas corpus remedy--or any other--for the purpose of exhausting domestic remedies. Therefore, the Commission concludes that this case fits under the exception provided for at Article 46(2)(a) of the Convention, according to which the requirement of exhausting domestic remedies, provided for at Article 46(1)(a) of the Convention, is not applicable when "the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated." The Commission believes it is important to highlight that in this case, it has been alleged that the writ of habeas corpus filed on behalf of Mr. Cruz had not been ruled on, which confirms this appraisal.

c. Time period for submission

12. With respect to the requirement set forth at Article 46(1)(b) of the Convention, according to which the petition must be submitted within six months from the date on which the victim is notified of the final judgment that exhausted domestic remedies, the Commission observes that this requirement does not apply in this case. This is because the exception to the exhaustion requirement at Article 46(2)(a) of the Convention, as set forth in the previous paragraph, also holds--by mandate of Article 46(2) of the Convention--for the requirement concerning the time for submission of the petitions provided for at the Convention.

13. The Commission, without prejudging on the merits, should add that the forced disappearance of a person by state agents constitutes a continuing violation by the State that persists, as a permanent infraction of several articles of the American Convention, until the person or corpse appears. Therefore, the requirement concerning the time period for submission of petitions, set forth at Article 46(1)(b) of the American Convention, does not apply to such cases.

d. Duplication of procedures and res judicata

14. The Commission understands that the subject matter of the petition is not pending before any other procedure for international settlement, nor does it reproduce a petition already examined by this or any other international organization. Therefore, the requirements established at Articles 46(1)(c) and 47(d) are also satisfied.

e. Characterization of the facts

15. The Commission considers that the petitioner's presentation refers to facts which, if true, could characterize a violation of rights guaranteed in the Convention, for, as established supra, the issue submitted to the Commission is the forced disappearance of a person.

16. For all the reasons set forth above, the Commission considers that it has jurisdiction to take cognizance of this case, and that pursuant to Articles 46 and 47 of the American Convention the petition is admissible, in the terms set forth above.

B. Considerations on the merits

17. Having determined its jurisdiction to hear this case, and that in keeping with Articles 46 and 47 of the American Convention the petition is admissible, the Commission now moves on to set forth its decision on the merits, bearing in mind that the parties did not agree to initiate a friendly settlement procedure, and that the Commission already has sufficient grounds to make a decision on the merits.

a. State practice of disappearances

18. In relation to the analysis of the merits of the present case, the Commission regards as pertinent to reiterate the following considerations concerning the practice of forced disappearances in Peru that the Commission set forth recently, when it decided an accumulated group of 35 cases involving 67 "disappeared" persons in different provinces of Peru during 1989-1993. To this respect, the Commission ruled in the following terms, which completely ratifies in the present case:

... the Commission decided to combine the cases under review because it considers that the alleged events suggest a pattern of disappearances brought about by Peruvian State agents around the same time period (1989-1993), within the context of what are called anti-subversive activities, and employing the same *modus operandi*.

The Commission therefore decided to look into the possible existence of a practice of forced disappearances brought about by the Peruvian State, or at least tolerated by it, during the period in question (1989-1993). The Commission cannot ignore, to use the words of the Inter-American Court, "the special seriousness of finding that a State Party to the Convention has carried out or has tolerated a practice of disappearances in its territory." Nonetheless, it is crucial that the Commission, in accordance with the functions assigned to it, carry out that analysis, not only for the purposes of this report, but also to arrive at the truth regarding a policy of human rights violations, with all its possible repercussions for the clarification of other cases that have come to the attention of this Commission.

In this regard, it should be pointed out that the criteria used to evaluate evidence in an international court of human rights have special standards, which empower the Commission to weigh the evidence freely and to determine the amount of proof necessary to support the judgment.

The *modus operandi* used, according to the petitions received by the Commission, in the arrests and disappearances in the cases in question, involving Messrs. (...), shows an overall pattern of behavior that can be considered admissible evidence of a systematic practice of disappearances.

The Commission has received a very large number of complaints of disappearances in Peru, many of which pertain to multiple disappeared persons. In its 1993 Report on the Situation of Human Rights in Peru, the Commission discussed the problem of the forced disappearance of persons in that country and indicated that it had already passed 43 resolutions regarding individual cases involving 106 victims. Subsequently, the Commission has continued to write reports on the matter. Moreover, the Peruvian State itself has officially recognized the existence of forced disappearances and has reported on 5,000 complaints of disappearances between 1983 and 1991. The large number of complaints of this type is a clear indication, in the Commission's view, that disappearances in Peru followed an official pattern devised and carried out in a systematic manner.

This indication is supported by the fact that, at the United Nations (UN), the Working Group on Enforced or Involuntary Disappearances, established by the Commission on Human Rights in 1980, had received 3,004 cases of forced disappearances in Peru. That Group points out that:

The vast majority of the 3,004 cases of reported disappearances in Peru occurred between 1983 and 1992, in the context of the Government's fight against terrorist organizations, especially the "Shining Path" (Sendero Luminoso). In late 1982, the armed forces and police undertook a counter-insurgency campaign and the armed forces were granted a great deal of latitude in fighting Shining Path and in restoring public order. While the majority of reported disappearances took place in areas of the country which had been under a state of emergency and were under military control, in particular in the regions of Ayacucho, Huancavelica, San Martín, and Apurímac, disappearances also took place in other parts of Peru. Detentions were reportedly frequently carried out openly by uniformed members of the armed forces, sometimes together with Civil Defense Groups. Some 20 other cases reportedly occurred in 1993 in the Department of Ucayali and concerned largely the disappearance of peasants.

Dr. Imelda Tumialán, the ad hoc Provincial Prosecutor for the Department of Junín, has placed on record that in 1991 there were more than 100 disappearances in that Department. Likewise, in a note dated January 9, 1992, Peru's Assistant Attorney General pointed out that in the first 11 months of 1991 there had been 268 complaints of disappearances, and that only a few cases had been solved. For its part, the National Coordinating Body for Human Rights in Peru, a recognized nongovernmental umbrella group of various Peruvian human rights organizations, estimates that 725 persons disappeared in Peru between 1990 and 1992. The Commission has been told that reports circulating freely in Peru indicated that military personnel, and in some cases police officers, were carrying out disappearances. The Commission has received numerous articles and news reports on such disappearances, published by the print media and others.

On the basis of the foregoing evidence, the Commission concludes that in the 1989-1993 period there existed in Peru a systematic and selective practice of forced disappearances, carried out by agents of, or at least tolerated by, the Peruvian State. That official practice of forced

disappearances was part of the "fight against subversion", although in many cases it harmed people who had nothing to do with the activities related to dissident groups.

Perpetration of the disappearances

On the basis of the various items of evidence mentioned above, the Commission sees fit to map out the steps usually involved in the above-mentioned official policy of disappearances:

Detention of the victims

The Commission has been told that, in general, perpetration of the disappearances was delegated to the political military commanders and the commanding officers at military bases. The latter imparted orders directly to the personnel who carried out the detentions, normally the first stage of the disappearance process. Peru's national police force was also in charge of perpetrating disappearances, usually through DINCOTE.

Most often the abduction and disappearance of a person began with information obtained by members of the intelligence service, according to which that person was in some way linked to subversive groups, chiefly the Shining Path or the Tupac Amaru Revolutionary Movement (MRTA). It should be pointed out that in many instances the persons concerned were in no way involved with those subversive groups, but were unfortunate enough to have been included, fraudulently or by mistake, on the lists that would later lead to their disappearance.

Another factor that, in certain Departments and under particular circumstances, could lead to the detention and later disappearance of many people was the fact that they were not carrying their voter registration documents, which were used for identification purposes. In certain cases, during checkpoint operations on public thoroughfares, a person unable to produce an identification document upon request was almost automatically considered a terrorist.

Once a person was considered "suspect", he or she was arrested; on numerous occasions, this was the first step toward disappearance. Some arrests were carried out openly in public, others at the victim's home, usually in the early hours of the morning and in the presence of witnesses. Those charged with carrying out the detentions were heavily armed soldiers or police, sometimes dressed in civilian clothing, but most often in uniform.

Generally, the soldiers or police paid little attention to the witnesses and proceeded to do what they came to do anyway. Arrests in people's homes were usually carried out in front of whoever happened to be there: wives, children, fathers, mothers, etc. Thus the normal pattern was for the personnel to arrest the victim regardless of who might be present, with no attempt to hide the official nature of what they were doing.

Official denial of the detentions

The same day of the arrest, or in the days immediately following, relatives would go to the place where the victim was detained and be told that he or she was not being held. It should be stressed that since the arrests were usually carried out publicly, the relatives knew where the victim had

first been detained. Nevertheless, the authorities denied the detention. As the Commission has established previously:

The fact that the military authorities deny having carried out the detention thus merely confirms the clandestine nature of the military operations. Detention is neither registered nor officially admitted, in order to make it possible to employ torture during interrogation and if need be to apply extrajudicial punishment to persons considered to be sympathizers, collaborators, or members of the rebel groups.

A variation on this practice consisted of the authorities alleging that the victim had been released and even producing documents to show this, sometimes with a forgery of the victim's signature, others with his or her real signature obtained under torture, when in fact the release had never taken place.

Torture and extrajudicial execution of detainees

When the victim did not die as a result of the torture inflicted, he or she was generally executed in summary, extrajudicial fashion. The bodies were then hidden by burial in secret places chosen to make their discovery practically impossible.

Amnesty for those responsible for the disappearances

In general, cases of disappearance in Peru were not seriously investigated. In practice, those responsible enjoyed almost total impunity, since they were carrying out an official State plan. Despite that, the authorities decided to go even further by passing Act N° 26.479 (the "Amnesty Act") in 1995. Article 1 of that Law grants a blanket amnesty to all members of the security forces and civilian personnel accused, investigated, indicted, prosecuted, or convicted for human rights violations committed between May 1980 and June 1995. That law was later strengthened by Act N° 26.492, which prohibited the judiciary from ruling on the legality or applicability of the Amnesty Law. In its annual reports for 1996 and 1997, the Commission has addressed the issue of those amnesty laws in the overall analysis of the human rights situation in Peru.

Although the Commission has been told that both laws can be rendered inapplicable by Peruvian judges, through what is known as their "broad powers" to rule on the constitutionality of laws--provided for in Article 138 of the Peruvian Constitution--the Commission considers the aforesaid laws an invalid attempt to legalize the impunity that existed in practice with regard to forced disappearances and other serious offenses committed by agents of the State. For example, the Commission has learned that the judges of the Constitutional Court, who were removed by the Congress, invoked that same Article 138 of the Constitution in their December 27, 1996, finding that Act N° 26.657 did not apply to President Alberto Fujimori.

The burden of proof regarding disappearances

The general principle is that, in cases of disappearance in which, in the Commission's view, there is sufficient evidence that the arrest was carried out by State agents acting within the general framework of an official policy of disappearances, it shall be presumed that the victim's

disappearance was brought about by acts by Peruvian State agents, unless that State gives proof to the contrary.

Thus it is not incumbent upon the petitioners to prove that the victims have disappeared, because it may be assumed, for lack of proof to the contrary, that the Peruvian State is responsible for the disappearance of any person it has detained. This is even more important in view of the aforementioned government practice of causing disappearances. It is up to the State to prove that it was not its agents who brought about the disappearance of the victims.

Indeed, the "policy of disappearances, sponsored or tolerated by the Government, is designed to conceal and destroy evidence of disappearances". Then, as a result of action by the State, the petitioner is deprived of evidence of the disappearance, since "this type of repression is characterized by an attempt to suppress all information about the kidnapping or the whereabouts and fate of the victim." The fact is, as established by the Inter-American Court of Human Rights:

.... in contrast to domestic criminal law, in proceedings to determine human rights violations the State cannot rely on the defense that the complainant has failed to present evidence when it cannot be obtained without the State's cooperation.

The Commission has explained in this regard that when there is proof of the existence of a policy of disappearances sponsored or tolerated by the Government, it is possible, using circumstantial or indirect evidence, or through relevant logical inference, to prove the disappearance of a specific individual when that would otherwise be impossible given the link between that disappearance and the overall policy.

More recently, the Commission has also determined that:

The burden of proof lies with the State, because when the State holds a person in detention and under its exclusive control, it becomes the guarantor of that person's safety and rights. In addition, the State has exclusive control over information or evidence regarding the fate of the detained person. This is particularly true in a disappearance case where, by definition, the family members of the victim or other interested persons are unable to learn about the fate of the victim.

This establishes the inversion of the burden of proof for cases of disappearance in Peru and the effects of that inversion on cases being heard by the Commission.

Considerations relating to forced disappearances

The General Assembly of the Organization of American States (OAS) has called the practice of the forced or involuntary disappearance of persons a crime against humanity that strikes against the fundamental rights of the human individual, such as personal liberty and well-being, the right to proper judicial protection and due process, and even the right to life. In that context, the member states of the Organization of American States (OAS) adopted, in 1994, an Inter-American Convention on the Forced Disappearance of Persons as a means of preventing and punishing the forced disappearance of persons in our Hemisphere.

The Commission has affirmed, in relation to the forced disappearance of persons, that:

This procedure is cruel and inhuman. ... [It] not only constitutes an arbitrary deprivation of freedom but also a serious danger to the personal integrity and safety and to even the very life of the victim. It leaves the victim totally defenseless, violating the rights to a fair trial, to protection against arbitrary arrest, and to due process.

The UN Working Group on Enforced or Involuntary Disappearances has affirmed that the forced or involuntary disappearance of a person is a particularly odious violation of human rights, and is

a doubly paralyzing form of suffering: for the victims, frequently tortured and in constant fear for their lives, and for their family members, ignorant of the fate of their loved ones, their emotions alternating between hope and despair, wondering and waiting, sometimes for years, for news that may never come. The victims are well aware that their families do not know what has become of them and that the chances are slim that anyone will come to their aid. Having been removed from the protective precinct of the law and "disappeared" from society, they are in fact deprived of all their rights and are at the mercy of their captors. If death is not the final outcome and they are eventually released from the nightmare, the victims may suffer for a long time from the physical and psychological consequences of this form of dehumanization and from the brutality and torture which often accompany it.

The family and friends of disappeared persons experience slow mental torture, not knowing whether the victim is still alive and, if so, where he or she is being held, under what conditions, and in what state of health. Aware, furthermore, that they too are threatened; that they may suffer the same fate themselves, and that to search for the truth may expose them to even greater danger.

The family's distress is frequently compounded by the material consequences resulting from the disappearance. The missing person is often the mainstay of the family's finances. He or she may be the only member of the family able to cultivate the crops or run the family business. The emotional upheaval is thus exacerbated by material deprivation, made more acute by the costs incurred should they decide to undertake a search. Furthermore, they do not know when--if ever--their loved one is going to return, which makes it difficult for them to adapt to the new situation. In some cases, national legislation may make it impossible to receive pensions or other means of support in the absence of a certificate of death. Economic and social marginalization is frequently the result.[FN3]

[FN3] IACHR, Report N° 51/99, Cases 10.471 and others (Peru), Annual Report 1998, para. 68 to 95. See also, IACHR, Reports Nos. 52/99, 53/99, 54/99, 55/99, 56/99, and 57/99 (Peru), Annual Report 1998.

b. Facts established

19. In keeping with the doctrine of the Commission outlined above, the general principle is that in cases of disappearance in which there are sufficient indicia of evidence, in the view of the Commission, that the detention was presumably effectuated by State agents in the general context of an official policy of disappearances, the Commission will presume that the victim was disappeared by agents of the Peruvian State, unless that State has proven otherwise.

20. In applying these considerations to the instant case, the Commission observes with respect to the detention of the victims that the petitioner alleges that Mr. Yone Cruz Ocalio was detained on February 24, 1991, by members of the National Police, at the Tulumayo agricultural station, Aucayacu, province of Leoncio Prado, department of Huánuco, Peru, and that he was later taken to the Tulumayo military base.

21. In this respect, and based on the facts narrated by the petitioner and all other evidentiary indicia--which include the initiatives taken and remedies pursued domestically aimed at locating the victim and winning his release, the reports prepared by the police and members of the military to deny that the detention had been carried out by members of the police or military, without the Peruvian State having carried out a judicial investigation, which can be added to the circumstance that the detention occurred in 1991, when, as the Commission has established, there was a systematic and selective practice of forced disappearances carried out by agents of the Peruvian State, or at least tolerated by the Peruvian State--the Commission concludes that it is sufficiently enlightened to establish the veracity of the facts alleged with respect to the victim's detention.[FN4]

[FN4] As mentioned at paragraph 30, supra, the Commission, citing doctrine of the Inter-American Court, has said that when the existence of a policy of disappearances sponsored or tolerated by the Government has been shown, the disappearance of a particular individual may be proved through circumstantial or indirect evidence or by logical inference; otherwise it would be impossible to prove that an individual has been disappeared. (Inter-American Court of Human Rights, Case of Velásquez Rodríguez, Judgment of July 29, 1988, para. 124).

22. Based on the foregoing, the Commission considers it true that the victim was detained on February 24, 1991, by members of the National Police, at the Tulumayo agricultural station, Aucayacu, province of Leoncio Prado, department of Huánuco, Peru, from which he was apparently taken to the Tulumayo military base.

23. Accordingly, and in keeping with the above-noted doctrine of the Commission, the burden was on the Peruvian State to prove that it did not disappear Mr. Cruz Ocalio. In this regard, the Commission observes that the State did not set forth any evidence tending to show that it did not disappear Mr. Cruz Ocalio; rather, it denied that it had detained him.

24. Based on the reasons set forth above, the Commission concludes that the Peruvian State, through members of the National Police, detained Mr. Yone Cruz Ocalio on February 24, 1991, at the Tulumayo agricultural station, Aucayacu, province of Leoncio Prado, department of

Huánuco, Peru, from which he was apparently taken to the Tulumayo military base, and that they later proceeded to disappear him.

25. That detention and subsequent disappearance followed the characteristic pattern: the detention of the victim by military agents; an official denial of responsibility for the disappearance; the failure of the public authorities to carry out an investigation into the situation of the victim; the ineffectiveness of domestic remedies; the torture and possible extrajudicial execution of the victim; and absolute impunity, reinforced by the subsequent amnesty.

c. Violation of the victims' human rights

26. The Commission now proceeds to analyze the specific violations by the Peruvian State of the rights set forth in the Convention implicit in the disappearance of Mr. Yone Cruz Ocalio.

Right to Personal Liberty (Article 7 of the Convention)

27. The American Convention establishes:

Article 7. Right to Personal Liberty

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support.

28. A detention is arbitrary and illegal when not carried out for the reasons, and according to the formalities, established by law; when carried out without adherence to the standards established by law; and when it involves misuse of the authority to arrest--in other words, when carried out for purposes other than those envisaged and stipulated by law. The Commission has

also pointed out that detention for improper ends is, in itself, a form of penalty without due process, or extralegal punishment, which violates the guarantee of a fair trial.

29. In this case, Peruvian citizen Yone Cruz Ocalio was detained illegally and arbitrarily by members of the Peruvian police.

30. It is necessary to recall the circumstances in Peru at that time, which generally affected most of the Departments where detentions and disappearances occurred. Continuous raids by armed groups had generated permanent unrest in the local population. For that reason, a "state of exception" had been declared in various Departments, which was, prima facie, justified by the crisis faced by the Peruvian State in fighting terrorism. By virtue of that state of emergency, in numerous Departments Article 2(20)(g) of the 1979 Constitution had been suspended, [FN5] which meant that the military was legally empowered to detain a person without a warrant from a competent judge, even if an individual was not being caught in flagranti.

[FN5] According to which every person has the right: ... Article 20: .. to personal liberty and security. Consequently, (g) No one shall be detained except with a justified, written order or by police officers in flagrante delicto...

31. Despite the prima facie legality of this measure, the security forces are not thereby entitled, without restrictions, to detain citizens arbitrarily. The suspension of the judicial warrant requirement for detention does not mean that public officials are exempted from observing the legal requirements for such detentions, nor does it annul jurisdictional controls over the manner in which detentions are carried out.

32. The suspension of the right to personal liberty authorized in Article 27 of the American Convention on Human Rights can never be absolute. There are basic principles at the heart of any democratic society that the security forces must respect in order to carry out a detention, even in a state of emergency. The legal prerequisites for detention are obligations that State authorities must respect, in keeping with their international commitment under the Convention to protect and respect human rights.

33. Secondly, in accordance with those principles, preventive detention by the military or police must be designed solely to prevent the escape of a person suspected of having committed a crime and thereby ensure his appearance before a competent court, either for trial within a reasonable period of time or for his release. No State may impose a sentence without a trial.[FN6]In a constitutional, democratic State in which the rule of law and the separation of powers are respected, all penalties established by law should be imposed by the judiciary after guilt has been established in a fair trial with all the procedural guarantees. The existence of a state of emergency does not authorize the State to disregard the presumption of innocence, nor does it confer upon the security forces the right to exercise an arbitrary and unlimited ius puniendi.

[FN6] The Commission has established that: The rationale behind this guarantee is that no person should be punished without a prior trial which includes a charge, the opportunity to defend oneself, and a sentence. All these stages must be completed within a reasonable time. The time limit is intended to protect the accused with respect to his or her fundamental right to personal liberty, as well as the accused personal security against being the object of an unjustified procedural risk. (IACHR, Report N° 12-96, para. 76 (Case 11.245, Argentina), published in the 1995 Annual Report.

34. On this subject, Article 7(5) of the American Convention establishes that "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released...." Paragraph 6 of that article adds: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention (...)". The Commission has also stated that anyone deprived of his liberty must be kept in an officially recognized detention center and brought, without delay, in accordance with domestic legislation, before a competent judicial authority. Should the authority fail to comply with this legal obligation, the State is duty-bound to guarantee the detainee's right to apply for an effective judicial remedy to allow judicial verification of the lawfulness of his detention.

35. The Commission concludes that the Peruvian State is responsible for violating the right to personal liberty and security by arbitrarily imprisoning Mr. Yone Cruz Ocalino; for violating his right of recourse to a competent judge or court that would rule on the lawfulness of his arrest; and, thereby, for violating Article 7 of the American Convention on Human Rights.

Right to Humane Treatment (Article 5 of the Convention)

36. The American Convention establishes:

Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
3. Punishment shall not be extended to any person other than the criminal.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

37. Since forced disappearance involves violation of multiple rights, violation of the right to humane treatment is implicit in the case of Mr. Yone Cruz Ocalio .

38. In this regard, the Court has stated that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention, which recognizes the right to the integrity of the person....". [FN7]

[FN7] Inter-American Court of Human Rights, Velásquez Rodríguez case, op.cit., paragraph 156.

39. Accordingly, the Commission, on the basis of the facts presented, is convinced, by way of presumptive evidence, that Mr. Yone Cruz Ocalio was tortured. The circumstances in which the victim was detained, kept hidden, isolated, and in solitary confinement, and his defenselessness as a result of being denied and prevented from exercising any form of protection or safeguards of his rights make it perfectly feasible for the armed forces to have tortured the victim with a view to extracting information about subversive groups or units. Accordingly, the Commission concludes that the Peruvian State violated the rights guaranteed to the victim under Article 5 of the Convention.

Right to Life (Article 4 of the Convention)

40. The American Convention establishes:

Article 4. Right to Life

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.
2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.
3. The death penalty shall not be reestablished in states that have abolished it.
4. In no case shall capital punishment be inflicted for political offenses or related common crimes.
5. Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women.
6. Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority.

41 The Inter-American Court of Human Rights has stated that the forced disappearance of persons "often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention...". The Court also ruled that the fact that a person has disappeared for seven years creates a reasonable presumption that he or she was killed.[FN8]

[FN8] *Idem*, paragraphs 157 and 188.

42. In the case of Mr. Yone Cruz Ocalio, it has been established his "disappearance" by State agents, and there is sufficient evidence to support the presumption that he is dead--given that more than eight years have elapsed since his detention and disappearance--and the presumption that those responsible are agents of the State.

43. Therefore, the Commission finds that the Peruvian State violated the victim's right to life, a fundamental right protected under Article 4 of the Convention, which states that "Every person has the right to have his life respected... No one shall be arbitrarily deprived of his life."

Right to Juridical Personality (Article 3 of the Convention)

44. The American Convention establishes:

Article 3. Right to Juridical Personality

Every person has the right to recognition as a person before the law.

45. Article 3 of the American Convention on Human Rights establishes that every person has the right to recognition as a person before the law. When Mr. Yone Cruz Ocalio was detained and then "disappeared" by State agents, he was excluded from the legal and institutional framework of the Peruvian State. In that sense, the forced disappearance of a person constitutes the negation of their very existence as human beings recognized as persons before the law.[FN9]

[FN9] Article 1(2) of the declaration regarding protection of persons from forced disappearances defines disappearance as a violation of the norms of international law guaranteeing every human being the right to recognition as a person before the law. UN General Assembly resolution 47/133, december 18, 1992.

46. Thus, the Commission finds that Peru violated the victim's right to recognition as a person before the law, enshrined in Article 3 of the Convention.

Right to Judicial Protection (Article 25 of the Convention)

47. The American Convention establishes:

Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

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.

48. From the information provided by the parties, it is clear that the Peruvian State has not complied with its obligation to investigate the facts of this case and initiate judicial proceedings.

49. The Inter-American Court of Human Rights has stated that the principles of international law "refer not only to the formal existence of such remedies, but also to their adequacy and effectiveness, as shown by the exceptions set out in Article 46(2)."[FN10] It has also made it clear that the failure to provide effective, not merely formal, judicial remedies not only entails an exception to the rule that domestic remedies must be exhausted, but also constitutes a violation of Article 25 of the Convention.[FN11]

[FN10] Inter-American Court of Human Rights, Velásquez Rodríguez case, *op.cit.*, paragraph 63.

[FN11] Inter-American Court of Human Rights, Velásquez Rodríguez case. Preliminary objections. Judgment of June 24, 1987, par. 91.

50. Peruvian law establishes that in all cases of offenses against the public order, the Office of the Attorney General represents both the State and the victim. The Office of the Attorney General is obligated to participate in investigating and prosecuting the crime. Consequently, it should promote and undertake whatever action may be required (provision of evidence, inspections, or any other) to establish the veracity of the complaint, to identify those responsible, if applicable, and to bring criminal charges against them.

51. The jurisprudence of the Inter-American Court of Human Rights confirms the provisions of domestic law when it refers to the obligation of States and says, with regard to the previous point, that "The State has a legal duty (...) to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[FN12]

[FN12] Inter-American Court of Human Rights, Velásquez Rodríguez case, op.cit., paragraph 174.

52. The State must not evade, under any pretext, its duty to investigate a case involving violation of fundamental human rights. The Court says as much when it states that "the investigation... must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the... family... without an effective search for the truth by the government." [FN13]

[FN13] Idem, paragraph 177.

53. The right to be brought before a competent judge is a fundamental safeguard for the rights of any detainee. As the Inter-American Court of Human Rights has stated, judicial supervision of detention, through habeas corpus, "performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment." [FN14]

[FN14] Inter-American Court of Human Rights, Habeas Corpus in Emergency Situations (Articles 27(2), 25(1) and 7(6), American Convention on Human Rights). Advisory Opinion OC-8/87 of January 30, 1987. Series A N° 8, paragraph 35.

54. Precisely for that reason, Article 27 of the American Convention on Human Rights has established that essential judicial guarantees safeguarding certain fundamental rights cannot be suspended. As the Inter-American Court of Human Rights has ruled, "from Article 27(1), moreover, comes the general requirement that in any state of emergency there be appropriate means to control the measures taken, so that they are proportionate to the needs and do not exceed the strict limits imposed by the Convention or derived from it." [FN15]

[FN15] Inter-American Court of Human Rights, Judicial Guarantees in State of Emergency (Articles 27(2), 25 and 8 of the American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987, Series A N° 9, paragraph 21.

55. The Court has also stated that the judicial nature of those means presupposes "the active involvement of an independent and impartial judicial body having the power to pass on the lawfulness of measures adopted in a state of emergency [FN16] and that "it must also be understood that the declaration of a state of emergency" whatever its breadth or denomination in internal law "cannot entail the suppression or ineffectiveness of the judicial guarantees that the

Convention requires States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency."[FN17]

[FN16] Inter-American Court of Human Rights, Habeas Corpus in Emergency Situations, op.cit., paragraph 30.

[FN17] Inter-American Court of Human Rights, Judicial Guarantees in State of Emergency, op.cit., paragraph 25.

56. According to the Inter-American Court of Human Rights, this also includes the right to a fair trial enshrined in Article 8, which "includes the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination." [FN18] The Court concluded that "the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees." [FN19]

[FN18] Idem, paragraph 28.

[FN19] Ibidem, paragraph 30.

57. Such a lack of access to effective domestic remedies against acts that violate fundamental rights constitute a violation by the Peruvian State of Articles 8 and 25 of the Convention.

Obligation to respect and guarantee rights

58. In this case, it has been shown that the Peruvian State failed to comply with the obligation, set forth in Article 1(1) of the Convention, "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," because it violated rights established in Articles 5, 4, 3, 7, 8 and 25 of the Convention.

59. The first obligation of States, under Article 1(1) of the Convention, is to respect the rights and freedoms of all persons subject to their jurisdiction. With regard to this obligation, the Court ruled that "under international law a State is responsible for the acts of its agents... and for their omissions, even when those agents act outside the sphere of their authority or violate internal law." It ruled also that "any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State." [FN20]

[FN20] Inter-American Court of Human Rights, Velásquez Rodríguez case, op.cit., paragraphs 170 and 172.

60. The Commission concludes that the forced disappearance of Mr. Yone Cruz Ocalio constitutes an act perpetrated by agents of public authority, and that, therefore, the Peruvian State violated the rights of that victim, enshrined in Article 1(1) of the Convention, in relation to violations of Articles 5, 4, 3, 7, 8 and 25 of the Convention.

61. The second obligation set forth in Article 1(1) is to ensure free and full exercise of the rights and freedoms recognized in the Convention. On this the Court's jurisprudence establishes that: "This obligation implies the duty of the States Parties to organize the governmental apparatus, and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, States must prevent, investigate, and punish any violation of the rights recognized by the Convention ..."[FN21]

[FN21] *Idem*, paragraph 166.

62. In the event of a "forced disappearance", the State is obligated to ascertain the whereabouts and situation of the victim, punish those responsible, and make reparation to the family members. In the case at hand, these obligations have not been met. Therefore, the Commission concludes that the Peruvian State has violated Article 1(1) of the Convention by failing to ensure the exercise of the rights and guarantees of the individual involved.

V. PROCEEDINGS SUBSEQUENT TO REPORT N° 135/99

63. The Commission adopted Report N° 135/99 (Article 50) in this case on November 19, 1999, during its 105th session. That Report, with the Commission's recommendations, was transmitted to the Peruvian State on December 20th, 1999; the State was given two months to carry out the recommendations, counted from the date of transmittal of the Report.

64. By Note No. 7-5-M/193 of April 17, 2000, the State forwarded to the Commission its considerations regarding Report No. 135/99 and stated its disagreement with matters of fact and law reflected in that report, and with the Commission's conclusion. The State added that "it considers that it is not viable to carry out a new investigation into this case, and even less viable to punish the persons responsible, who have yet to be singled out and, logically, it would not be appropriate to make any reparation to the family members of Yone Cruz Ocalio, especially if the Government has shown that the forces of order are not responsible for the alleged detention-disappearance of said citizen, without prejudice to continuing to undertake the pertinent investigations in this regard."

65. The Commission refrains from analyzing the reiterations of the Peruvian State in response to arguments made prior to the adoption of Report N° 135/99, and its expressions of disagreement with that Report, for pursuant to Article 51(1) of the Convention, what the Commission must determine at this stage of the procedure is whether the State did or did not resolve the matter. In this respect, the IACHR observes that the Peruvian State has not carried out any of the recommendations made to it by the Commission in its Report N° 135/99.

VI. CONCLUSION

66. The Commission concludes that the Peruvian State, through members of the National Police, detained Mr. Yone Cruz Ocalio on February 24, 1991, at the Tulumayo agricultural station, Aucayacu, province of Leoncio Prado, department of Huánuco, Peru, from which he was apparently taken to the Tulumayo military base, and later disappeared him. Accordingly, the Peruvian State is responsible for the forced disappearance of Mr. Yone Cruz Ocalio; consequently, Peru violated the right to liberty (Article 7), the right to humane treatment (Article 5), the right to life (Article 4), the right to juridical personality (Article 3), and the right to effective judicial recourse (Article 25), set forth in the American Convention on Human Rights. In addition, the Peruvian State breached its general obligation to respect and ensure the exercise of these rights enshrined in the Convention, as set forth at Article 1(1) of the Convention.

VII. RECOMMENDATIONS

Based on the foregoing analysis and conclusion,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE PERUVIAN STATE:

1. That it carry out an exhaustive, impartial, and effective investigation to determine the circumstances of the forced disappearance of Mr. Yone Cruz Ocalio, and that it punish the persons responsible, in keeping with Peruvian legislation.
2. That it void any domestic measure, legislative or otherwise, that tends to impede the investigation, prosecution, and punishment of the persons responsible for the detention and forced disappearance of Mr. Yone Cruz Ocalio. Accordingly, the State should nullify Laws 26.479 and 26.492.
3. That it adopt the measures required for the family members of Mr. Yone Cruz Ocalio to receive adequate and timely reparation for the violations established herein.

VIII. PUBLICATION

67. On October 4, 2000, the Commission transmitted Report 58/00, whose text is the foregoing, to the Peruvian State and the petitioner, pursuant to Article 51(2) of the Convention, and gave the State an additional time to comply with the foregoing recommendations. On November 20, 2000, Peru forwarded a communication to the Commission in which it stated that “the Peruvian State ... is designing a comprehensive solution to cases affected by this problem. To this end, the State, and the opposition political groups and representatives of civil society, in the framework of the Mesa de Diálogo sponsored by the OAS, are holding conversations aimed at designing and implementing a National Reconciliation policy, which will include, among others, issues such as that which is the subject of this case.” Nonetheless, in that communication the State did not show that it had carried out the Commission’s recommendations.

68. According to the above considerations, and Articles 51(3) of the American Convention and 48 of the Commission’s Regulations, the Commission decides to reiterate the conclusion and

recommendations set forth in chapters VI and VII above; to make public the present report and include it in its Annual Report to the OAS General Assembly. The Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the Peruvian State with respect to the above recommendations until they have been complied with by the Peruvian State.

Done and signed in the city of Washington, D.C., on the 4th day of the month of December, 2000 (Signed): Chairman; Claudio Grossman, First Vice-Chairman; Juan Méndez, Second Vice-Chairman; Marta Altolaguirre, Commissioners:, Hélio Bicudo, Robert K. Goldman, Peter Laurie, and Julio Prado Vallejo.