In the Castillo Petruzzi et al. Case,

the Inter-American Court of Human Rights (hereinafter "the Court," the Inter-American Court" or "the Tribunal"), pursuant to articles 55 and 57 of the Court's Rules of Procedure, enters the following judgment.

I. INTRODUCTION OF THE CASE

1. On July 22, 1997, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed an application against the Republic of Peru (hereinafter "the State" or "Peru"). The case in question had originated in a petition (No. 11,319) received at the Commission's Secretariat on January 28, 1994. Citing articles 50 and 51 of the American Convention (hereinafter "the Convention" or "the American Convention"), in its application the Commission submitted the instant case for a ruling as to whether the following articles of the Convention were violated when a "faceless" military tribunal tried Mr. Jaime Francisco Sebastián Castillo Petruzzi, Mrs. María Concepción Pincheira Sáez, Mr. Lautaro Enrique Mellado Saavedra and Mr. Alejandro Luis Astorga Valdez, convicted them of treason under Decree-Law No. 25,659, and sentenced them to life imprisonment: Article 1(1) (Obligation to Respect Rights); Article 2 (Duty to Undertake Internal Legislative or Other Measures); Article 5 (Right to Humane Treatment); Article 8 (Right to a Fair Trial); Article 20 (Right to Nationality); Article 29 (Restrictions Regarding Interpretation), in combination with the Vienna Convention on Consular Relations, and Article 51(2), all from the American Convention.

The Commission also requested that the Court find that "the State must make full restitution" to the alleged victims for the "grievous material and moral damages they suffered."It therefore asked the Court to call upon the State "to order their immediate release and to pay them fair compensation." It also requested that the State be ordered to pay "the reasonable costs and expenses of the [alleged] victims and their next of kin."

II. COMPETENCE

2. Peru has been a State Party to the American Convention since July 28, 1978, and recognized the jurisdiction of the Court on January 21, 1981. Therefore, under Article 62(3) of the Convention the Court has jurisdiction to consider the merits of the instant case.

III. PROCEEDINGS WITH THE COMMISSION

3. On January 28, 1994, Mrs. Verónica Reyna, Head of the Legal Department of the Chilean organization Fundación de Ayuda Social de las Iglesias Cristianas (hereinafter "FASIC"), submitted the first petition in this case. On June 29, l994, the Commission forwarded the pertinent parts of that petition to the State with the request that the latter supply information relevant to the subject of the petition within ninety days. It also asked that the State provide information concerning the exhaustion of domestic remedies.

4. On August 26, 1994, a second group of claimants provided new information on the case and on September 29, 1994, they reiterated their complaint.On November 18, 1994, that second group of claimants requested that Mr. Astorga Valdez' case be joined with the original case. In a November 22, 1994 telephone conversation, the Secretariat of the Commission advised the second group that they would need a power of attorney or authorization from the original claimants in order to become co-claimants in the case.

5. On September 14, 1994, the State presented information, together with a copy of Official Document No. 534-S-CSJM of the Superior Court of Military Justice, dated September 1, 1994. That report stated the following:

Case No. 078-TP-93-L [against Castillo Petruzzi, Pincheira Sáez and Mellado Saavedra] was prosecuted before the Military Court of the Peruvian Air Force [hereinafter "FAP"]. The charge was treason. The court convicted the defendants of the crime with which they were charged and sentenced them to life imprisonment.

The State added that Peruvian courts had "jurisdiction over crimes committed within the national territory[,] as a matter of sovereignty," and that Peru's criminal laws applied irrespective of the nationality or domicile of the author of the crime. It also observed that the criminal conduct that Decree-Law No. 25,659 classified as treason was aggravated terrorism; "given the nature of the crime and the manner in which it is perpetrated, the tribunals that hear such cases must take the necessary security precautions." Finally, the State noted that in all proceedings conducted by military courts, the "principles of due process, the right of appeal (three instances), judicial control, reasoning of judgments, the prohibition of the use of analogy in criminal law, and notification of the cause for arrest" were observed and the detainee was provided with legal

counsel. On September 23, 1994, the Commission forwarded a copy of the State's answer to the claimants.

6. On November 18, 1994, the original claimants presented their observations on the State's answer. There they requested that the "January complaint be expanded to include Alejandro Astorga Valdez," who was not named as a victim in the original petition. They maintained that in Mr. Astorga Valdez' case, the courts of first and second instance had agreed to a motion to dismiss for lack of jurisdiction. When the highest court granted a motion to nullify the lower courts' rulings, however, Mr. Astorga Valdez was convicted and sentenced to life imprisonment.

7. Under Article 30 of its Regulations, the Commission agreed to expand the original complaint.

8. On December 14, 1994, the second set of claimants submitted a notarized power of attorney, executed by the alleged victims' next of kin to the president of the Chilean Human Rights Commission, Mr. Jaime Castillo Velasco, and to Mr. Carlos Margotta Trincado.

9. On January 31, 1995, the Commission received from the claimants a report of the Human Rights Commission of the Chilean Parties of Democratic Reconciliation, which noted that the Commission in question had attempted, without success, to visit the Chilean citizens in prison in Peru. This report was sent to the State on March 20, 1995.

10. On March 8, 1995, the Commission received document No. 09-FG/CSJM, dated February 15 of that year, wherein the Prosecutor General of the Supreme Court of Military Justice reported that the alleged victims had been sentenced to life imprisonment. The document also stated that Mr. Castillo Petruzzi's defense attorney had filed a motion to have his conviction overturned, which the Special Tribunal of the Supreme Court of Military Justice dismissed as unfounded. This information was conveyed to the claimants on March 16, 1995.

11. By note of June 6, 1995, the State presented documents No. 316-95 of June 2, 1995, and No. 222-95-MP-FN-FEDPDH-DH-V of April 18, 1995, concerning a request for verification of the four alleged victims' health and legal status. Additional information was supplied on November 7, 1995, to the effect that Mrs. María Concepción Pincheira Sáez had been convicted of treason and sentenced to life imprisonment and that "she was counseled by Dr. Castañeda throughout the proceedings." That communication added that the prisoner "reports health problems and harassment by inmates." This information was sent to the claimants on November 30, 1995.

12. On June 14, 1996, the claimants asked the Commission to adopt precautionary measures for the alleged victims in anticipation of their possible transfer to an "uninhabitable" prison. The Commission asked the State to supply information on this matter, since the order from the Special Tribunal of the Supreme Court of Military Justice had been that their sentence of life imprisonment was to be served at the Yanamayo Prison in Puno. By note of July 16, 1996, the State reported that "there was no order of any kind to transfer the Chilean prisoners" to another prison facility.

13. On November 19, 1996, the Commission informed the State that at its 93rd session, it had determined that Case No. 11,319 was admissible and that the Commission was at the disposition of the parties to arrive at a friendly settlement. On February 6, 1997, the State rejected the proposed friendly settlement, based on the fact that the alleged victims had been "tried, convicted, and sentenced in accordance with Decree-Law 25,659 and Decree-Law 25,708, which regulate the crime and corresponding procedure in cases of treason. It also pointed out that the rules of due process and the principle of territoriality established in Article 1 of the Peruvian Criminal Code had been observed.

14. On December 17, 1996, the Commission received a report from Peru's Supreme Court of Military Justice wherein it asserted that Peruvian courts had jurisdiction in the cases prosecuted against the alleged victims, since the crimes with which they were charged were committed on Peruvian soil and that "the territoriality of criminal law is independent of the nationality of the perpetrator." The State went on to point out that in the alleged victims' cases, the rules of due process, right of appeal, judicial control, and the grounds for the judgments were observed.

15. On December 18, 1996, the claimants asked the Commission to take precautionary measures to protect the alleged victims' physical safety, given the situation that developed when members of the Tupac Amaru Revolutionary Movement (hereinafter the "MRTA"), the group with which the alleged victims had allegedly been associated, "took numerous people hostage at the residence of the Japanese Ambassador in Peru."

16. On March 11, 1997, the Commission approved Report 17/97, the final part of which reads as follows:

> [...]
>
> 86. That by trying Jaime Francisco Castillo Petruzzi, María Concepción Pincheira Saéz, Lautaro Enrique Mellado Saavedra and Alejandro Astorga [Valdez] under Decree-Laws Nos. 25,475 and 25,659, the State of Peru violated the judicial guarantees recognized in Article 8(1) of the American Convention on Human Rights […] and the rights to nationality and to judicial protection recognized, respectively, in articles 20 and 25, all in conjunction with Article 1(1) of the Convention.
>
> 87. That the crime of treason classified under Peru's legal system, violates universally accepted principles of international law, of legality, due process, judicial guarantees, right to a defense, and the right to be heard by impartial and independent courts.

The Commission therefore resolved [to recommend] that the State of Peru:

> 88. Nullify the proceedings conducted in the military courts against Jaime Castillo Petruzzi, Lautaro Mellado Saavedra, María Concepción Pincheira Sáez and Alejandro Astorga [Valdez] on charges of treason, and order that they be given a new trial in the regular court system, with full guarantees of due process, and
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> 89. Pursuant to Article 50 of the Convention, the Commission requests that the Peruvian Government inform the Commission within two months of any measures it has taken in the instant case in furtherance of the recommendations contained in the present report, which is confidential in nature and should not be published.

17. Report 17/97 was transmitted to the State on April 24, 1997, with the request that within two months, it inform the Commission of the measures adopted in this regard.

18. After having requested and received an extension until July 8, 1997, the State presented a report wherein it took issue with the Commission's findings and asserted the lawfulness of its actions.

19. The Commission decided to submit this case to the Court on June 27, 1997.

IV. PROCEEDINGS WITH THE COURT

20. The Court will now describe the course of the proceedings in the instant case, highlighting the most significant developments in the process.

21. When the application was filed with the Court on July 22, 1997 (supra 1), the Commission named Messrs. Oscar Luján Fappiano, Carlos Ayala Corao and Claudio Grossman as its delegates; Ms. Christina M. Cerna as attorney, and Verónica Reyna, Nelson Caucoto, Jaime Castillo Velasco and Enrique Correa as assistants. In accordance with Article 22.2 of the Rules of Procedure, it also advised the Court that the first two assistants had been among the original claimants, while that latter two had been attorneys for the alleged victims. On August 4, 1997, the Commission referred to the Court a power of attorney authorizing Mr. Jaime Castillo Velasco and Mr. Carlos Eduardo Margotta Trincado to represent alleged victims Castillo Petruzzi, Astorga Valdez and Mellado Saavedra. On August 27, 1997, the Commission sent the Court a power of attorney that the next of kin of the alleged victims had executed to Ms. Verónica Reyna Morales and Mr. Nelson Caucoto Pereira. On September 26, 1997, the Commission submitted a power of attorney executed to Mr. Enrique Correa to allow him to represent the alleged victims.

22. By note of July 31, 1997, after a preliminary examination of the application by the President of the Court (hereinafter "the President"), the Secretariat of the Court (hereinafter "the Secretariat") notified the State of the application and advised it that it had the following time limits: four months to present its answer to the application, one month to appoint an agent and alternate agent, and two months to file preliminary objections. These time periods were to begin as of the date of notification of the application. By a communication of that same date, the State was invited to designate a judge ad hoc.

23. By communications of August 26 and 28, 1997, the Commission submitted a corrected version of the Spanish text of the application, and noted that it contained "corrections of minor errors, above all in style and [that it] should replace the earlier version […] submitted to the Court on July 22, 1997." The corrected version was sent to the State on September 2 of that year.

24. On September 3, 1997, the State advised the Court that Mr. Fernando Vidal-Ramírez had been appointed judge ad hoc.

25. On September 5, 1997, the State designated Mr. Mario Cavagnaro Basile as its agent, and Mr. Walter Palomino Cabezas as its alternate agent.

26. On September 22, 1997, the State asked the Court to indicate which of the two versions of the application –the new version (supra 23) or the version submitted on July 22 of that year- should be considered "as valid".

27. On September 24, 1997, the Secretariat, following the President's instructions, informed the State that in view of its request for clarification and to ensure the "transparency of the process," the President had decided to suspend the time limits given to answer the application and to interpose preliminary objections, until such time as the Commission had presented the clarifications -requested that same day- of the corrections made to the original text of the application.

28. On October 1, 1997, the State filed ten preliminary objections under Article 31 of the Rules of Procedure.

29. On October 6, 1997, the Commission submitted a "list of corrections made [...] to the application" of July 22, 1997 (supra 1 and 23). The next day, the Secretariat asked the State to present its observations to the Commission's clarifications by no later than October 13, 1997. Those observations were never received.

30. By order of October 15, 1997, the President decided that the original text of the application submitted to the Court on July 22, 1997, was the version that the parties should consider valid, incorporating those corrections that the Commission had submitted on October 6, 1997. He also ordered that processing of the case was to continue and that the time period for answering the application was to resume. The new deadline would be December 27 of that year.

31. On November 21, 1997, the Commission submitted its written comments on the State's preliminary objections and requested that the Court dismiss them.

32. On December 12, 1997, the State requested an extension of the deadline it was given to submit its answer to the application, and that the new deadline be January 5, 1998. On instructions from the President, on December 15, 1997, the Secretariat informed the State that

the time period to file the answer to the application cannot be extended. Nevertheless, the Court will be closed as of noon on December 24 of the present year and will reopen on January 5, 1998, for which reason the Illustrious State of Peru may take until that date to file its answer.

33. On January 5, 1998, the State presented its response to the application and there asked the Court to declare the application unfounded in all its parts. It denied the alleged violations imputed to it.In its response to the application, the State made reference to the terrorist violence that had disrupted life in Peru since it first appeared in 1980 with the so- called Sendero Luminoso, and then continued with the MRTA, the group to which, the State alleged, the four Chilean citizens belonged.

34. On January 19, 1998, the State "challenged" a document annexed to the Commission's observations on the State's preliminary objections, which document had certified FASIC's legal capacity; in the State's communication, the organization is referred to as the Fundación de Ayuda Social de Fieles de las Iglesias Cristianas.

35. On January 22, 1998, the Commission submitted a copy of the documentation that FASIC had sent to it concerning that foundation's legal capacity.

36. In a brief of March 17, 1998, the State asserted that the documents referred to in the preceding paragraph merely confirmed its doubts as to the legal status of the claimant foundation. It also "challenged" one of the powers of attorney.

37. In its brief of preliminary objections and in its answer to the application, the State had requested that the Commission show all the proceedings in this case. On March 19, 1998, the Secretariat informed the State that, as per the latter's request, the Commission had duly supplied the pertinent parts of its case file and that those papers were in the Court's possession.

38. That same day, acting on the President's instructions, the Secretariat requested from the State an authenticated copy of the laws and regulations cited in the proceedings conducted in the Peruvian courts against the alleged victims in this case, and for the complete court records of those legal proceedings.

39. On April 14, 1998, the State informed the Court that the laws the latter had requested had been submitted as evidence in the Loayza Tamayo Case. It therefore asked that the Court kindly indicate which records of the court proceedings conducted in the cases of the alleged victims would be needed, since the files "contain an enormous number of documents concerning persons other than those named in this application."

40. On April 27, 1998, the Commission reiterated its request for submission of the "laws and other regulatory decrees relevant to the proceedings carried out by the Peruvian courts against Jaime Francisco Castillo Petruzzi et al., and all relevant parts of the court records in these cases." The Commission objected to the use of the documents submitted in the Loayza Tamayo case containing the laws and regulations cited in that case, arguing that they were completely different case files. On July 7, 1998, the Secretariat, on instructions from the Court, asked that the State submit the pertinent parts of the court record of the proceedings in Peru against Jaime Francisco Castillo Petruzzi et al. and informed both parties that the laws and decrees submitted for the Loayza Tamayo Case would be added to the Court's file on this case. [FN1]

[FN1] Those laws and decrees are as follows: Code of Criminal Procedure, enacted into law on November 22, 1939; Statute of Military Justice, February 4, 1986; Code of Military Justice, Decree Law No. 23,214, promulgated on February 4, 1986; Statute of the Court of Constitutional Guarantees, May 19, 1982; the 1979 Constitution, July 12, 1979; the 1993 Constitution, December 29, 1993; Decree-Law No. 23,506 (Habeas Corpus and Amparo Act), promulgated on December 7, 1982; Decree-Law No. 24,150 (rules that must be observed in states of emergency in which the armed forces assume control over internal order, in all or part of the national

territory), promulgated on June 8, 1985; Decree-Law No. 25,418 (Statute of the National Emergency and Reconstruction Government, general law on the state of emergency of April 5, 1992), promulgated on April 7, 1992; Decree-Law No. 25,499 (establishing the terms for granting reduced sentences, immunity, pardon or lighter sentences to those who have committed crimes of terrorism), promulgated on May 17, 1992; Decree-Law No. 25,708 (rules governing proceedings in trials for treason: it states that the summary proceeding called for under the Code of Military Justice will apply), promulgated on September 10, 1992; Decree-Law No. 25,728 (authorizing courts to convict in absentia when the charges are terrorism and treason), promulgated on September 19, 1992; Decree-Law No. 25,744 (rules and procedure that will be followed during the police investigation, the judicial inquiry and trial, and sentencing guidelines for the crimes of treason classified in Decree-Law No. 25,659), promulgated on September 28, 1992; Decree-Law No. 26,248 (amending Decree-Law No. 25,659, as regards the admissibility of writs of habeas corpus when the crimes involved are terrorism or treason), promulgated on November 25, 1993; Supreme Decree No. 015-96-JUS (approving the Ley de Arrepentimiento [Repentance Act]), promulgated on May 7, 1993; and Decree-Law No. 25,499, Regulation Governing the Repentance Act, published May 8, 1993.

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41. The Secretariat also asked the Commission "to indicate whether any other law was cited in the case." Those requests were repeated on September 30, 1998, at which time the Commission and the State were given until October 30, 1998 to comply with the Court's request. On October 5, 1998, the State sent two volumes containing "certified copies of the proceedings conducted against Jaime Castillo Petruzzi et al. [...] before the Military Courts of Peru, for the crime of treason." For its part, on October 26, 1998, the Commission indicated that "the State would be the one to know which laws were applied in these cases." Accordingly, it again petitioned the Court to ask the State for the laws and provisions used in the domestic proceedings and for the records from the military courts. The following day, the Secretariat informed the Commission that the court records had been sent to it that day, by special mail, and that the Commission's request would be brought to the President's attention.

42. On July 14, 1998, the Secretariat, on instructions from the Court, which for its part was acting at the State's behest, requested that the Commission remit the minutes of the meeting where the decision to submit the instant case to the Court was made, and any other document showing that the alleged victims were aware of the steps being taken on their behalf with the Commission, regardless of whether the claimants had powers of attorney from the alleged victims' next of kin. On July 29, 1998, the Commission supplied the requested documents, which were forwarded to the State that same day.

43. On August 24, 1998, the State objected to the minutes of the Commission's proceedings on the grounds that they were in English and asked that it be furnished with a Spanish translation. The next day, the Secretariat sent the State a translation of the minutes so that it might understand the contents. No reply was received at the Secretariat by the August 28, 1998 deadline that the State was given to present its comments on the minutes. On September 11 of that year, the State asserted that the minutes of the Commission meeting where the decision to submit the case to the Court was taken, revealed that it was "a premature decision on a matter not yet settled; the matter was, in fact, pending because a previously requested extension had been

granted." Acting on instructions from the President, on September 29, 1998 the Secretariat informed the State that its observations should have been presented by August 28 of that year at the latest. As a consequence, the submission it filed on September 11 was extemporaneous and, moreover, moot since the Court had already delivered its judgment on the preliminary objections.

44. In its judgment of September 4, 1998, the Court concurred with the third preliminary objection, which concerned consular visits, but dismissed all the other preliminary objections filed by the State. The Court therefore decided to continue its consideration of the case. [FN2]

[FN2] Castillo Petruzzi et al. Case, Preliminary Objections, Judgment of September 4, 1998. Series C No. 41.

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45. By order of September 8, 1998, the President convened the Inter-American Commission and the State to a public hearing at the seat of the Court, starting on November 25, for the purpose of hearing the testimony of the witnesses offered by the Commission. The President also instructed the Secretariat to advise the parties that they could present their closing arguments on the merits of the case immediate after that testimony was taken.

46. On November 16, 1998, the State forwarded to the Court the alleged victims' immigration records, issued by the Interior Ministry's Office of Immigration and Naturalization.

47. On November 17, 1998, the Commission petitioned the Court to order the State to send a copy of Repentance Declaration B1A 000087 and the Opinion of the Chief Prosecutor. Although specifically requested, both documents "were missing from the recently transmitted court records." On November 20, 1998, the State indicated that the Opinion of the Chief Prosecutor was one the pertinent parts of the court record that had already been sent (supra 41) and that the Repentance Declaration was not part of the court record. A copy of that statement was attached to its reply.

48. The public hearing was held at the seat of the Court on November 25, 1998.

There appeared before the Court:

for the Republic of Peru:

Mario Cavagnaro Basile, Agent;
Walter Palomino Cabezas, Advisor;
Jorge Hawie Soret, Advisor;
Sergio Tapia Tapia, Advisor;
Alberto Cortez Torres, Advisor; and

for the Inter-American Commission on Human Rights:

Oscar Luján Fappiano, Delegate;
Claudio Grossman, Delegate;
Verónica Gómez, Advisor;
Verónica Reyna, Assistant;
Nelson Caucoto, Assistant;
Enrique Correa, Assistant; and

as witnesses offered by the Inter-American Commission on Human Rights:

Gloria Cano;
Grimaldo Achaui Loaiza; and
Héctor Salazar Ardiles.

Although summoned by the Court, the following witnesses offered by the Commission did not appear:

León Carlos Arslanian;
Teresa Valdez Escobar;
María Angélica Mellado Saavedra;
Sandra Cecilia Castillo Petruzzi;
Jaime Castillo Navarrete;
Juana Ramírez Gonveya; and
Gabriel Asencio Mansilla.

49. That same day, before the close of the public hearing, the State presented a copy of a videocassette titled "Fifteen Years That Changed Peru's History."The video, shown during the hearing, concerned the social upheaval and destruction that terrorism had caused.

50. On December 9, 1988, the Secretariat asked the Secretary General of the Organization of American States (hereinafter "the OAS") to report whether Peru had notified him of any suspension of guarantees for the period between January 1, 1993 and June 1, 1994, as required under Article 27(3) of the Convention and, if so, whether the notification indicated "the provisions whose application had been suspended, the reasons for the suspension, its territorial scope and the date set for termination of such suspension." On December 15, 1998, the Secretariat reiterated its request. On January 7, 1999, the Director of the OAS General Secretariat's Department of International Law, Mr. Jean-Michel Arrighi, reported that it had not received any notification of suspension of guarantees for the dates in question. On February 16, 1999, the State took issue with the content of the communication from the official in question, since its January 15, 1999 brief had reported that the declaration of the state of emergency and its extensions were reported to the OAS General Secretariat and the Executive Secretariat of the Commission.

51. On April 7, 1999, the Secretariat asked the State to clarify whether the notifications of suspension of guarantees had been sent both to the Executive Secretariat of the Commission and to the General Secretariat of the OAS. The Secretariat also asked that the State kindly furnish the Court with a copy of any direct communication the State had sent to the OAS General

Secretariat. On April 19, 1999, the State sent its clarification to the effect that the orders declaring states of emergency "were sent by [its] Permanent Mission to the Executive Secretariat of the Commission on Human Rights." It also provided a copy of a note addressed to the OAS General Secretariat, dated February 24, 1993, concerning the state of emergency declared from April 13, 1992, to February 24, 1993. On December 9, 1998, the President requested documentation related to the suspension of guarantees. On January 15, 1999, the State forwarded the supreme decrees ordering suspension of guarantees between January 1, 1993 and June 1, 1994.

52. On February 8, 1999, the Secretariat informed the State and the Commission that March 8, 1999, had been set as the deadline for the final pleadings on the merits. On February 24, 1999, the State requested that the deadline in question be extended to April 15. The extension ultimately granted was until March 19, 1999.

53. Following instructions from the President, on February 8 and 10, 1999, the Secretariat requested additional documentary evidence from both the State and the Commission (paragraph 76). On February 17 and March 10, the State submitted a portion of the information solicited from it. On February 17 and 19, 1999, the Commission requested a 15-day extension to submit the information it had been asked to provide. Although both requests were granted, the Commission never submitted the requested information.

54. On February 9, 1999, the State sent a communication listing a series of international treaties on the subject of terrorism.

55. The Inter-American Commission submitted its final pleading on March 8, 1999. There, it maintained that articles 8, 7, 20, 25, 5, 2 and 1.1 of the American Convention on Human Rights, the Convention's preamble and the preamble to the Universal Declaration of Human Rights were all violated in the proceedings that the military courts conducted against the alleged victims.

56. On March 19, 1999, the State filed its final pleading asserting that the trials conducted in the domestic courts had proven the alleged victims' ties to terrorism. It argued that the alleged victims' alien status did not shield them from prosecution under Peruvian criminal law. It added that inasmuch as the proceedings in which the alleged victims "were tried were conducted with scrupulous regard for the procedural guarantees established under Peruvian law, especially those of due process and the right of self defense," they should be neither compensated nor released. It said that from 1980 onward, terrorism had created a very tense situation in Peru that had necessitated successive, government-ordered states of emergency, all, it said, in accordance with Article 27 of the Convention and the provisions of its own Constitution. The emergency laws that the government was compelled to enact became part of the State's strategy for combating terrorism.

57. On April 26 and May 10, 1999, the State sent information on the alleged victims' prison situation and visits.

58. On May 19, 1999, the State sent a copy of a December 1872 ruling of the United States Supreme Court on the subject of aliens convicted of crimes.

V. GENERAL OBSERVATIONS ON THE EVIDENCE

59. Article 43 of the Court's Rules of Procedure stipulates the following:

Items of evidence tendered by the parties shall be admissible only if previous notification thereof is contained in the application and in the reply thereto […] Should any of the parties allege force majeure, serious impediment or the emergence of supervening events as grounds for producing an item of evidence, the Court may, in that particular instance, admit such evidence at a time other than those indicated above, provided that the opposing party is guaranteed the right of defense.

60. The Court has held previously that the proceedings conducted before the Court are not subject to the same formalities required in domestic courts. Its consistent case law has been that its criteria for admitting items into evidence are flexible and the addition of certain elements to the evidence must take particular account of the circumstances of the case in question and the limitations necessitated by the need to protect the principles of legal certainty and equality of arms.

61. As for the formalities required in both the application and the reply as regards the tendering of evidence, the Court has held that

the procedural system is a means of attaining justice and … the latter cannot be sacrificed for the sake of mere formalities. Keeping within certain timely and reasonable limits, some omissions or delays in complying with procedure may be excused, provided that a suitable balance between justice and legal certainty is preserved. [FN3]

[FN3] Cayara Case, Preliminary Objections, Judgment of February 3, 1993. Series C No. 14, para. 42. See also Paniagua Morales et al. Case, Judgment of March 8, 1998. Series C No. 37, para. 70.

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62. In addition to direct evidence, either in the form of testimony, opinions of experts or treatises, international tribunals and domestic courts may base judgments on circumstantial evidence, clues and presumptions, provided solid conclusions as to the facts can be inferred therefrom. The Court has ruled that:

In the exercise of its juridical functions and when ascertaining and weighing the evidence necessary to decide the cases before it, the Court may, in certain circumstances, make use of both circumstantial evidence and indications or presumptions on which to base its pronouncements when they lead to consistent conclusions as regards the facts of the case … [FN4]

[FN4] Gangaram Panday Case, Judgment of January 21, 1994. Series C No. 16, para. 49; see also Loayza Tamayo Case, Judgment of September 17, 1997. Series C No. 33, para. 42; Castillo

Páez Case, Judgment of November 3, 1997. Series C No. 34, para. 39; Blake Case, Judgment of January 24, 1998. Series C No. 36, para. 49; Paniagua Morales et al. Case, supra footnote 3, para. 70.

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63. The Court will now address the evidentiary aspects of the instant case given the law and jurisprudence described herein.

DOCUMENTARY EVIDENCE

64. With its application the Commission tendered, inter alia, the following documents as evidence:

a) the alleged victims' birth certificates; [FN5]
b) report of the International Commission of Jurists on the crimes of terrorism and treason in Peru; [FN6]
c) legislation in effect for prosecuting the crimes of treason; [FN7]
d) final judgment of the alleged victims, May 3, 1994; [FN8] and
e) report on the visit to Peruvian prisons by representatives of the Human Rights Commission of the Chilean Parties of Democratic Reconciliation. [FN9] [FN9]

[FN5] Cf. Birth certificates A7965145, A7965144, A7965146 and 12,874,542, all issued in July 1997, Bureau of Vital Statistics and Identification of Chile, Appendix VI.
[FN6] Cf. Report of the International Commission of Jurists, Appendix IV.
[FN7] Cf. Decree-Law No. 25,475 (establishing sentencing guidelines for the crimes of terrorism and procedure for the investigation, judicial inquiry and trial of cases involving terrorism crimes), May 5, 1992; Decree-Law No. 25,659 (regulating the crime of treason), September 2, 1992; Decree-Law No. 25,564 (sentencing guidelines for adults over the age of 15 convicted of acts of terrorism, amendments to Article 20 of the Penal Code), June 17,1992; and various rules of trial "in the theater of operations," Appendix V.
[FN8] Cf. Final Judgment, May 3, 1994, entered by the Special Tribunal of the Supreme Court of Military Justice, Appendix III..
[FN9] Cf. Report on the trip to Lima made by representatives of the Human Rights Commission of the Chilean Parties of Democratic Reconciliation, Appendix II.

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65. The State objected to the inclusion of the appendix submitted by the Commission containing the report on the visit that representatives of the Human Rights Commission of the Chilean Parties of Democratic Reconciliation made to Peru. The State argued that it was without merit and invalid, inasmuch the report's allegations to the effect that the State had failed to comply with the Vienna Convention on Consular Relations had never been conveyed to the State via the appropriate diplomatic channels.

66. The Court is ordering that those documents that were neither disputed nor challenged and those whose authenticity was never in doubt are admitted into evidence. As regards the

document listed under paragraph 64.e), to which the State objected, the Court reserves the right to evaluate it and, if it so decides, admit it into evidence. As to the allegation concerning the alleged violation of the Vienna Convention on Consular Relations, the Court finds that by now the allegation and the information to which the State objected are irrelevant and immaterial, given the Court's judgment on the preliminary objections.

* * *

67. In its answer to the application, the State submitted the following instruments, among others, as evidence:

a) decisions in the internal proceedings against the alleged victims; [FN10] and
b) documentation on terrorism in Peru today. [FN11]

[FN10] Cf. The January 7, 1994 sentence handed down by the Special Military Court of Inquiry; the March 14, 1994 decision of the FAP's Special Tribunal that upheld the previous ruling on appeal; the order to execute the judgment, dated May 3, 1994, issued by the Special Tribunal of the Supreme Court of Military Justice that took the case on a motion to vacate.
[FN11] Cf. The Declaration of Lima on Hemispheric Cooperation to Prevent, Combat and Eliminate Terrorism, approved at the Inter-American Specialized Conference on Terrorism, held in Lima in April 1996.

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68. The documents presented and referred to in the preceding paragraph were neither disputed nor challenged, nor was their authenticity questioned. Therefore, the Court admits them and orders that they be added to the evidence.

* * *

69. On November 16, 1998, when the prescribed time limit for submitting evidence had already lapsed, the State submitted the alleged victims' immigration records. [FN12]

[FN12] Cf. Immigration records of the alleged victims, issued by the Interior Ministry's Office of Immigration and Naturalization.

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70. On April 26 and May 10, 1999, the State presented documents having to do with the isolation of the alleged victims in their cells and the visits they had received at the Yanamayo Prison since 1998. [FN13]

[FN13] Cf. Report No. 16-99-INPE-DRA-EPMSYP/RP of February 24, 1999, signed by the Chief of Prison Records of the Bureau of Prisons and sent to the Director of the Yanamayo Prison in Puno

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71. On May 19, 1999, the State submitted a copy of a "ruling by the United States Supreme Court, December 1872" concerning the allegiance that aliens in that country owe. [FN14]

[FN14] Cf. Supreme Court of the United States of America. Carlisle v. United States. December 1872.

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72. The documents the State submitted on April 26 and May 10, 1999 (supra 70) contain information concerning supervening events, i.e., events that transpired subsequent to the reply to the application. Although the State did not point this out at the time it tendered these items of evidence, the Court believes that the documents should be admitted into evidence, pursuant to Article 43 of its Rules of Procedure. The documents tendered by the State on November 16, 1998 (supra 69) and May 19, 1999 concern events that occurred before the deadline for tendering evidence expired; inasmuch as the State has not argued force majeure, serious impediment or the emergence of supervening events, the Court finds that they have been tendered extemporaneously and consequently will not admit them into evidence.

* * *

73. On July 7, 1998, to facilitate adjudication of the case, the Court asked the State to submit all pertinent parts of the court record for the proceedings conducted in Peru against the alleged victims. On October 5, 1998, the State sent two volumes containing the documents in question (supra 41).

74. At the Commission's request, on November 18, 1998, the President asked the State to submit Repentance Declaration B1A 000087, which Peru submitted on November 20, 1998.

75. To facilitate adjudication of the case, on December 9, 1998, the President asked the State to furnish the Court with the Peruvian legislation in effect between January 1, 1993 and June 1, 1994, concerning suspension of guarantees; documents explaining the motives, the guarantees suspended, the dates the suspensions took effect and ended, and their territorial scope. On January 15 and February 16, 1999, the State sent a number of supreme decrees concerning suspension of guarantees in Peru. [FN15]

[FN15] Cf. Supreme Decree No. 001-93-DE/CCFFAA of January 7,1993, published in El Peruano on January 9, 1993; Supreme Decree No. 005-93-DE/CCFFAA of January 19, 1993, published in El Peruano on January 20, 1993; Supreme Decree No. 006-93-DE/CCFFAA of January 19, 1993, published in El Peruano on January 22, 1993; Supreme Decree No. 011-93-DE/CCFFAA of February 16, 1993, published in El Peruano on February 17, 1993; Supreme Decree No. 012-93-DE/CCFFAA of February 16, 1993, published in El Peruano on February 17, 1993; Supreme Decree No. 0139-93-DE/CCFFAA of February 16, 1993, published in El Peruano on February 17, 1993; Supreme Decree No. 025-93-DE/CCFFAA of April 16, 1993,

published in El Peruano on April 17, 1993; Supreme Decree No. 026-93-DE/CCFFAA of April 19, 1993, published in El Peruano on April 20, 1993; Supreme Decree No. 027-93-DE/CCFFAA of April 19, 1993, published in El Peruano on April 20, 1993; Supreme Decree No. 032-93-DE/CCFFAA of May 07, 1993, published in El Peruano on May 8, 1993; Supreme Decree No. 035-93-DE/CCFFAA of May 21, 1993, published in El Peruano on May 22, 1993; Supreme Decree No. 037-93-DE/CCFFAA of May 26, 1993, published in El Peruano on May 27, 1993; Supreme Decree No. 039-DE/CCFFAA of June 15, 1993, published in El Peruano on June 17, 1993; Supreme Decree No. 040-93-DE/CCFFAA of June 16, 1993, published in El Peruano on June 17, 1993; Supreme Decree No. 041-DE/CCFFAA of June 16, 1993, published in El Peruano on June 17, 1993; Supreme Decree No. 045-93-DE/CCFFAA of June 25, 1993, published in El Peruano on June 26, 1993; Supreme Decree No. 046-93-DE/CCFFAA of July 08, 1993, published in El Peruano on July 09, 1993; Supreme Decree No. 047-93-DE/CCFFAA of July 16, 1993, published in El Peruano on July 17, 1993; Supreme Decree No. 048-93-DE/CCFFAA July 16, 1993, published in El Peruano on July 17, 1993; Supreme Decree No. 053-DE/CCFFAA of August 13, 1993, published in El Peruano on August 16, 1993; Supreme Decree No. 057-93-DE/CCFFAA of August 19, 1993, published in El Peruano on August 20, 1993; Supreme Decree No. 058-DE/CCFFAA of August 24, 1993, published in El Peruano on August 25, 1993; Supreme Decree No. 062-DE/CCFFAA of September 16, 1993, published in El Peruano on September 17, 1993.; Supreme Decree No. 063-DE/CCFFAA, published in El Peruano on September 18, 1994; Supreme Decree No. 064-DE/CCFFAA, published in El Peruano on September 18, 1994; Supreme Decree No. 070-DE/CCFFAA of September 24, 1993, published in El Peruano on October 5, 1993; Supreme Decree No. 071-DE/CCFFAA of October 04, 1993, published in El Peruano on October 15, 1993; Supreme Decree No. 072-93-DE/CCFFAA of October 04, 1993, published in El Peruano on October 16, 1993; Supreme Decree No. 075-93-DE/CCFFAA of October 04, 1993, published in El Peruano on October 16, 1993; Supreme Decree No. 076-DE/CCFFAA of October 04, 1993, published in El Peruano on October 23, 1993; Supreme Decree No. 081-DE/CCFFAA of October 28, 1993, published in El Peruano on November 06, 1993; Supreme Decree No. 084-DE/CCFFAA of November 12, 1993, published in El Peruano on November 16, 1993; Supreme Decree No. 085-DE/CCFFAA of November 12, 1993, published in El Peruano on November 18, 1993; Supreme Decree No. 086-DE/CCFFAA of November 12, 1993, published in El Peruano on November 18, 1993; Supreme Decree No. 087-DE/CCFFAA of November 12, 1993, published in El Peruano on November 20, 1993; Supreme Decree No. 090-DE/CCFFAA of November 25, 1993, published in El Peruano on December 04, 1993; Supreme Decree No. 092-DE/CCFFAA of November 25, 1993, published in El Peruano on December 14, 1993; Supreme Decree No. 093-DE/CCFFAA of November 25, 1993, published in El Peruano on December 16, 1993; Supreme Decree No. 094-DE/CCFFAA of November 25, 1993, published in El Peruano on December 16, 1993; Supreme Decree No .096-DE/CCFFAA of December 15, 1993, published in El Peruano on December 23, 1993; Supreme Decree No. 098-93-DE/CCFFAA of December 30, 1993, published in El Peruano on January 05, 1994; Supreme Decree No .002-94-DE/CCFFAA of January 13, 1994, published in El Peruano on January 15, 1994; Supreme Decree No. 098-DE/CCFFAA of December 30, 1993, published in El Peruano on January 05, 1994; Supreme Decree No. 002-94-DE/CCFFAA of January 13, 1994, published in El Peruano on January 15, 1994; Supreme Decree No. 003-94-DE/CCFFAA of January 13, 1994, published in El Peruano on January 15, 1994; Supreme Decree No. 004-94-DE/CCFFAA of January 13, 1994, published in El Peruano on January 15, 1994; Supreme Decree No. 010-DE/CCFFAA of February 03, 1994, published in

El Peruano on February 09, 1994; Supreme Decree No. 014-94-DE/CCFFAA of February 11, 1994, published in El Peruano on February 19, 1994; Supreme Decree No. 016-DE/CCFFAA of March 02, 1994, published in El Peruano on March 06, 1994; Supreme Decree No. 019-94-DE/CCFFAA of March 15, 1994, published in El Peruano on March 16, 1994; Supreme Decree No. 020-DE/CCFFAA of March 17, 1994, published in El Peruano on March 18, 1994; Supreme Decree No. 021-DE/CCFFAA of March 17, 1994, published in El Peruano on March 18, 1994; Supreme Decree No. 022-DE/CCFFAA of March 17, 1994, published in El Peruano on March 20, 1994; Supreme Decree No. 026-DE/CCFFAA of April 07, 1994, published in El Peruano on April 13, 1994; Supreme Decree No. 027-DE/CCFFAA of April 08, 1994, published in El Peruano on April 15, 1994; Supreme Decree No. 028-DE/CCFFAA of April 08, 1994, published in El Peruano on April 15, 1994; Supreme Decree No. 029-DE/CCFFAA of April 08, 1994, published in El Peruano on April 15, 1994; Supreme Decree No. 030-DE/CCFFAA of April 20, 1994, published in El Peruano on April 22, 1994; Supreme Decree No. 032-DE/CCFFAA of May 03, 1994, published in El Peruano on May 05, 1994; Supreme Decree No. 034-DE/CCFFAA of May 10, 1994, published in El Peruano on May 15, 1994; Supreme Decree No. 035-DE/CCFFAA of May 10, 1994, published in El Peruano on May 17, 1994; Supreme Decree No. 036-DE/CCFFAA of May 10, 1994, published in El Peruano on May 19, 1994; and Supreme Decree No. 046-DE/CCFFAA of June 08, 1994.----------

76. To facilitate the Court's adjudication of the case, on February 8 and 10, 1999, the President requested documents from both the State and the Commission. The following information was requested from the State:

a) Notes Nos. 7-5-M/211,7-5-M/019, 7-5-M/082, 7-5-M/144, 7-5-M/207 and 7-5-M/242-A, of July 12, 1993, January 24, March 28, July 19 and August 23, 1994, respectively, concerning the declarations of states of emergency and their extensions;
b) Law 24,150 and Decree 749, both of which were mentioned in the supreme decrees that declared and extended states of emergency in various places in Peru between January 1, 1993 and June 1, 1994; and
c) Information and/or laws on the state of emergency declared from September 22 to November 17, 1993, in the department of Lima and the constitutional province of Callao.

The following was requested of the Commission:

a) any information and/or legislation the Inter-American Commission on Human Rights might have in its possession concerning the state of emergency declared in the department of Lima and the constitutional province of Callao between September 22 and November 17, 1993; and
b) that it inform the Secretariat in regard to receipt of notes Nos. 7-5-M/211, 7-5-M/019, 7-5-M/082, 7-5-M/144, 7-5-M/207 and 7-5-M/242-A, dated July 12, 1993, January 24, March 28, July 19 and August 23, 1994, at the Executive Secretariat of the Inter-American Commission on Human Rights. These notes were referenced in the Peruvian Government's brief of January 7, 1999, forwarded to the Commission on January 25 of that year (CDH/11-319/211).

77. On February 17 and March 10, 1999, the State tendered part of the information requested. [FN16]

[FN16] Cf. Note No. 7-5-M/211 of July 12, 1993; Note No. 7-5-M/082 of March 28,1994; Note No. 7-5-M/144 of May 13, 1994; Note No. 7-5-M/207 of July 19, 1994; Note No. 7-5-M/242-A of August 23, 1994; Note No. 7-5-M/262 of September 09, 1994; Note No. 7-5-M/271 of September 22, 1994; Note No. 7-5-M/015 of January 23, 1995, and Note No. 7-5-M/019 of January 24, 1994, all of which were from the Permanent Mission of Peru to the Organization of American States to the Executive Secretariat of the Inter-American Commission on Human Rights; Supreme Decree No. 063-DE/CCFFAA, of September 13, 1993; Law No. 24.150 (establishing the rules and regulations that must be followed during states of emergency when the armed forces assume control of internal order in all or part of the territory); Decree-Law No. 24.150, which entered into force on June 8, 1985; Decree-Law No. 740 (amending Article 5 of Law No. 24.150, to regulate relations between the Military Political Command in areas where states of emergency have been declared, and various authorities within its jurisdiction), November 8, 1991; Supreme Decree No.036-93-JUS, published in El Peruano on September 18, 1994.

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78. On January 7, 1999, the Director of the OAS General Secretariat's Department of International Law, Mr. Jean-Michael Arrighi, reported that no notification had been received from Peru concerning suspension of guarantees in the period from January 1, 1993 to June 1, 1994. On February 16, 1999, the State took issue with the content of that communication (supra 50).

79. In the instant case, the Court is evaluating documents submitted by the Commission and the State that were neither disputed nor challenged by either party. The document that the State challenged, which the Court had ordered to facilitate adjudication of the case (supra 50), exercising its authority under Article 44 of its Rules of Procedure, is a document issued by a representative of the OAS General Secretariat, which is an appropriate body to speak to the matter about which it was consulted. The Court therefore orders that the document be admitted into evidence in the instant case. [FN17]

[FN17] Cf. Suárez Rosero Case, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of January 20, 1999, Series C No. 44, para. 33.

TESTIMONY

80. In its application, the Commission offered the following persons as witnesses: Héctor Salazar Ardiles, León Carlos Arslanian, Teresa Valdez Escobar, María Angélica Mellado Saavedra, Sandra Cecilia Castillo Petruzzi, Jaime Castillo Navarrete, Juana Ramírez Gonveya, Gloria Cano, Grimaldo Achaui Loaiza and Gabriel Asencio Mansilla.

81. The State offered no witnesses. In its answer to the application, however, the State challenged witnesses Teresa Valdez Escobar, María Angélica Mellado Saavedra, Sandra Cecilia Castillo Petruzzi, Jaime Castillo Navarrete and Juana Ramírez Gonveya, arguing that they would be "unable to offer any valid testimony on juridical aspects of the legal proceedings, as they are neither legal experts nor attorneys" and are, in fact, relatives of the alleged victims.

Peru also challenged witnesses Gloria Cano and Grimaldo Achaui on the grounds that "they are not only the attorneys representing the Chilean citizens, but also members of private organizations that have various cases pending against Peru with the Inter-American Commission on Human Rights and other organs of the United Nations." It argued that any statements they might make "would be patently biased and partial, because that would serve their immediate interests against the Peruvian State."

82. At the public hearing, the State reiterated its objections to the witnesses presented. It also asserted that witness Salazar Ardiless was a "hearsay witness" whose testimony was legally "worthless."

83. As to the objections to the Commission's witnesses, the Court reserves the right to evaluate their testimony when it delivers its judgment on the merits (supra 45). The Court once again underscores the fact that the standards by which evidence is evaluated in an international human rights tribunal are unique. The grounds for challenging witnesses do not operate as they do in domestic law. Because this is an inquiry into a State's international responsibility for human rights violations, the Court has greater latitude to use logic and experience when evaluating oral testimony. [FN18]

[FN18] Loayza Tamayo Case, supra note 4, para. 42.

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84. The Court's evaluation of the testimony of the challenged witnesses is as follows:

a) The State's objection to the testimony of Teresa Valdez Escobar, María Angélica Mellado Saavedra, Sandra Cecilia Castillo Petruzzi, Jaime Castillo Navarrete and Juana Ramírez Gonveya became moot, as the witnesses in question did not appear before the Court (supra 48);

b) As to the testimony of Gloria Cano and Grimaldo Achaui, in a similar situation the Court has noted that

> [c]ertain factors may clearly influence a witness' truthfulness. However, the Government did not present any concrete evidence to show that the witnesses had not told the truth, but rather limited itself to making general observations regarding their alleged incompetence or lack of impartiality. This is insufficient to rebut testimony that is fundamentally consistent with that of other witnesses. The Court cannot ignore such testimony. [FN19]

Accordingly, the Court is ordering that the testimony be admitted into evidence, notwithstanding the evaluation made of the testimony taking the witnesses' characteristics and qualifications into account; and

c) Witness Héctor Salazar Ardiles' testimony will be limited to a recounting of his conversation with the Director of Yanamayo Prison, which the Court considers admissible and therefore will admit into evidence.

[FN19] Velásquez Rodríguez Case, Judgment of July 29, 1988. Series C No. 4, para. 143; Godínez Cruz Case, Judgment of January 20, 1989. Series C No. 5, para. 149; Fairén Garbi and Solís Corrales Case, Judgment of March 15, 1989. Series C No. 6, para. 141.

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85. At the public hearing (supra 48), the Court heard testimony from the following witnesses offered by the Commission. Their testimony is summarized in the paragraphs that follow:

a. Testimony of Gloria Cano, defense counsel for Mr. Astorga Valdez

Treason should apply only to nationals and those under the protection of Peruvian law. She felt intimidated as Mr. Astorga Valdez' attorney, particularly because of the way she was treated as she was being taken to the Las Palmas Base on the day her client was brought before the "faceless" military judge for the preliminary hearing in the criminal trial. At that preliminary hearing, her client, who was in a hood and restraints for security reasons, managed to tell her only that he had not been represented by counsel during the investigation by the National Counter-Terrorism Bureau (hereinafter "DINCOTE"). By the time she was able to confer with the alleged victim, the lower court's ruling had already been delivered. At the preliminary hearing, she was not informed of the charges against her client and was not shown the case file, leaving her with no means to put on a defense.

Despite repeated requests, she did not have access to the case file – which consisted of some one thousand pages- until the day before the lower-court ruling was read. Once she was given access to the case file, she was allowed to consult it for only about an hour, together with the attorneys representing the other defendants in the case. She had to prepare and argue her case before the Military Judge of Inquiry that same day, only one day before that judge would read the finding of the court of first instance. Given all this, she felt that the judge never took her defense arguments into account.

In summary proceedings in military courts that prosecute crimes of this type, the defense attorney is not given sufficient time to review the evidence and examine the charges, either before or after the preliminary hearing, and is not permitted to cross-examine the witnesses or any DINCOTE officers who took part in the investigation, and therefore has no opportunity to present evidence for the defense. In Mr. Astorga's case, after the military courts of first and second instance had granted his attorney's motion to dismiss for lack of jurisdiction, a motion from the other co-defendants to have the lower courts' decision nullified on the basis of procedural error, and then the introduction of the testimony of a new witness for the prosecution, resulted in Mr. Astorga's conviction and a sentence of life imprisonment. The defense attorney was never given a copy of that witness' statement. She filed for a writ of habeas corpus and a motion for review of the judgment, but both were denied.

Once the high court had entered a judgment of conviction and the motion filed with the Supreme Court of Military Justice seeking review had been denied, the defendant was held incommunicado for one year in the Yanamayo Prison. In that first year, no visitation was

allowed; thereafter the family was permitted to visit him for one hour each week. The witness' visits with Mr. Astorga as his defense counsel were subject to certain restrictions. Her performance as Mr. Astorga's defense attorney was not effective, owing to the difficulties described here. Nevertheless, she stayed with the case in order not to leave Mr. Astorga without benefit of defense counsel. Attorneys who handle cases of this type are threatened, intimidated and even prosecuted for serving as defense counsel to the accused.

b. Testimony of Grimaldo Achaui Loaiza, defense counsel for Mr. Jaime Francisco Castillo Petruzzi

The crime of treason should apply to aliens only "under special circumstances": i.e., when they owe allegiance and loyalty to Peru. He felt threatened serving as counsel for the defense, particularly because of the treatment he received when taken to the Las Palmas Base on the day of the preliminary hearing before the "faceless" military judge. At that hearing, he was not permitted to speak with his client, who was in handcuffs and blindfolded for security reasons. All his client managed to tell him was that he did not know the charges against him. At the hearing, he was neither informed of the charges against his client nor permitted to see the case file. For that reason, he was unable to put on a defense. He was not permitted to confer with Mr. Castillo Petruzzi until after the lower court ruling was handed down.

After repeated requests, he was given access to the thousand-page case file for some forty minutes after the preliminary hearing had concluded, and then, together with the attorneys for the other defendants, for an hour the day before the court of first instance handed down its decision. During this second viewing of the case file, he had to prepare his arguments and then present them that same day before the Military Judge of Inquiry, who would read the judgment of first instance the following day. Given the circumstances, he felt that the judge did not take his defense arguments into consideration.

The procedure followed in the military court system does not allow defense counsel to view the evidence and know the charges during the preliminary hearing; nor is the defense counsel permitted to cross-examine witnesses or the DINCOTE officers who took part in the investigative phase. He did not file for a writ of habeas corpus since, with the suspension of guarantees, that remedy had been unavailable since 1990.

Once the high court decided to convict and Supreme Court of Military Justice denied the request for review, the defendant was held incommunicado for one year at the Yanamayo Prison. Thereafter, his attorney had no further contact with him. Whereas ideally sentences should rehabilitate, there is no type of rehabilitation for those convicted of treason or terrorism. The system used with them is utterly inhumane.

With all the impediments he encountered, he felt his defense was futile. Still, he stayed with Mr. Castillo Petruzzi's case so as not to leave him without defense counsel. Attorneys for defendants accused of treason or terrorism are intimidated and even prosecuted.

c. Testimony of Héctor Salazar Ardiles, Chilean attorney who visited the Yanamayo Prison

In December 1994, Mr. Salazar Ardiles was a member of a delegation composed of representatives of the Human Rights Commission of the Chilean Parties of Democratic Reconciliation, whose mission was to ascertain the situation of Chileans being held in Peruvian jails and prisons.

He visited Yanamayo Prison, some 3,800 meters above sea level, to meet with the Chilean citizens incarcerated there. However, he was unable to visit with them because, by law, those convicted of treason had to be held incommunicado for the first year of incarceration.

In his conversation with the warden of Yanamayo Prison, the latter explained that prisoners were allowed a half-hour in the prison yard each day and spent the rest of the day confined to their cells, which they shared with two other inmates. The cells were outfitted with sanitary facilities, but had no windows.
The witness also testified that the warden had told him that inmates had access to the library. Books for prisoners could be sent to the library, but were censored before being given to them. For economic reasons, medical care was poor. The climate was bad because of the altitude.
There were no prison incentives. If inmates disobeyed the rules, they were punished in a variety of ways, one being suspension of their half-hour in the prison yard. The witness testified that while he had seen prisons in other countries, the system at Yanamayo was the strictest he had ever seen.

* * *

VI. FACTS PROVEN

86. The Court will now consider the following material facts that the documentary evidence and testimony given in the instant case have established:

86.1 From 1980 to 1994, Peru experienced a terrible social upheaval caused by terrorist violence. [FN20]
86.2 DINCOTE is the organ charged with preventing, reporting and combating treason. Suspects may be held on DINCOTE premises for up to 15 days, with the possibility of another 15-day extension. If the investigation so warrants, suspects may be held incommunicado. [FN21]
86.3 Jaime Francisco Sebastián Castillo Petruzzi, Lautaro Enrique Mellado Saavedra, María Concepción Pincheira Sáez and Alejandro Luis Astorga Valdez are Chilean citizens. [FN22]
86.4 During the operation identified as El Alacrán, which DINCOTE conducted on October 14 and 15, 1993, the following persons were detained in the city of Lima: Lautaro Mellado Saavedra and Alejandro Astorga Valdez, both on block 22 of Av. Las Magnolias, San Isidro; María Concepción Pincheira Sáez, at Calle Vesalio No. 716, San Borja; and Jaime Francisco Castillo Petruzzi, on “Mz-A-20” street in the La Aurora-Surquillo development. [FN23]
86.5 At the time that Jaime Francisco Castillo Petruzzi, María Concepción Pincheira Sáez, Lautaro Enrique Mellado Saavedra and Alejandro Luis Astorga Valdez were detained and then tried by the military courts, a state of emergency was in effect in the Department of Lima and the Constitutional Province of Callao. With that, the guarantees provided under Article 2, subparagraphs 7 (inviolability of domicile), 9 (freedom of movement), 10 (right of assembly) and 20.g (arrest and appearance before a judge) of the Peruvian Constitution in effect at that time were suspended; a Military Political Commander was in charge of keeping internal order in the areas where the state of emergency had been declared. The state of emergency was in effect for the duration of the period in which the alleged victims were on trial. [FN24]

86.6 While a police investigation is in progress, suspects do not have a right to legal counsel until such time as they make a statement as to the facts. It was at this point that the alleged victims were assigned court-appointed attorneys. [FN25]

86.7 The procedures conducted during the course of DINCOTE's investigation included: detentions, searches of medical-legal records; body searches; household searches and searches of vehicles; impoundment and freezing of assets; deposing of the detainees and witnesses, and compiling of documentation, including expert opinions, request for police records, and summons and citations. [FN26]

86.8 The Office of the Special Military Prosecutor was informed of the detention of Jaime Francisco Castillo Petruzzi, María Concepción Pincheira Sáez, Lautaro Enrique Mellado Saavedra and Alejandro Luis Astorga Valdez on October 18, 1993. [FN27]

86.9 It was DINCOTE that determined what the legal classification of the crime allegedly committed by the detainees was. That classification determined military jurisdiction in this case. Military courts, with "faceless" judges presiding, tried Castillo Petruzzi, Pincheira Sáez, Mellado Saavedra, Astorga Valdez and other defendants on the charge of treason. The alleged victims were turned over to the FAP's Special Military Prosecutor on November 17, 1993. Based on the police investigations conducted by DINCOTE, on November 18, 1993, the Special Military Prosecutor charged the detainees with the crime of treason, under Decrees-Laws Nos. 25,659 and 25,475. [FN28]

86.10 When the charge is treason, procedure calls for a summary proceeding "in the theater of operations," before "faceless" judges. Actions seeking judicial guarantees are not permitted. [FN29]

86.11 Defense counsel for Mr. Astorga Valdez filed for two writs of habeas corpus: the first to get the court's permission for the defense attorney to visit him in the Castro Castro Prison, and the second to get the court to agree to allow relatives to visit him at Yanamayo Prison. [FN30] Both petitions were denied.

86.12 Alejandro Astorga Valdez, Lautaro Mellado Saavedra, María Concepción Pincheira Sáez and Jaime Francisco Castillo Petruzzi remain incarcerated to this day: the first three since October 14, 1993, and Mr. Castillo Petruzzi since October 15, 1993. During the first year of their incarceration, they were confined in very small, unventilated cells with no natural light, and allowed only a half-hour outside their cell each day. They are currently incarcerated in the Yanamayo Prison, [FN31] with very restricted visitation privileges.

86.13 As for the judicial proceedings conducted against the persons named in the Commission's application, the Court deems the following facts proven:

[FN20] Cf. Declaration of Lima on Hemispheric Cooperation to Prevent, Combat and Eliminate Terrorism, approved at the Inter-American Specialized Conference on Terrorism, held in Lima in April 1996; the State's brief of February 9, 1999; the Commission's final pleading and the State's final pleading.

[FN21] Cf. Articles 1 and 2.a) of Decree-Law No. 25,744, promulgated on September 28, 1992; articles 4 and 5 of Decree-Law No. 24,150, promulgated on June 8, 1985; Decree-Law No. 740 (amending Article 5 of Law No. 24,150, to regulate relations between the Military Political Command in areas where states of emergency have been declared, and various authorities within its jurisdiction), promulgated on November 8, 1991; Article 12.c) and d) of Decree Law No. 25,475, May 5, 1992.

[FN22] Cf. Birth certificate A7965145, birth certificate A7965144, birth certificate A7965146 and birth certificate 12,874,542, all issued in July 1997, Appendix VI.
[FN23] Cf. Police investigation report No. 225 DIVICOTE-II-DINCOTE, file No. 078-TP-93-L, p. 2.
[FN24] Cf. Article 231 of the Constitution approved on July 12,1979; Article 8 Decree-Law No. 25,418 (Statute of the National Emergency and Reconstruction Government), promulgated on April 7, 1992; Decree-Law No. 24,150, promulgated on June 8, 1985; Decree-Law No. 740 (amending Article 5 of Law No. 24, 150, to regulate relations between the Military Political Command in areas where states of emergency have been declared, and various authorities within a command's jurisdiction), promulgated on November 8, 1991; Supreme Decree No.063-93-DE/CCFFAA of September 13, 1993, published in El Peruano on September 18r, 1993; Supreme Decree No.085-DE/CCFFAA of November 12, 1993, published in El Peruano on November 18, 1993; Supreme Decree No.004-94-DE/CCFFAA of January 13,1994, published in El Peruano on January 15,1994; Supreme Decree No.020-DE/CCFFAA of March 17, 1994, published in El Peruano on March 18, 1994; and Supreme Decree No.035-DE/CCFFAA of May 10,1994, published in El Peruano on May 17, 1994.
[FN25] Cf. Article 12.f of Decree-Law No. 25,475, promulgated on May 5, 1992; Article 716 of the Code of Military Justice, Decree-Law 23,214 of July 24,1980; statement made to DINCOTE by Mr. Jaime Francisco Castillo Petruzzi on November 4, 1993, p. 121; statement made to DINCOTE by Mr. Lautaro Enrique Mellado Saavedra on October 29, 1993, p. 141; statement made to DINCOTE by Mrs. María Concepción Pincheira Sáez on October 22, 1993, p. 195; statement made to DINCOTE by Mr. Alejandro Luis Astorga Valdez on October26 , 1993, p. 177; all of which are part of police investigation report No. 225, file No. 078TP 93 ZJ FAP.
[FN26] Cf. Police investigation report No. 225 DIVICOTE-II-DINCOTE, file No. 078-TP-93-L; record of the body search done on Lautaro Enrique Mellado Saavedra on October 14, 1993, pp. 310-312; record of the body search done on Jaime Francisco Castillo Petruzzi on October 15, 1993, p. 308; record of the body search done on Alejandro Luis Astorga Valdez on October 14, 1993, pp. 314-316; record of the body search done on María Concepción Pincheira Sáez on October 14, 1993, pp. 319-322; physical-chemical analysis of the property, October 22, 1993, pp. 74 and 448-453; record of the search of the residence of María Concepción Pincheira Sáez and of Lautaro Enrique Mellado Saavedra on October 14, 1993, pp. 329-347; record of the search of the residence of Jaime Francisco Castillo Petruzzi on October 15, 1993, pp. 352-357, all of which are part of police investigation report No. 225-DINCOTE-II-DIVICOTE, file No. 078 TP 93 ZJ FAP.
[FN27] Cf. Official Document No. 529-DIVICOTE II-DINCOTE, mentioned in police investigation report No. 225 DIVICOTE-II-DINCOTE, file No. 078-TP-93-L, p. 14.
[FN28] Cf. Official Document No. 10525-DIVICOTE-DINCOTE, pp. 538-539; notice of prosecution from the Prosecutor for the Special Military Court, dated November 18, 1993, pp. 564-567, police investigation report No. 225-DIVICOTE-II-DINCOTE, both from file No. 078-TP-93-L; Article 13.a of Decree No. 25,475) and Decree-Law No. 25,659 (crime of treason).
[FN29] Cf. Articles 1 and 3 of Decree-Law No. 25,708 (rules governing proceedings in treason trials, requiring a summary proceeding under the Military Code of Justice in all such trials), which entered into force on September 10, 1992; articles 710 to 724 of the Code of Military Justice, Decree-Law No. 23,214 of July 24, 1980, and Article 13 of Decree-Law No. 25,475, May 5, 1992.

[FN30] Cf. Articles 6 and 38 of Decree-Law No. 23,506 (Habeas Corpus and Amparo Act), promulgated on December 7, 1982; Article 22 of the Regulations of the Habeas Corpus and Amparo Act, Supreme Decree No. 024-90-JUS and Article 16.a of Decree-Law No. 25,398 (law that supplements the provisions of Law 23,506 on the matter of Habeas Corpus and Amparo), promulgated on February 6, 1992, and published in El Peruano on February 9, 1992; Article 6 of Decree-Law No. 25,659; Article 6.4 of Decree-Law No. 26,248 of November 12, 1993; testimony of defense attorney Gloria Cano Legua (transcript of the public hearing held on November 15, 1998).
[FN31] Cf. Notification of the detention of Alejandro Luis Astorga Valdez, dated October 14, 1993, p. 112; notification of the detention of Jaime Francisco Castillo Petruzzi, dated October 15, 1993, p. 110; notification of the detention of María Concepción Pincheira Sáez, dated October 14, 1993, p. 115; notification of the detention of Lautaro Enrique Mellado Saavedra, dated October 14, 1993, p. 111; Judgment of May 3, 1994 of the Special Tribunal of the Supreme Court of Military Justice, pp. 970 et seq. (all these notifications were in file No. 078-TP-93-L); testimony of attorney Gloria Cano; testimony of Mr. Héctor Salazar Ardiles; the Commission's final pleading; account of visits to Yanamayo Prison; Article 3.b of Decree-Law No. 25,744, promulgated on September 28, 1992; Article 20 of Decree-Law No. 25,475, promulgated on May 5, 1992; Judgment of the Special Military Court of Inquiry, dated January 7, 1994, file No. 078 TP 93 ZJ FAP. Judgment of the FAP Special Military Tribunal, dated March 14, 1994, file 078 TP 93 ZJ FAP.

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1) With respect to Mr. Alejandro Astorga Valdez:

86.14 On November 17, 1993, Mr. Astorga Valdez appointed Mrs. Gloria Cano Legua as his attorney. [FN32]
86.15 On November 20, 1993, the Judge of the Special Military Court opened the inquiry against Mr. Alejandro Astorga Valdez, issued the detention order and ordered that the court of inquiry be convened for the suspect's preliminary hearing. [FN33]
86.16 On November 28, 1993, the alleged victim made his statement at the preliminary hearing held at the Las Palmas Military Base, in the presence of the Judge of the Special Military Court, the clerk of the court and the military prosecutor, all of whom were "faceless." Defense counsel was also present. The following facts stand out: [FN34]

a) the defense attorney was unable to confer with her client in private prior to this hearing and prior to the reading of the finding of the court of first instance;
b) Astorga Valdez was kept in restraints, with a hood over his head, for the duration of the preliminary hearing;
c) during the hearing, neither the defendant nor his defense counsel was shown the prosecution's evidence; defense counsel was not permitted, either at the preliminary hearing or thereafter, to cross-examine the witnesses whose statements appeared in the police investigation report;
d) the document containing the statement made by the detainee at the preliminary hearing does not bear the signatures of the participating officers of the court; and
e) defense counsel was intimidated when representing the alleged victim.

86.17 On November 28 and 29, 1993, Mr. Astorga Valdez was sent notification of the order instituting the first phase of the trial, and the order of detention; at the same time, the Director of Lima's Bureau of Prisons was asked to move the individual in custody to a maximum security prison. [FN35]
86.18 On December 1, 1993, Mr. Astorga Valdez' attorney filed a motion to dismiss for lack of jurisdiction. [FN36]
86.19 On January 2, 1994, the prosecutorial indictment was presented. It stated that while the evidence "proves [Mr. Astorga Valdez'] criminal conduct, said conduct does not rise to the level of treason." It therefore recommended that were the accused found guilty of the crime of terrorism, his case be referred to the regular courts. [FN37]
86.20 On January 6, 1993, the defense attorney was permitted to view the case file for a period of one hour for the purpose of preparing her arguments. She was also notified that the verdict would be read at 9:00 a.m. the following day. Defense counsel presented her written arguments on January 6, the same day she was given her first access to the case file. [FN38]
86.21 On January 7, 1994, the Judge of the FAP Special Military Court of Inquiry granted "the motion to dismiss for lack of jurisdiction, entered by Alejandro Astorga Valdez"; consequently, "the Court d[id] not have jurisdiction to rule on [his] criminal behavior." [FN39]
86.22 The Prosecutor of the Special Military Superior Court issued an opinion in which he concurred with the decision to move the proceedings to the regular courts. Notification of that opinion was sent to Mr. Astorga Valdez. [FN40]
86.23 On March 14, 1994, the FAP Special Military Tribunal upheld the January 7, 1994 ruling of the court of first instance. [FN41]
86.24 On April 28, 1994, the Assistant Special Prosecutor General filed his opinion wherein he requested that the lower court ruling granting the motion to dismiss for lack of jurisdiction in the Astorga Valdez case be nullified and that the defendant be convicted of treason and sentenced to life imprisonment. [FN42]
86.25 On May 3, 1994, ruling on the motion filed by the other alleged victims petitioning the court to nullify the ruling of the court of first instance, the Special Tribunal of the Supreme Court of Military Justice nullified that part of the ruling in which the court granted Mr. Astorga Valdez' motion for the lower court to dismiss the case for lack of jurisdiction, wherein the judge of first instance had ruled that because the crime of which defendant was guilty was terrorism, the military court did not have jurisdiction in the case. The Supreme Court of Military Justice nullified that part of the lower court ruling and with that sentenced Mr. Astorga Valdez "to life imprisonment for the crime of treason." [FN43]
86.26 The special appeal seeking a review of the judgment in this case was denied. [FN44]

[FN32] Cf. Defense brief, file No. 078 TP 93 ZJ FAP, p. 575.
[FN33] Cf. Judgment of the Special Military Court of Inquiry, file No. 078 TP 93 ZJ FAP, pp. 568-570.
[FN34] Cf. Official notice of legal proceedings, dated November 24, 1993, p. 581 and the statement made by Mr. Alejandro Luis Astorga Valdez at the preliminary hearing on November 28, 1993, pp. 556-558, both from file No. 078 TP 93 ZJ FAP; testimony of defense counsel Gloria Cano Legua; final pleadings of the Commission; Article 2.b of Decree-Law No. 25,744, promulgated on September 28, 1992, and articles 13.c, 14, 15, 16 of Decree-Law No. 25,475, promulgated on May 5, 1992.

[FN35] Cf. Notification of the order instituting the examining phase, p. 659, and memorandum No- III-JIME No. 037 from the Special Military Court to the Director of the Lima Bureau of Prisons, p. 873, both from file No. 078 TP 93 ZJ FAP.
[FN36] Cf. Brief of defense counsel Gloria Cano Legua of November 30, 1993, file No. 078 TP 93 ZJ FAP, pp. 673-674f.
[FN37] Cf. Criminal indictment, p. 769, and the decision of the Special Military Court of Inquiry, January 4, 1994, p. 773, both from file No. 078 TP 93 ZJ FAP.
[FN38] Cf. Official notice of January 5, 1994, f. 761, and pleading of defense counsel Gloria Cano Legua, pp. 780-785, both from file No. 078 TP 93 ZJ FAP; the Commission's final pleadings, and testimony of defense counsel Gloria Cano Legua.
[FN39] Cf. Judgment of the Special Military Court of Inquiry, January 7, 1994, pp. 800-812; file No. 078 TP 93 ZJ FAP.
[FN40] Cf. Opinion of the Military Superior Court Prosecutor, file 078 TP 93 ZJ FAP, p. 825.
[FN41] Cf. Judgment of the FAP's Special Military Tribunal, March 14, 1994, file 078 TP 93 ZJ FAP, pp. 893-895.
[FN42] Cf. Opinion of the Assistant Special Prosecutor General, April 28, 1994, file 078 TP 93 ZJ FAP, pp. 937-938.
[FN43] Cf. May 3, 1994 Judgment of the Special Tribunal of the Supreme Court of Military Justice, file 078 TP 93 ZJ FAP, pp. 970 et seq.
[FN44] Cf. Article1 of Decree-Law No. 26,248 (amending Decree-Law No. 25,659 as regards the permissibility of petitions of habeas corpus in treason or terrorism cases), which entered into force on November 25, 1993, Article 690 of the Code of Military Justice, Decree-Law No. 23,214, promulgated on February 4, 1986; and Article 2.a of Decree-Law No. 25,659 (regulating the crime of treason), promulgated on September 2, 1992; testimony of defense counsel Gloria Cano Legua.

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2) With respect to Mr. Jaime Francisco Castillo Petruzzi:

86.27 On November 20, 1993, the Judge of the Special Military Court opened the examining phase of the proceedings against Jaime Francisco Castillo Petruzzi, issued the warrant for his detention, and ordered that the suspect's preliminary hearing be held in the fact-finding phase of the proceedings. [FN45]
86.28 On November 22, 1993, Mr. Castillo Petruzzi named Mr. Grimaldo Achaui Loaiza as his attorney; that same day, the military judge of inquiry recognized Mr. Achaui Loaiza as defense counsel in the proceedings and set November 25, 1993, as the date for a preliminary hearing at the Las Palmas Military Base for depositions in the fact-finding phase. On November 25, 1993, the defense attorney asked to be admitted to the Las Palmas Air Base to confer with his client but was denied entry. [FN46]
86.29 On November 25, 1993, defense counsel for Mr. Castillo Petruzzi requested access to the case file, invoking the right of defense. On November 29, 1993, he was advised that he would be permitted access to the file on December 2 for thirty minutes, given "the abbreviated time period that the law allows for cases of this kind."Nonetheless, he repeated his request a number of times, but to no avail. On January 6, 1994, the Judge of the Special Military Court of Inquiry who entered the ruling of first instance, allowed him 40 minutes with the case file. [FN47]

86.30 On November 28, 1993, the alleged victim's preliminary hearing was held at the Las Palmas Military Base in the presence of the Judge of the Special Military Court, the clerk of the court and the Prosecutor of the Special Military Court, all of whom were "faceless." The alleged victim's attorney, Grimaldo Achaui Loaiza, was also present. The following facts have been established: [FN48]

a) defense counsel was not permitted to confer with his client in private either before the preliminary hearing or even before the ruling of first instance was delivered;
b) Mr. Castillo Petruzzi was blindfolded and in handcuffs for the duration of the preliminary hearing;
c) during the hearing, neither the accused nor his defense attorney was shown the prosecution's evidence, nor was the defense attorney permitted to cross-examine the witnesses whose testimony appeared in the police investigation report;
d) the record of the detainee's preliminary hearing is not signed by the officers of the court who participated; and
e) the attorney for the defense was intimidated when representing the alleged victim.

86.31 On November 28 and 29, 1993, Mr. Castillo Petruzzi was notified of the court order instituting the examining phase, including the arrest warrant. At the same time, the Director of the Lima Bureau of Prisons was asked to move the prisoner in his custody to a maximum-security prison. [FN49]
86.32 On November 29, 1993, Mr. Castillo Petruzzi's defense counsel filed a motion to dismiss for lack of military jurisdiction, and to have the case referred to the regular courts. [FN50]
86.33 On December 23, 1993, and February 10, 1994, defense counsel requested permission to confer with his client for fifteen minutes, which finally happened after the ruling of the court of first instance had been delivered. [FN51]
86.34 On January 2, 1994, the criminal indictment was presented, which asserted that Mr. Castillo Petruzzi was "a person of rank in subversive planning and execution" and had been charged with the crime of treason based on materials found in his possession. [FN52]
86.35 On January 6, 1994, the same day he first had access to the case file, the defense attorney presented his defense brief. [FN53]
86.36 On January 7, 1994, the Judge of the FAP Special Military Court of Inquiry rejected "[defendant] Jaime Castillo Petruzzi's motion to dismiss for lack of jurisdiction" and convicted him of the "crime of treason, [sentencing him] to life imprisonment, with complete disqualification for life, continuous confinement to his cell for the first year of incarceration, and then forced labor." [FN54]
86.37 On January 7, 1994, the defendant and his defense attorney were notified of the verdict and sentence, which they immediately appealed. The appeal was admitted and referred to the superior court. [FN55]
86.38 The Prosecutor with the Special Military Superior Court issued an opinion that concurred with the ruling of the court of first instance. Notice of that opinion was sent to Mr. Castillo Petruzzi. [FN56]
86.39 On February 10 and 16, 1994, the defense filed a motion requesting that the judgment of the court of first instance be nullified and that the case be referred to the regular courts. [FN57]
86.40 On March 14, 1994, the FAP's Special Military Tribunal upheld the January 7, 1994 ruling of the court of first instance. [FN58]

86.41 Mr. Castillo Petruzzi's defense lawyer filed a motion seeking nullification of judgment and the case was referred to the Special Tribunal of the Supreme Court of Military Justice. [FN59]

86.42 On April 28, 1994, the Assistant Special Prosecutor General presented an opinion requesting that the defendant be sentenced to life imprisonment. [FN60]

86.43 On 3 May, 1994, the Special Tribunal of the Supreme Court of Military Justice dismissed the motion to nullify the March 14, 1994 ruling. The latter had confirmed the January 7, 1994 judgment of the court of first instance that had ruled that Mr. Castillo Petruzzi's motion to dismiss for lack of jurisdiction was without merit. [FN61]

[FN45] Cf. Order of the Special Military Court of Inquiry, file No. 078 TP 93 ZJ FAP, pp. 568-570.

[FN46] Cf. Brief of defense counsel Grimaldo Achaui, p. 576 f; order of the Judge of Inquiry, p. 576 v, from file No. 078 TP 93 ZJ FAP; testimony of defense counsel Grimaldo Achaui Loaiza.

[FN47] Cf. Orders of the Special Military Court of Inquiry, December 8 and 29, 1993 and January 4, 1994, pp. 750 v, and 765 v; briefs of defense counsel Grimaldo Achaui Loaiza of November 25, 1993, December 21, 1993 and January 4,1994, pp. 666 f, 750 f, 751 v, 765 f); January 5, 1994 notification, p. 764; all the preceding from file No. 078 TP 93 ZJ FAP; testimony of defense attorney Grimaldo Achaui Loaiza.

[FN48] Cf. November 28, 1993 statement made by Mr. Jaime Francisco Castillo Petruzzi during the examining phase, file No. 078 TP 93 ZJ FAP, pp. 604-606; testimony of defense attorney Grimaldo Achaui Loaiza; the Commission's final oral arguments; Article 2.b of Decree-Law No. 25,744, promulgated on September 28, 199, and articles 13.c, 14, 15 and 16 of Decree-Law No. 25,475, promulgated on May 5,1992.

[FN49] Cf. Notice to Mr. Castillo Petruzzi notifying him of the order opening the examining phase, p. 654, and memorandum No- III-JIME No. 037 from the Special Military Court of Inquiry to the Director of the Lima Bureau of Prisons, p. 873, both from file No. 078 TP 93 ZJ FAP.

[FN50] Cf. Brief of defense attorney Grimaldo Achaui Loaiza, dated November 29, 1993, file No. 078 TP 93 ZJ FAP, pp. 671-672 f.

[FN51] Cf. Briefs by defense attorney Grimaldo Achaui Loaiza, dated December 23, 1993 and February 10, 1994, pp. 751 and 835-836; order of the Special Military Court of Inquiry, dated December 29, 1993, pp. 751 v; all from file No. 078 TP 93 ZJ FAP; testimony of defense attorney Grimaldo Achaui.

[FN52] Cf. Prosecutorial indictment, p. 767, and the order of the Special Military Court of Inquiry, dated January 4, 1994, p. 773, both from file No. 078 TP 93 ZJ FAP.

[FN53] Cf. Brief of defense attorney Grimaldo Achaui Loaiza, dated January 6, 1994, file No. 078 TP 93 ZJ FAP, pp. 777-779; the Commission's final pleadings.

[FN54] Cf. Judgment of the Special Military Court of Inquiry, dated January 7, 1994, file No. 078 TP 93 ZJ FAP, pp. 800-812.

[FN55] Cf. Notification sent to defense attorney Grimaldo Achaui Loaiza, p. 812 f, and the order of the Special Military Court of Inquiry, dated January 7, 1994, p. 815, both from file No. 078 TP 93 ZJ FAP; testimony of defense attorney Grimaldo Achaui Loaiza.

[FN56] Cf. Opinion of the Military Superior Court Prosecutor, file 078 TP 93 ZJ FAP.

[FN57] Cf. Brief of defense attorney Grimaldo Achaui Loaiza, dated February 10, 1994, pp. 835-836, and the record of the February 16, 1994 hearing held in the trial against Jaime Castillo Petruzzi et al. for the crime of treason, p. 855, both from file 078 TP 93 ZJ FAP.
[FN58] Cf. Judgment of the FAP's Special Military Tribunal, dated March 14, 1994, file 078 TP 93 ZJ FAP, pp. 893-895.
[FN59] Cf. Article 2 of Decree-Law No. 25,708 (procedure in trials for the crimes of treason), promulgated on September 10, 1992; Article 5 of Decree-Law No. 25,659 (regulating the crime of treason), promulgated on September 2, 1992; Article 13.g of Decree-Law No. 25,475 (establishing the sentencing guidelines for the crimes of terrorism and procedure for investigation, judicial inquiry and trial in cases of terrorism crimes), promulgated May 5, 1992; defense pleading of Mr. Castillo Petruzzi's defense attorney, dated March 18, 1994, p. 898; order of the FAP's Special Military Tribunal, of March 22, 1994, p. 901; from file 078 TP 93 ZJ FAP.
[FN60] Cf. Opinion of the Assistant Special Prosecutor General, April 28, 1994, pp. 929-931, file 078 TP 93 ZJ FAP.
[FN61] Cf. Judgment of May 3, 1994, of the Special Tribunal of the Supreme Court of Military Justice, pp. 970 et seq.; file 078 TP 93 ZJ FAP.

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3) With respect to Mrs. María Concepción Pincheira Sáez and Mr. Lautaro Enrique Mellado Saavedra:

86.44 On November 20, 1993, the Judge of the Special Military Tribunal instituted the examining phase of the proceedings against Mrs. Pincheira Sáez and Mr. Mellado Saavedra, issued the orders for them to be taken into custody and ordered that a preliminary hearing be held. [FN62]
86.45 On November 22, 1993, Mrs. María Angélica Mellado Saavedra, sister-in-law of Mrs. Pincheira Sáez, named Mr. Juan F. Castañeda Abarca as her defense counsel. That same day, the Judge of Inquiry recognized him as defense counsel in the proceedings and set November 28 as the date for the preliminary hearing in her case, which was to be conducted at the Las Palmas Military Base. [FN63] On November 26, 1993, Mrs. María Angélica Mellado Saavedra, sister of Mr. Lautaro Enrique Mellado Saavedra, named David P. Barrios Franco as his defense attorney. On November 30, the Judge of the Special Military Court of Inquiry recognized Mr. Barrios Branco as defense counsel in the proceedings. [FN64]
86.46 On November 27 and 28, 1993, Mr. Mellado Saavedra and Mrs. Pincheira Sáez, respectively, made statements at the preliminary hearing conducted at the Las Palmas Military Base in the presence of the Judge of the Special Military Court, the clerk of the court, the Prosecutor for the Special Military Court, all of whom were "faceless." Also present for their respective cases were Mr. Mellado's attorney appointed by the Special Military Court, and Mrs. Pincheira's defense counsel, Mr. Juan F. Castañeda Abarca. The following facts have been established:

a) During these proceedings, the defense attorneys were not permitted to confer with their clients until after the latter had made their statements; they were never permitted to cross-examine the witnesses whose testimony appeared in the police investigation report; and

b) the document prepared as a consequence of the statements made by Mrs. Pincheira Sáez and Mr. Mellado Saavedra does not bear the signatures of the officers of the court who participated. [FN65]

86.47 On November 27, 28 and 29, 1993, Mrs. Pincheira Sáez and Mr. Mellado Saavedra were notified of the order instituting the examining phase, including the warrant for their detention; the Director of the Lima Bureau of Prisons was asked to move them to a maximum security prison. [FN66]

86.48 On December 1, 1993, pursuant to Article 295 of the Statute of the Judiciary, the defense attorneys requested access to the case file. On December 2, 1993, it was decided that the respective attorneys would be permitted to consult the case file on December 9, 1993, for a period of 30 minutes, given "the abbreviated time period that the law allows for cases of this kind." [FN67]

86.49 On December 22, 1993, the defense attorneys for Mrs. Pincheira Sáez and Mr. Mellado Saavedra filed a motion to dismiss for lack of military jurisdiction. [FN68]

86.50 The criminal indictment in the case was handed down on January 2, 1994, charging Mrs. Pincheira Sáez and Mr. Mellado Saavedra with the crime of treason. [FN69]

86.51 On January 5, 1994, the defense attorneys were summoned to view the case file.As ordered, they presented their defense arguments the following day, January 6, and were told that day that the verdict would be read on January 7 at 9:00 a.m. [FN70]

86.52 On January 7, 1994, the Judge of the FAP Special Military Court of Inquiry rejected "the motion to dismiss for lack of jurisdiction" filed by Mrs. Pincheira Sáez and Mr. Mellado Saavedra. Having found them guilty of "the crime of treason," the court sentenced them to "life imprisonment, with absolute disqualification for life, confinement to their cells for the first year of their incarceration, and then forced labor." [FN71]

86.53 On January 7, 1994, the defendants and their respective attorneys were notified of the verdict and the sentence of the court of first instance. Their attorneys immediately filed an appeal, which was admitted and referred to the higher court. [FN72]

86.54 The Military Superior Court Prosecutor's opinion concurred with the ruling of the court of first instance. Mrs. Pincheira Sáez and Mr. Mellado Saavedra were notified of that report. [FN73]

86.55 On February 15 and 16, 1994, the defense attorneys of the two defendants requested that the ruling of the court of first instance be nullified. [FN74]

86.56 On March 14, 1994, the FAP Special Tribunal upheld the January 7, 1994 ruling of the court of first instance. [FN75]

86.57 The defense attorneys for Mrs. Pincheira Sáez and Mr. Mellado Saavedra filed a motion to have that ruling nullified, and the case went to the Special Tribunal of the Supreme Court of Military Justice. [FN76]

86.58 On April 28, 1994, the Assistant Special Prosecutor General presented his opinion wherein he asked that the court agree to the motion to nullify only in respect of the sentence given to Mrs. Pincheira Sáez and Mr. Mellado Saavedra. He asked that the sentence be changed from life to 40 years' imprisonment. [FN77]

86.59 On May 3, 1994, the Special Tribunal of the Supreme Court of Military Justice ruled that there were no grounds for the motion seeking nullification of the March 14, 1994 ruling. It therefore confirmed the January 7, 1994 ruling of the court of first instance and declared that the

motion filed by Mrs. Pincheira Sáez and Mr. Mellado Saavedra for dismissal for lack of jurisdiction was without merit. [FN78]

[FN62] Cf. Order of the Special Court of Inquiry, file No. 078 TP 93 ZJ FAP.
[FN63] Cf. Defense brief, p. 577; order of the Judge of Inquiry, p. 577 v, and the notification of 24 November 1993, f. 580, all from file No. 078 TP 93 ZJ FAP.
[FN64] Cf. Brief of defense lawyer David Pablo Barrios, p. 667 f; decision of the Special Military Court of Inquiry, p. 667 v; November 30, 1993 notice, p. 667 v; all from file No. 078 TP 93 ZJ FAP.
[FN65] Cf. Statement made by Mrs. María Concepción Pincheira Sáez at the November 28, 1993 preliminary hearing, pp. 660-662, and statement made by Mr. Lautaro Enrique Mellado Saavedra at the November 27, 1993 preliminary hearing, pp. 594-596, both from file No. 078 TP 93 ZJ FAP; the Commission's final pleadings; Article 2.b of Decree-Law No. 25,744, which entered into force on September 28, 1992, and articles 13.c, 14, 15 and 16 of Decree-Law No. 25,475, promulgated on May 5, 1992.
[FN66] Cf. Notification of the order instituting the examining phase, p. 662; record of notification of the order instituting the examining phase in the case of Mr. Mellado Saavedra, p. 592; memorandum No- III-JIME No. 037 from the Special Military Court of Inquiry to the Director of the Lima Bureau of Prisons, p. 873; all from file No. 078 TP 93 ZJ FAP.
[FN67] Cf. Brief of defense attorney Juan F. Castañeda Abarca, dated December 1, 1993, p. 677 f; brief of defense attorney David P. Barrios Franco, dated December 1, 1993, p. 676, and decisions of the Special Military Court of Inquiry of December 2, 1993, p. 676 v and 677 v; all from file No. 078 TP 93 ZJ FAP.
[FN68] Cf. Brief of defense attorney Juan F. Castañeda Abarca, dated December 22, 1993, p. 745 f; brief of defense attorney David Barrios Franco, dated December 22, 1993, p. 746; decisions of the Special Military Court of Inquiry of December 29, 1993, p. 745 and 746 vv.; all from file No. 078 TP 93 ZJ FAP.
[FN69] Cf. Criminal indictment, pp. 767, 769 and 770, and the ruling of the Special Military Court of Inquiry, of January 4, 1994, p. 773, both from file No. 078 TP 93 ZJ FAP.
[FN70] Cf. Notification of January 5, 1994, pp. 752 and 758; brief of arguments by defense attorney Juan F. Castañeda, pp. 795-796; brief of defense attorney David Barrios Franco, dated January 6,1994, p. 794; all from file No. 078 TP 93 ZJ FAP; the Commission's final pleadings.
[FN71] Cf. Judgment of the Special Military Court of Inquiry, January 7, 1994, file No. 078 TP 93 ZJ FAP, pp. 800-812.
[FN72] Cf. Notifications sent to the defense attorneys, p. 813 f, and the decision of the Special Military Court of Inquiry, January 7, 1994, p. 815, both from file No. 078 TP 93 ZJ FAP, p. 813.
[FN73] Cf. Opinion of the Military Superior Court Prosecutor, file 078 TP 93 ZJ FAP, pp. 824-828.
[FN74] Cf. Brief of defense attorney Juan Fernando Castañeda Abarca, dated February 15,1994, pp. 850-851; brief of defense attorney David Barrios Franco, dated February 16,1994, pp. 848-849; record of the February 16, 1994 hearing held in the proceedings against Jaime Castillo Petruzzi et al. on charges of treason, p. 854; all from file 078 TP 93 ZJ FAP.
[FN75] Cf. Judgment of the FAP Special Military Tribunal, March 14, 1994, file 078 TP 93 ZJ FAP.

[FN76] Cf. Article 2 of Decree-Law No. 25,708 (procedure in trials for treason), promulgated on September 10, 1992; Article 5 of Decree-Law No. 25,659 (regulating the crime of treason), promulgated on September 2, 1992; Article 13.g of Decree-Law No. 25,475 (sentencing guidelines for terrorism crimes and procedure for their investigation, inquiry and trial), promulgated on May 5 May, 1992; brief of the defense attorney for Mrs. María Concepción Pincheira Sáez, dated March 24, 1994, p. 907; brief of the defense attorney for Mr. Lautaro Enrique Mellado Saavedra, dated March 24, 1994, pp. 908-909; decision of the FAP Special Military Tribunal, April 21, 1994, p. 917; these last documents are from file 078 TP ZJ ZAP 93.
[FN77] Cf. Opinion of the Assistant Special Prosecutor General, dated April 28, 1994, file 078 TO 93 ZJ FAP, pp. 925, 926, 938-940.
[FN78] Cf. Judgment of May 3, 1994 of the Special Tribunal of the Supreme Court of Military Justice, file 078 TP 93 ZJ FAP, pp. 970 et seq.

VII. PRELIMINARY OBSERVATIONS

87. Now that the Court has established which proven facts are material to the case, it will examine the arguments of the Inter-American Commission and of the State in order to determine whether the latter bears international responsibility for the violations of the American Convention being alleged. To that end, the Court will summarize the arguments made by the Commission in the application and in its final pleading, and those made by the State in its answer to the application and in its own final pleading.

The Court will begin by examining some of the assertions made by the parties to these proceedings.

88. The first set of assertions that the Court will consider are those that concern the issue of whether Mr. Castillo Petruzzi, Mr. Mellado Saavedra, Mrs. Pincheira Sáez and Mr. Astorga Valdez are guilty of the crimes that they are alleged to have committed in Peru. The State asserted that the alleged victims were guilty of serious crimes that constituted treason.

89. The Court does not have jurisdiction to judge the nature and gravity of the crimes that the alleged victims are said to have committed. It takes note of the State's allegations regarding these matters and asserts, as it has on previous occasions, that a State "has the right and the duty to guarantee its own security," [FN79] although it must always exercise that right and duty within limits and according to procedures that preserve both public safety and the fundamental rights of the human person. Obviously, nothing justifies terrorist violence –no matter who the perpetrators- that is harmful to individuals and to society as a whole. Such violence warrants the most vigorous condemnation. The Court's primary function is to safeguard human rights, regardless of the circumstances.

[FN79] Cf. Velásquez Rodríguez Case, supra note 19, para. 154.

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90. The Court does have authority to rule that States that violate human rights bear international responsibility; it does not have the authority to investigate the agents of the State who had a hand in those violations or to punish them. This is the nature of a human rights court. It is not a criminal court before which an individual's responsibility for crimes committed may be litigated. [FN80]This is true in the instant case as well, which is not about the guilt or innocence of Mr. Castillo Petruzzi, Mr. Mellado Saavedra, Mrs. Pincheira Sáez and Mr. Astorga Valdez. Hence, the Court will determine the legal consequences of the proven facts that are within its competence and will indicate whether the State bears international responsibility for violation of the Convention. It will not, however, examine assertions by the parties as to the alleged criminal responsibility of the alleged victims, as such matters are the purview of the domestic courts.

[FN80] Cf. Velásquez Rodríguez Case, supra note 19, para. 134; Suárez Rosero Case, Judgment of November 12, 1997. Series C No. 35, para. 37; Paniagua Morales et al. Case, supra note 3, para. 71.

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91. In its application, the Commission asserted that the isolation of the convicted prisoners and the refusal to allow visits by consular officials were violations of Article 36 of the Vienna Convention on Consular Relations.

92. In its reply to the application, the State asserted that it had "always afforded every means to enable foreign consular officials to visit their countrymen being held for the commission of a crime on Peruvian soil." The State also noted that this issue was never raised when the case was with the Inter-American Commission.

93. The Court notes that the allegations made with regard to the alleged violation of Article 36 of the Vienna Convention on Consular Relations have become moot given the Court's finding in the judgment on preliminary objections in the instant case. [FN81]

[FN81] Cf. Castillo Petruzzi et al. Case, Preliminary Objections, supra note 2.

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94. At the public hearing the Court held on the merits of the instant case, the State argued that in Mr. Astorga Valdez' case, local remedies had not been exhausted since the original petition was filed with the Commission on January 28, 1994, but his conviction did not come until later that year, in May. It further argued that Mr. Astorga Valdez' case was not joined to that original petition until even later that year, in November. In other words, "more than six months passed between the date of the final ruling and the date of the submission requesting joinder of Mr. Astorga's case to the original petition."

95. The Court notes that the exhaustion of local remedies and the request to include Mr. Astorga Valdez in the petition originally presented to the Inter-American Commission were

issues decided in the judgment on preliminary objections and therefore need not be revisited at this phase of the proceedings.

VIII. ON ARTICLE 20 (RIGHT TO NATIONALITY)

96. Article 20 of the Convention provides the following:

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the state in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

97. The Commission's arguments were as follows:

a) Peru violated the right to nationality recognized in Article 20 of the Convention because it did "not have the right to try and convict the four Chilean citizens for the crime of treason." Following the principle of the territoriality of criminal law, the State applied Decree-Law No. 25,659, which makes no distinction for nationals and aliens;
b) In convicting the four Chilean citizens, the State arbitrarily "imposed on them and attempted to create within them an artificial bond of allegiance and loyalty to Peru"; in other words, a relationship with that country or nation. For the State to require allegiance and loyalty from these persons, they would first have to have voluntarily opted to acquire Peruvian nationality and, as a consequence, renounce their Chilean nationality;
c) the crime of treason should be classified among crimes "against the external security of the Nation" that attack the sovereignty, independence, security or honor of the Nation [...] to further the interests of a foreign power." The crime of treason "is a special crime in the sense that it can only be committed by a particular category of persons […] in other words, it is a classification reserved for nationals of the country;"
d) the crime of treason to which Decree-Law No. 25,659 refers bears no relation to the crime of treason as defined in the Peruvian Code of Military Justice. The former is not about conduct that stricto sensu constitutes acts of treason; instead, its purpose is to suppress terrorism, under a false nomen iuris. The crime classified in the Code of Military Justice is a breach of the allegiance that nationals owe to their own country;
e) Decree Law No. 25,659 could be viewed as a "fraudulent circumvention of the applicable law" that flouts or evades the normal sphere of application of the crime of treason and applies it instead to persons like aliens from whom one cannot require allegiance and loyalty to the country because they are not bound by law to owe allegiance to the Peruvian Nation.
f) The State is thus expanding the "application of extraordinary military rules applicable only in times of war against an enemy State, in order to prosecute and punish aliens who, moreover, are not subject to military court jurisdiction for crimes of this type;" and
g) Under Article 27 of the Convention, Article 20 cannot be suspended; hence, the State's failure to observe Article 20 is unjustified.

98. The State's arguments:

a) Peru has "sovereign authority to investigate, prosecute and convict all those who commit criminal acts within its territory, especially if such acts constitute crimes of lese humanité," as in the case of crimes of aggravated terrorism. For over ten years, those types of crimes have caused terrible loss of life and have inflicted enormous property damage;
b) terrorist acts such as those committed by the MRTA "to which the Chilean nationals belong" have placed the country's internal order and security in grave peril. Under Decree-Law 25,418, which established the National Emergency and Reconstruction Government, Peru had to adopt Decree-Law No. 25,475, establishing penalties for terrorist crimes and the procedures to be followed when investigating, examining and trying such crimes, and Decree-Law No. 25,659, which regulates the crime of treason;
c) the State cannot be accused of a "fraudulent circumvention of the law" for having expanded the application of the provisions of the Code of Military Justice to prosecution of civilians since,
[a]s is readily apparent, Decree-Law No. 25,659 [...] was never intended to arbitrarily impose upon aliens an artificial bond of allegiance and loyalty to Peru […]. In that law, the State classified the crime of "aggravated terrorism," giving it the nomen iuris of treason, a common but exceptionally serious crime that is universally condemned in all international fora. The active agent of this crime could be anyone, whatever his nationality, so long as it is committed on Peruvian soil";
d) under Article 78 of the Code of Military Justice, the crime of treason can be committed by persons who are Peruvian citizens –whether by birth or by naturalization- or by anyone subject to Peruvian law. The latter group refers to "those persons who enjoy the protection of Peruvian laws [… in other words] anyone who is on national soil, whether he be Peruvian or foreign," and can even include illegal aliens, such as the persons in this case;
e) during the course of the domestic criminal proceedings, none of the attorneys representing the Chilean nationals proved that they were aliens;
f) because the crimes in this case were "crimes of lese humanité committed on [Peruvian] soil" and against the State and its civilian and military population, those responsible must be prosecuted in accordance with domestic criminal law; to do otherwise would be to "violate the principle of the sovereignty and independence of States";
g) under the Code of Military Justice, Decree-Law No. 25,659, and the Penal Code, "no distinction is made between Peruvian and foreign perpetrators."Therefore, the right recognized in Article 20 of the Convention and Article 15 of the Universal Declaration has not been violated, since "the nationality of [the alleged victims] in no way influenced their trial and the sentence imposed."

99. This Court has defined nationality as "the political and legal bond that links a person to a given state and binds him to it with ties of allegiance and loyalty, entitling him to diplomatic protection from that state." If an alien acquires this link to a given state, it is understood that he has satisfied the conditions that the State sets to ensure that an effective link exists between the candidate for citizenship and the system of values and interests of the society with which he seeks to fully associate himself; it is natural, then, that the "conditions and procedures for its acquisition should be governed primarily by the domestic laws of that state." [FN82]

[FN82] Cf. Proposed amendments to the naturalization provisions of the Constitution of Costa Rica, Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paras. 35-36; see also Nottebohm Case (second phase), Judgment of April 6, 1955, I.C.J. Reports 1955, p. 24.

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100. This Court has also held that the right to nationality recognized in Article 20 has two aspects: first, it "provides the individual with a minimal measure of legal protection in international relations through the link his nationality establishes between him and the state in question; and second, the protection therein accorded the individual against the arbitrary deprivation of his nationality, without which he would be deprived for all practice purposes of all of his political rights as well as of those civil rights that are tied to the nationality of the individual." [FN83]

[FN83] Proposed amendments to the naturalization provisions of the Constitution of Costa Rica, supra note 82, para. 34.

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101. The Court has previously held that "international law does impose certain limits on the broad powers enjoyed by the states" and that "nationality is today perceived as involving the jurisdiction of the state as well as human rights issues." [FN84] This is recognized in regional instruments and in Article 15 of the Universal Declaration.

[FN84] Cf. Proposed amendments to the naturalization provisions of the Constitution of Costa Rica, supra note 82, paras. 32-33.

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102. In the case before the Court, the nationality of the Chilean citizens was never at issue. At no time was their right to that nationality ever questioned or impugned; neither was there ever any intention to create or artificially impose, between Peru and the defendants, the bond that is distinctive of nationality and the ties of allegiance and loyalty that follow therefrom. Whatever the consequences of nationality in law, they exist solely with respect to Chile and not Peru, and are not altered by the fact that the criminal behavior in question is classified as treason. "Treason" is simply the nomem iuris that the State uses in its laws and does not mean that the defendants somehow acquired the duties of nationality that Peruvians owe.

103. The Court therefore finds that Article 20 was not violated in the instant case.

IX. VIOLATION OF ARTICLE 7(5) (RIGHT TO PERSONAL LIBERTY)

104. Article 7, paragraph 5 of the American Convention provides 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

without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.

105. Arguments of the Commission:

a) Peru violated Article 7 of the Convention by not bringing the alleged victims before a judge within the reasonable time required under the Convention. In the case under study, "the military judge was not notified of the arrests, searches and expert reports and opinions until 30 days after the fact," whereas the Convention requires that any person detained is to be brought before a judge either immediately or after an acceptable delay. An acceptable delay would be the "amount of time needed to prepare the transfer";
b) States "have a right and a duty to defend themselves against terrorist attacks." The issue here, however, is whether a government of laws must ensure the guarantees of due process in the case of persons detained on suspicion of having committed terrorist acts;
c) While Article 27 of the Convention regulates states of emergency, international case law holds that states of emergency must be ones in which there is a danger to the nation; even then, only certain rights are derogable.The fact that some rights are not among the non-derogable rights named in Article 27(2) of the Convention does not give the States blanket authority to suspend them; nor is the State permitted to suspend them simply because there is no law that says otherwise. Finally, the suspension of guarantees must not be incompatible with other obligations and should not result in any form of discrimination.

106. Arguments of the State:

a) the certified copies of the court record show that Mr. Castillo Petruzzi was detained on October 15, 1993, and made a statement the following November 4. This proves that "he was in isolation […] or incommunicado for fifteen days, not thirty";
b) "From [1980] onward, terrorism created a very tense situation in Peru […] forcing the competent authorities to implement the laws that the circumstances dictated." Given the situation, the Executive Branch used the authorities conferred under Articles 231.a of the 1979 Constitution and 137.1 of the 1993 Constitution to declare a 60-day state of emergency in the affected areas, regulated by a "body of stringent laws"; and
c) the Commission is bringing a case against the State for allegedly violating Article 7 of the Convention, even though rights had been suspended because of the terrorism rampant in the country. Such suspensions are permissible under Article 27(2) of the Convention, which does not list Article 7 as one of the non-derogable rights.

107. The Court observes that the Commission did not allege violation of Article 7 in its application; it did so only in its final pleading. However, this does not prevent this Tribunal from examining, during the proceedings on the merits, the Commission's arguments concerning the defendants' prolonged detention.

108. Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter the "European Convention" or "Rome Convention") provides that "[e]veryone arrested or detained … shall be brought promptly before a judge," the assumption being that anyone deprived of his freedom without any form of judicial control must

be either released or brought promptly before a judge. The European Court of Human Rights held that while the word "promptly" must be interpreted with due regard for the "attendant circumstances," no situation, however grave, gave the authorities the power to prolong incarceration unduly without violating Article 5.3 of the European Convention. [FN85]

[FN85] Cf. Eur. Court H. R., Brogan and Others Case, decision of 23 March 1988, Series A No. 145-B, paras. 58-59, 61-62.

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109. In the instant case, the detention occurred amid a terrible disruption of public law and order that escalated in 1992 and 1993 with acts of terrorism that left many victims in their wake. In response to these events, the State adopted emergency measures, one of which was to allow those suspected of treason to be detained without a lawful court order. As for Peru's allegation that the state of emergency that was declared involved a suspension of Article 7 of the Convention, the Court has repeatedly held that the suspension of guarantees must not exceed the limits strictly required and that "any action on the part of the public authorities that goes beyond those limits, which must be specified with precision in the decree promulgating the state of emergency, would … be unlawful." [FN86] The limits imposed upon the actions of a State come from "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." [FN87]

[FN86] Habeas corpus in emergency situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), Advisory Opinion OC-8/87 of January 30, 1987. Series A No. 8., para. 38, and Judicial guarantees in states of emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 36.

[FN87] Judicial guarantees in states of emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), supra note 86, para. 21.

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110. As to the State's alleged violation of Article 7(5) of the Convention, the Court is of the view that those Peruvian laws that allow the authorities to hold a person suspected of the crime of treason in preventive custody for 15 days, with the possibility of a 15-day extension, without bringing that person before a judicial authority, are contrary to the provision of the Convention to the effect that "[a]ny person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power [...]."

111. Applying the laws in force to this specific case, the State held Mr. Mellado Saavedra, Mrs. Pincheira Sáez and Mr. Astorga Valdez in custody, without judicial oversight, from October 14, 1993, to November 20, 1993, the date on which they were brought before a military court judge. Mr. Castillo Petruzzi, for his part, was detained on October 15, 1993, and brought before the judge in question on November 20 of that year. This Court finds that the period of approximately 36 days that elapsed between the time of detention and the date on which the

alleged victims were brought before a judicial authority is excessive and contrary to the provisions of the Convention.

112. The Court therefore finds that the State violated Article 7(5) of the Convention.

X. VIOLATION OF ARTICLE 9 (PRINCIPLE OF NULLUM CRIMEN NULLA POENA SINE LEGE PRAEVIA AND FREEDOM FROM EX POST FACTO LAWS)

113. Article 9 of the Convention provides that:

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

114. Arguments of the Commission:

a) for practical purposes, there is no difference between the crime of terrorism and the crime of treason or aggravated terrorism classified under Peruvian law and both are open to broad interpretation which, in turn, leaves room for confusion. They are open-ended criminal classifications "couched in vague language," contrary to the modern principles of criminal law that require very specific terminology with little or no room for interpretation. This is a violation of a basic canon of criminal law, which requires a precise legal description or definition of the crime or other classification;

b) the principle of nullum crimen nulla poena sine lege praevia is the cornerstone of a government of laws and a basic principle of criminal law. When coupled with the principles of legal certainty and juridical security, a range of principles follow that serve to reinforce it: 1) guarantees of criminal procedural law; 2) guarantees for those imprisoned or in custody; 3) the guarantee of a competent, independent and impartial judge previously established by law; 4) the guarantee of judicial control of execution of sentence; 5) the principle of nonrespectivity of laws and prohibition of retroactivity when unfavorable to the defendant; 6) the principle prohibiting the use of analogy in criminal law; 7) the principle of adjudication by the laws and the constitution in effect at the time the crime was committed; 8) the principle of the proportionality of the sentence; 9) the principle prohibiting judicial lawmaking; 10) the principle prohibiting ambiguity in the law; and 11) the principle whereby sentences may not be amended for the worse, or reformatio in peius, etc.;

c) the crime of treason, as the State itself has acknowledged, is the nomen iuris of aggravated terrorism. Apart from being open-ended, this classification removes prosecution of this criminal behavior "from the jurisdiction of the competent, independent and impartial tribunal previously established by law, which is the regular court, and transfers it to the military court." Furthermore, "the crime of treason as a classification […] under criminal law has nothing to do with terrorism." Treason is a crime against the security of a nation and is criminalized in order to protect a nation's independence, sovereignty or integrity, which is not at issue in this case; and

d) Article 2 of Decree-Law No. 25,659 provides who the authors of the crime of treason are. However, it makes no provision for alien perpetrators. In other words, it does not specify

whether the State is demanding allegiance of certain foreign citizens, and under what conditions it must do so. This is a violation of the principle of nullum crimen nulla poena sine lege praevia. Allegiance to the Peruvian nation is the duty of Peruvian citizens. Aliens cannot be prosecuted for a failure to fulfill a duty of allegiance that the law does not require.

115. Argument of the State:

The legal classification of the crime is in Decree-Law No. 25,659, promulgated in August 1992. In other words, "at the time [the alleged victims] were detained and brought to trial, the laws were already on the books." They "knew perfectly well what drastic legal consequences they were risking."

116. The Commission's first reference to the violation of Article 9 of the Convention was in its final pleading. The fact that it did not do so in its original application does not preclude the Court from examining that allegation during the proceedings on the merits, in accordance with the principle of iura novit curia. [FN88]

[FN88] Cf. Blake Case, supra note 4, para. 112.

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117. In its definition of the crime of treason, Article 1 of Decree-Law No. 25,659 refers to Article 2 of Decree-Law No. 25,475, which sets forth the sentencing guidelines for terrorism crimes and procedure for the police investigation, judicial inquiry and trial of persons who commit terrorism.

118. Article 3 of Decree-Law No. 25,659 provides that "[t]he penalty for the crime of treason […] shall be the one stipulated in Article 3, subparagraph a) of Decree-Law No. 25,475," which is life imprisonment.

119. The Court notes that the criminal offenses classified in Decrees-Laws 25,475 and 25,659 -terrorism and treason- are similar in certain fundamental respects. As the parties have acknowledged, the crime called treason is "aggravated terrorism," regardless of the label the lawmaker chose to give it. In an earlier ruling, this Court held that "[b]oth Decrees-Laws refer to actions not strictly defined, so that they may be interpreted similarly within both crimes, in the view of the Ministry of the Interior and the corresponding judges and […] of the Police (DINCOTE) itself." [FN89] The fact that both have certain elements in common and the vague distinction between the two categories of crime is prejudicial to the defendants' legal situation on several counts: the applicable penalty, the court with jurisdiction, and the nature of the proceedings. Under Peruvian law, this criminal conduct is classified as treason and persons charged with this crime are to be tried by a "faceless" military tribunal. The trials will be summary proceedings in which the defendant will have fewer guarantees and, if convicted, will be sentenced to life imprisonment.

[FN89] Cf. Loayza Tamayo Case, supra note 4, para. 68.

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120. The Court has held that

[t]he meaning of the word "laws" in the context of a system for the protection of human rights cannot be disassociated from the nature and origin of that system. The protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. These are individual domains that are beyond the reach of the State or to which the State has but limited access. Thus, the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power. [FN90]

[FN90] Cf. The Words "Laws" in Article 30 of the American Convention on Human Rights, Advisory Opinion OC-6/86 of May 9, 1986. Series A No. 6, para. 21.

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121. The Court considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of nullum crimen nulla poena sine lege praevia in criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty. Laws of the kind applied in the instant case, that fail to narrowly define the criminal behaviors, violate the principle of nullum crimen nulla poena sine lege praevia recognized in Article 9 of the American Convention.

122. The Court therefore finds that the State violated Article 9 of the Convention.

XI. VIOLATION OF ARTICLE 8 (JUDICIAL GUARANTEES AND DUE PROCESS)

123. The Commission argued that in the military court proceedings against Mr. Castillo Petruzzi, Mr. Mellado Saavedra, Mr. Astorga Valdez and Mrs. Pincheira Sáez for the crime of treason, the State violated the following rights and guarantees of due process of law contemplated in the American Convention: the right to a hearing by an independent and impartial tribunal [Article 8(1)]; the right to be presumed innocent [Article 8(2)]; the right to adequate time and means to prepare one's defense and the right to defend oneself [articles 8(2)(c) and (d)]; the right to examine witnesses present in the court [Article 8(2)(f)]; the right to appeal the judgment to a higher court [Article 8(2)(h)]; and the right to public proceedings [Article 8(5)].

* * *

A COMPENTENT, INDEPENDENT AND IMPARTIAL TRIBUNAL, PREVIOUSLY ESTABLISHED BY LAW

124. Article 8(1) of the Convention stipulates that:

[e]very person has the right to a hearing, with due guarantees and with 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.

125. Arguments of the Commission:

a) Article 8(1) of the Convention recognizes every person's right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal previously established by law. While at the international level trial by military tribunals is not, per se, regarded as a violation of the right to a fair trial, "an international consensus has developed in favor of the need to restrict it whenever possible, and to prohibit exercise of military jurisdiction vis-à-vis civilians, especially in emergency situations";
b) The United Nations Human Rights Committee found that the practice of military or special tribunals trying civilians "could present serious problems as far as the equitable, impartial and independent administration of justice is concerned… While the [International] Covenant [of Civil and Political Rights] does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional …";
c) "A military court is a special and purely functional court designed to maintain discipline in the military and police." As the Commission stated in its 1993 Annual Report, placing civilians under the jurisdiction of the military courts is patently contrary to the rights and guarantees protected under articles 8 and 25 of the American Convention, specifically the right to a hearing by a competent, independent and impartial tribunal previously established by law;
d) Because the armed forces are performing dual roles -combating terrorism and exercising jurisdictional functions that properly pertain to the judicial branch of government-, "there are some serious and legitimate doubts about the impartiality of a military court in such cases, as the court would be both judge and prosecutor." The conduct of the military judge of inquiry who ordered the defendants detained, attached their property and then examined the witnesses and the suspects, was a violation of the right to an impartial tribunal, since the same judge or court conducted both the preliminary inquiry and the trial;
e) members of military tribunals are appointed by the military hierarchy, which means they exercise jurisdictional authority at the discretion of the executive branch. This would be understandable only when the crimes being prosecuted are military offenses. Whereas the Statute of Military Justice provides, under its preliminary title, that military tribunals are autonomous, elsewhere that same body of law stipulates that such courts are answerable to the executive branch; nowhere does it stipulate that military tribunals shall be composed of legal professionals. Article 23 of the Statute provides that the minister of the pertinent sector shall designate the members of the Supreme Court of Military Justice. In practice, military judges continue to be subordinate to their superiors and must respect the established military hierarchy. For these

reasons, such tribunals do not "provide civilians with guarantees of impartiality and independence, since the military judges act according to military logic and their own principles";
f) the very concept of a tribunal previously established by law "means that judicial competence can be neither derogated nor removed; in other words, absolute adherence to the law is required and judicial competence may not be arbitrarily altered." In the case of Peru, the nomen iuris of treason is one element used to "cloak this arbitrary mutation in the guise of legality" and to remove jurisdiction from the tribunal previously established by law to the military courts. But, "for a tribunal established by law to exist it is not sufficient that it be provided for by law; such a tribunal must also fulfill all the other requirements stipulated in Article 8 of the American Convention and elsewhere in international law;" and
g) Article 15, paragraph 1 of Decree-Law No. 25,475 provides that those military who are officers of the court in cases involving crimes of terrorism shall keep their identity secret, wherefore decisions and judgments are to be unsigned. The use of "faceless" tribunals denies the accused his right to be judged by an independent and impartial tribunal, the right to defend himself and the right to due process. Trials of this type make it difficult for the accused to know whether the judge is competent and impartial.

126. Arguments of the State:

a) Decree-Laws Nos. 25,475 and 25,659 were promulgated under the National Emergency and Reconstruction Government. "Subsequently, the 1993 Constitution recognized the competence of the military courts to prosecute civilians in the cases specifically listed in its Article 173." Article 139 of the Constitution now in force in Peru establishes the independence of the courts and, by extension, the independence of the military courts. It also provides that rulings of military courts "do not apply to civilians, except in the case of the crimes of treason and terrorism that the law specifies";
b) Article 139.1 of the Constitution now in force provides that the judicial function rests entirely and exclusively with the judicial branch of government, "except in the case of military law and arbitration law." This is consistent with Article 233 paragraph 1 of the 1979 Constitution and Article 1 of the Statute of the Judiciary.And on this basis, Article 229 of the Constitution stipulates that a law shall determine the organization and attributes of the military courts. It is thus "patently clear that Peru's constitutions and laws have consistently provided that the military system of justice will be separate and independent";
c) the practice of trying civilians in military tribunals must be examined in light of Article 27 of the Convention, which allows states the possibility of extraordinary measures "in time of war, public danger, or other emergency that threatens the independence or security of a State Party;"
d) the right to a hearing by a tribunal previously established by law implies that "the accused must be tried by judges appointed prior to the facts in the case, with the express stipulation that the individual shall be brought before a tribunal previously established by law"; it does not stipulate whether the tribunals or judges are to be military or civilian;
e) to deny the validity of a military court's ruling in the instant case would contradict the finding in the Loayza Tamayo case:

If, as it did in the case of Mrs. Loayza Tamayo, the Honorable Court based its judgment on a decision handed down by military courts, mistakenly or otherwise, we believe that it would be

illogical to argue in the instant case, that a judgment from those same courts is not authoritative and has no consequence in law. This would be tantamount to saying that the decisions of military courts are authoritative in some instances, provided they serve the interests that the Commission represents, but not if they are contrary to those interests.

127. The Court considers that under Peru's Code of Military Justice, military courts are permitted to try civilians for treason, but only when the country is at war abroad. A 1992 decree-law changed this rule to allow civilians accused of treason to be tried by military courts regardless of temporal considerations. In the instant case, DINCOTE was given investigative authority, and a summary proceeding "in the theater of operations" was conducted, as stipulated in the Code of Military Justice.

128. The Court notes that several pieces of legislation give the military courts jurisdiction for the purpose of maintaining order and discipline within the ranks of the armed forces. Application of this functional jurisdiction is confined to military personnel who have committed some crime or were derelict in performing their duties, and then only under certain circumstances. This was the definition in Peru's own law (Article 282 of the 1979 Constitution). Transferring jurisdiction from civilian courts to military courts, thus allowing military courts to try civilians accused of treason, means that the competent, independent and impartial tribunal previously established by law is precluded from hearing these cases. In effect, military tribunals are not the tribunals previously established by law for civilians. Having no military functions or duties, civilians cannot engage in behaviors that violate military duties. When a military court takes jurisdiction over a matter that regular courts should hear, the individual's right to a hearing by a competent, independent and impartial tribunal previously established by law and, a fortiori, his right to due process are violated. That right to due process, in turn, is intimately linked to the very right of access to the courts.

129. A basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law. States are not to create "[t]ribunals that do not use the duly established procedures of the legal process […] to displace the jurisdiction belonging to the ordinary courts or judicial tribunals." [FN91]

[FN91] Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Conference on the Prevention of Crime and Treatment of Offenders, held in Milan August 26 to September 6, 1985, and confirmed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

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130. Under Article 8(1) of the American Convention, a presiding judge must be competent, independent and impartial. In the case under study, the armed forces, fully engaged in the counter-insurgency struggle, are also prosecuting persons associated with insurgency groups. This considerably weakens the impartiality that every judge must have. Moreover, under the Statute of Military Justice, members of the Supreme Court of Military Justice, the highest body in the military judiciary, are appointed by the minister of the pertinent sector. Members of the Supreme Court of Military Justice also decide who among their subordinates will be promoted

and what incentives will be offered to whom; they also assign functions. This alone is enough to call the independence of the military judges into serious question.

131. This Court has held that the guarantees to which every person brought to trial is entitled must be not only essential but also judicial. "Implicit in this conception is 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." [FN92]

[FN92] Habeas corpus in emergency situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), supra note 86, para. 30 and Judicial guarantees in states of emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), supra note 86, para. 20.

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132. In the instant case, the Court considers that the military tribunals that tried the alleged victims for the crimes of treason did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8(1) of the American Convention recognizes as essentials of due process of law.

133. What is more, because judges who preside over the treason trials are "faceless," defendants have no way of knowing the identity of their judge and, therefore, of assessing their competence. Compounding the problem is the fact that the law does not allow these judges to recuse themselves.

134. The Court therefore finds that the State violated Article 8(1) of the Convention.

* * *

VIOLATION OF ARTICLE 8(2)(B) AND 8(2)(C) (ADEQUATE TIME AND MEANS FOR THE PREPARATION OF THE DEFENSE)

135. Article 8(2)(b) and 8(2)(c) of the Convention provide that:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[…]
b) prior notification in detail to the accused of the charges against him;
c) adequate time and means for the preparation of his defense;
[…]

136. Arguments of the Commission:

a) under Article 8(2)(b) and 8(2)(c), any person accused of a criminal offense has the right to know the charges against him and to have adequate time and means to prepare his defense. In a number of ways, the conduct of the military courts affected the presumption of innocence that is fundamental to due process;
b) the scant amount of time given to the defense lawyers and the news that the judgment would be delivered the day after the attorney's first access to the case file made a "serious defense" as impossible as it was illusory, all in violation of Article 8(2)(c) of the Convention;
c) under Decree-Law No. 25,659, the time limits given for fulfillment of procedural requirements in treason cases are two thirds shorter than they are in terrorism cases. Also, for treason cases Decree-Law No. 25,708 requires the summary proceeding "established under the Code of Military Justice for trials in the "theater of operations." It also stipulates that the finding of the judge of inquiry must be issued "within a maximum of 10 days, and the Military Superior Court's review within five days." The proceeding "in the theater of operations" is "the […] most summary proceeding provided for under the Code of Military Justice." During such proceedings, the accused has no means of challenging the reports and evidence;
d) with legislation of this type, "the court's inquiry is meaningless, since decisions are based on the findings contained in the police investigation reports." Judgments in the military courts are not the result of "evidence taken at trial, but rather expanded police investigation reports that the accused has not seen." The proceedings conducted in the case against the alleged victims were based entirely on the police investigation report produced by DINCOTE, an organ answerable to the executive branch and "not the typical investigative police force." That document had to serve as the charge, because "it is not proof but rather facts that have to be proven." In order for police investigation work to constitute evidence, "the police must be intervening in the inquiry strictly for precautionary reasons, in cases of urgency or necessity, on orders of the judicial authority." This does not appear to have happened in the instant case, except in the case of the medical tests done on the alleged victims;
e) it is a principle of procedural law that "any evidence used to argue the guilt of the accused in a case must be tendered by an organ other than the court" and the latter must exhibit the evidence so that the defense has an opportunity to state its position. Moreover, the investigative work of the preliminary phase is quite apart from the evidence-gathering and fact-finding done during the second phase [trial]."The verdict is to be based entirely on evidence produced at trial;
f) Mr. Astorga Valdez' conviction was based on testimony introduced during proceedings conducted by the court of third and final instance. The introduction of new evidence at this late stage dealt a lethal blow to his case and was a "gross infringement of his guarantees that left him with no means of self-defense." Moreover, under Article 8 of the Convention, a higher court must review a verdict of conviction;
g) the defense attorneys were unable to confer with their clients until after the latter had made their preliminary statements. Even then, military were present, rattling their weapons, close enough to listen in on the attorney/client conversations;
h) from the situations described here it is obvious that the defense was denied the minimum guarantees and ended up becoming "a mere spectator to the proceedings."

137. Arguments of the State:

a) the defense lawyers had the opportunity to put on whatever defense they deemed appropriate; the alleged victims "were tried in proceedings that scrupulously complied with the procedural guarantees established under Peruvian law, especially those relating to due process and the right of defense."The attorneys participated "actively in all the proceedings conducted throughout the process, advising their clients when they made their statements to the police and in the presence of the officers of the court. They filed briefs to support their arguments and presented oral arguments before the competent courts;"
b) according to the domestic court records, the identity of neither the prosecutor for the first stages of the inquiry nor of the witnesses was kept secret; and
c) the right of the four persons in this case to be presumed innocent was never violated, since it was not until the final ruling that they were considered guilty of the crime with which they were charged.

138. The Court observes that Article 717 of the Code of Military Justice, which is the applicable law in treason cases, provides that once the criminal indictment has been produced, the case files will be made available to the defense for a period of twelve hours. In the instant case, the criminal indictment was presented on January 2, 1994, and the attorneys were allowed to view the file on January 6, for a very brief time. The judgment was delivered the following day. As the applicable law dictated, the defense was never allowed to cross-examine the DINCOTE agents who participated in the investigation.

139. In the Basic Principles on the Role of Lawyers, number 8 -under the heading of "Special safeguards in criminal justice matters"- sets out the proper standards for an adequate defense in criminal cases. It reads as follows:

> All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials. [FN93]

[FN93] United Nations Basic Principles on the Role of Lawyers, relative to the special safeguards in criminal justice matters, approved by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders at its meeting in Havana, Cuba, from 27 August to 7 September 1990.

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140. Mr. Astorga Valdez' conviction illustrates even more vividly what little chance the accused had of putting on an effective defense. In his case, the accused was convicted in the court of last instance, based on new evidence that his defense attorney had not seen and consequently could not rebut.

141. This particular case illustrates how the work of the defense attorneys was shackled and what little opportunity they had to introduce any evidence for the defense. In effect, the accused did not have sufficient advance notification, in detail, of the charges against them; the conditions under which the defense attorneys had to operate were wholly inadequate for a proper defense, as

they did not have access to the case file until the day before the ruling of first instance was delivered. The effect was that the presence and participation of the defense attorneys were mere formalities. Hence, it can hardly be argued that the victims had adequate means of defense.

142. The Court therefore finds that the State violated Article 8(2)(b) and 8(2)(c) of the Convention.

* * *

VIOLATION OF ARTICLE 8(2)(D) (RIGHT TO LEGAL COUNSEL OF ONE'S CHOOSING)

143. Article 8(2)(d) of the Convention provides as follows:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]
d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

144. Argument of the Commission:

Article 18 of Decree-Law No. 25,475 and Article 2.c of Decree-Law No. 25,744 violate one's right to be assisted by legal counsel of one's choosing, recognized in Article 8(2)(d) of the Convention, because they stipulate that at any given time defense lawyers may have only one case involving the crimes to which said decrees refer. While the provisions in question were amended by Decree-Law No. 26,248, the new law was not applied in the instant case; the law's amendment "is evidence of the government's acknowledgment of the flaws" in the amended legislation.

145. Arguments of the State:

a) the alleged victims and their court-appointed attorney did participate in the police proceedings. In the presence of the military judge of inquiry, "the Chilean citizens were given the counsel of a court-appointed attorney because they stated that they had not hired private attorneys;" and
b) the alleged victims "were tried in proceedings that scrupulously complied with the procedural guarantees established in Peruvian law, especially those relating to due process and the right of defense."

146. The facts have shown that, by virtue of laws currently in effect in Peru, the victims were not allowed legal counsel between the time of their detention and the time they gave their statements to DINCOTE. Only then were they assigned court-appointed attorneys. Once the detainees had legal counsel of their choosing, the latter's role was peripheral at best (supra 141).

147. While the law that prohibits an attorney from assisting more than one defendant at the same time does have the effect of limiting the accused's choices of defense attorneys, it does not represent, per se, a violation of Article 8(2)(d) of the Convention.

148. However, in similar cases, where it was shown that defense attorneys had difficulty conferring in private with their clients, the Court ruled that Article 8(2)(d) of the Convention had been violated. [FN94]

[FN94] Suárez Rosero Case, supra note 80, paras. 79 and 83.

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149. The Court therefore finds that the State violated Article 8(2)(d) of the Convention.

* * *

VIOLATION OF ARTICLE 8(2)(F) (RIGHT TO EXAMINE WITNESSES)

150. Article 8(2)(f) of the Convention provides as follows:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]
f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

151. Argument of the Commission:

Given the provision contained in Article 13 of Decree-Law No. 24,575, "it is very difficult to get the police or army agents who took part in the investigation to appear in court and be cross-examined to enable the defense to refute the evidence." "As neither the accused nor their defense counsel were present when the agents' statements were taken, there was no cross-examination."

152. Argument of the State:

the proceedings […] scrupulously complied with the procedural guarantees established in Peruvian law, especially those relating to due process … (supra 145.b).

153. The law applied in the case did not allow cross-examination of the witnesses whose testimony was the basis for the charges brought against the alleged victims. The problem created by disallowing cross-examination of the police and military agents was compounded, as previously established (supra 141), by the fact that the suspects were not allowed the advice of counsel until they had made their statements to the police. This left the defense attorneys with no means to refute the evidence compiled and on record in the police investigation report.

154. As the European Court has held, one of the prerogatives of the accused must be the opportunity to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf, under the same conditions as witnesses against him. [FN95]

[FN95] Eur. Court H. R., case of Barberà, Messegué and Jabardo, decision of December 6, 1998, Series A No. 146, para. 78 and Eur. Court H. R., Bönisch case, judgment of May 6, 1985, Series A No. 92, para. 32.

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155. In the Court's view, the restrictions imposed on the victims' defense attorneys violated the defense's right to examine witnesses and to obtain the appearance of persons who might have shed light on the facts, as recognized in the Convention.

156. The Court therefore finds that the State violated Article 8(2)(f) of the Convention.

* * *

VIOLATION OF ARTICLE 8(2)(H) (RIGHT TO APPEAL THE JUDGMENT TO A HIGHER COURT)

157. Article 8(2)(h) of the Convention provides that:

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

[...]
h) the right to appeal the judgment to a higher court.

158. Arguments of the Commission:

a) the right to appeal the judgment to a higher court, recognized in Article 8(2)(h) of the Convention, is an essential part of due process and "is non-derogable under Article 27(2)" thereof; and
b) the right to appeal a judgment implies:
a review of the facts of the case, a thorough examination of the trial, thereby giving the defendants genuine assurances that their case will be heard and their rights guaranteed in accordance with the principles established in Article 8 of the Convention. These requisites were not present in the instant case, with the result that Article 8, paragraph 2), letter h) of the Convention was violated.

159. Arguments of the State:

a) during the proceedings conducted against the accused, "no formal complaint was filed charging the alleged procedural irregularity that purportedly violated the right" of the alleged victims. Quite the contrary, their defense attorneys availed themselves of the "principle of plural instances, filing appeals against the ruling of the judge of the Special Military Court of Inquiry, which were then decided by the higher court, i.e., the FAP Special Military Court; they even went so far as to file an appeal with the Supreme Court of Military Justice seeking to have the lower court ruling nullified;"
b) the testimony of the defense lawyers proved nothing. Their clients not only had the guarantee of a court of review, but also even had access to a still higher court, a third instance. This would not have happened in the regular court system, which has only two instances: a lower court and a higher court;
c) The judge of inquiry
hands down a decision, but that decision can be appealed to a higher court. The higher courts in this case are the Courts-Martial. Decisions at this second instance may also be appealed by means of a petition filed with the Supreme Court of Military Justice seeking nullification of the lower-court ruling. The decision at that instance is also subject to appeal, which at that stage would be the motion for review[.]

160. The Court observes that under the law that applies when the crime is treason, the judgment of first instance can be appealed; an appeal seeking nullification of the judgment of the court of second instance is also allowed. In addition to these two remedies, a petition can also be filed seeking review of the final judgment, based on the existence of supervening evidence and provided the individual has not been convicted of treason as a leader, head, or member of a command group of an armed organization. In the instant case, the appeal and the motion seeking nullification were filed by the attorneys for Mr. Castillo Petruzzi, Mr. Mellado Saavedra and Mrs. Pincheira Sáez, while Mr. Astorga Valdez' attorney petitioned for a review of the final judgment. As a last recourse, a remedy of cassation may be filed with the Supreme Court to challenge decisions of military courts in cases involving civilians. This remedy, recognized in the 1979 Constitution in effect at the time of the detention and applicable in the proceedings against the victims, was altered in the Constitution promulgated on December 29, 1993, which states that the remedy of cassation is allowed only in treason cases where the sentence is death. When the attorneys for Mr. Castillo Petruzzi and Mr. Astorga Valdez filed remedies of cassation, they were dismissed based on the provisions of the Constitution now in effect.

161. The Court observes, as it did earlier (supra 134), that proceedings conducted in the military courts against civilians for the crime of treason violate the guarantee of the competent, independent and impartial tribunal previously established by law, recognized in Article 8(1) of the Convention. The right to appeal the judgment, also recognized in the Convention, is not satisfied merely because there is a higher court than the one that tried and convicted the accused and to which the latter has or may have recourse. For a true review of the judgment, in the sense required by the Convention, the higher court must have the jurisdictional authority to take up the particular case in question. It is important to underscore the fact that from first to last instance, a criminal proceeding is a single proceeding in various stages. Therefore, the concept of a tribunal previously established by law and the principle of due process apply throughout all those phases and must be observed in all the various procedural instances. If the court of second instance fails to satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal

previously established by law, then the phase of the proceedings conducted by that court cannot be deemed to be either lawful or valid. In the instant case, the superior court was part of the military structure and as such did not have the independence necessary to act as or be a tribunal previously established by law with jurisdiction to try civilians. Therefore, whereas remedies, albeit very restrictive ones, did exist of which the accused could avail themselves, there were no real guarantees that the case would be reconsidered by a higher court that combined the qualities of competence, impartiality and independence that the Convention requires.

162. The Court therefore finds that the State violated Article 8(2)(h) of the Convention.

* * *

VIOLATION OF ARTICLE 8(3) (CONFESSION)

163. Article 8(3) provides that:

[...]

[A] confession of guilt by the accused shall be valid only if is made without coercion of any kind.

164. Argument of the Commission:

During the preliminary proceedings, the alleged victims were ordered to tell the truth, despite the fact that "the accused must speak freely [and] may not be subject to any kind of pressure to 'tell the truth'," as he is not a witness and is protected by law against having to testify against himself. "If the right is not to testify in general, there can be no obligation to testify in a certain manner. The maxim of the law is that silence can only be construed as a manifestation of innocence."

165. Argument of the State:

[the] proceedings […] scrupulously complied with the procedural guarantees established in Peruvian law, especially those relating to due process … (supra 145.b).

166. The fact that the violation of Article 8(3) of the Convention was not included in the application filed by the Commission but only in its final pleading does not preclude this Tribunal examining the allegation during the proceedings on the merits, in accordance with the principle of iura novit curia. [FN96]

[FN96] Cf. Blake Case, supra note 4, para. 112.

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167. The Court has established that during the preliminary testimony before the Judge of the Special Military Court of Inquiry, the accused were urged to tell the truth. However, nothing in the record suggests that any punishment or other adverse legal consequence was threatened if

they did not tell the truth. Nor is there any evidence to suggest that the accused were required to testify under oath or to swear to tell the truth, either of which would have violated their right to choose between testifying and not testifying.

168. The Court therefore finds that it has not been proven in these proceedings that the State violated Article 8(3) of the Convention.

* * *

VIOLATION OF ARTICLE 8(5) (PUBLIC PROCEEDINGS)

169. Article 8(5) of the Convention provides the following:

[...]

Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

170. Argument of the Commission:

The trial phase must be public; in other words, the general public must be present and the mass media should have its role. This is the principle upheld in such international norms as articles 14.1 and 14.2 of the International Covenant of Civil and Political Rights, articles 10 and 11.1 of the Universal Declaration of Human Rights, and Article XXVI of the American Declaration of the Rights and Duties of Man. This type of trial must also be:

Focused and immediate, which necessarily means that anything that might influence the court ruling must play itself out within the courtroom; in this way, the decision is informed solely by the allegations or evidence entered in the presence of the trial judge, and in a public hearing.

171. Argument of the State:

the alleged victims "were judged in proceedings that scrupulously complied with the procedural guarantees established in Peruvian law, especially those relating to due process and the right of defense."

172. The Court has established that the military proceedings against the civilians accused of having engaged in crimes of treason were conducted by "faceless" judges and prosecutors, and therefore involved a number of restrictions that made such proceedings a violation of due process. In effect, the proceedings were conducted on a military base off limits to the public. All the proceedings in the case, even the hearing itself, were held out of the public eye and in secret, a blatant violation of the right to a public hearing recognized in the Convention.

173. The Court therefore finds that the State violated Article 8(5) of the Convention.

XII. VIOLATION OF ARTICLES 25 AND 7(6) (JUDICIAL PROTECTION)

174. Article 25 of the Convention states that:

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.

175. For its part, Article 7(6) provides that:

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

176. Argument of the Commission:

"In the instant case, Peru is responsible for violation of the rights recognized in [Article] 25 of the American Convention on Human Rights", given the particularly egregious abridgement of the defendants' guarantees, which left them defenseless.

177. Arguments of the State:

Under law No. 26,248,

persons being detained and/or prosecuted for the crime of terrorism or treason could and still can file a petition seeking the respective writ of habeas corpus under the conditions stipulated in Article 12 of Law No. 23,506 - Habeas Corpus and Amparo Act, or an action of amparo with respect to the right of nationality and the guarantees of due process provided for in subparagraphs 15, 16 and 24 of Article 24 of that law.

178. The Commission argued violation of articles 7 and 25 in its final pleading, not in the original application. However, by virtue of the general principle of iura novit curia, this does not prevent the Court from examining the allegation during the proceedings on the merits of the case. [FN97]

[FN97] Cf. Blake Case, supra note 4, para. 112.

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179. Law No. 23,506 (Habeas Corpus and Amparo Act) was amended by Article 16.a of Decree-Law No. 25,398, promulgated on February 6, 1992, and published in the Official Gazette "El Peruano" on February 9 of that year. This 1992 decree provided that the writ of habeas corpus was impermissible when "petitioner's case is in its examining phase or when petitioner is on trial for the very facts against which remedy is being sought."

180. The Court understands that Article 6 of Decree-Law No. 25,659 of September 2, 1992, which regulates the crime of treason and was in force at the time the alleged victims were detained and the proceedings against them instituted, denied persons suspected of terrorism or treason the right to bring actions seeking judicial guarantees. That article reads as follows:

> Article 6.-During the preliminary proceedings and trial of those detained for, suspected of or on trial for the crime of terrorism classified in Decree Law No. 25,475, remedies seeking judicial guarantees shall not be permitted, nor may such actions be filed against the provisions of this Decree Law.

181. This article was amended by Decree-Law No. 26,248, promulgated on November 12, 1993, and in effect since November 26 of that year, which in principle permitted remedies seeking guarantees in behalf of those suspected of terrorism or treason. This new decree law, however, did nothing to improve the juridical situation of the accused, since its Article 6.4 stipulated that "writs of habeas corpus based on the same facts or grounds [that are] the subject of a proceeding that is under way, or a proceeding that is already resolved, are not admissible."

182. As the Court already held in this case [FN98] and in a previous case, [FN99] because Decree-Law No. 25,659 was in effect at the time the alleged victims were detained and during a good part of the proceedings in the domestic courts, the law prohibited any writ of habeas corpus on their behalf. The amendment introduced with Decree-Law No. 26,248 did not help the detainees because theirs was "a proceeding […] under way."

[FN98] Castillo Petruzzi et al. Case, Preliminary Objections, supra note 2, para. 62.
[FN99] Loayza Tamayo Case, supra note 4, para. 52.

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183. The fact that Mrs. Gloria Cano, defense counsel for Mr. Astorga Valdez, filed for two writs of habeas corpus (supra 86.11) does not alter the conclusion arrived at in the preceding paragraph, since those writs were not filed in order to have "a competent court […] decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention [was] unlawful." In fact, Mr. Astorga's defense counsel was filing to obtain a court order to allow his relatives to visit him.

184. The Court reiterates that the right to a simple and prompt recourse or any other effective remedy filed with the competent court that protects that person from acts that violate his basic rights

is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention […] Article 25 is closely linked to the general obligation contained in Article 1(1) of the American Convention, in that it assigns duties of protection to the States Parties through their domestic legislation. [FN100]

[FN100] Castillo Páez Case, supra note 4, paras. 82 and 83; Suárez Rosero Case, supra note 80, para. 65; Paniagua Morales et al. Case, supra note 3, para. 164; Blake Case, supra note 4, para. 102.

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185. The Court has further held that

the absence of an effective remedy to violations of the rights recognized by the Convention is itself a violation of the Convention by the State Party in which the remedy is lacking. In that sense, it should be emphasized that, for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. [FN101]

[FN101] Judicial guarantees in states of emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), supra note 86, para. 24.

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186. The above conclusion is true in ordinary and extraordinary circumstances. As the Court has pointed out, "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 the States Parties to establish for the protection of the rights not subject to derogation or suspension by the state of emergency." [FN102] Therefore, "any provision adopted by virtue of a state of emergency which results in the suspension of those guarantees is a violation of the Convention." [FN103]

[FN102] Judicial guarantees in states of emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), supra note 86, para. 25.
[FN103] Judicial guarantees in states of emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights), supra note 86, para. 26.

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187. Of the essential judicial guarantees not subject to derogation or suspension, habeas corpus is the proper remedy 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." [FN104]

[FN104] Habeas corpus in emergency situations (Arts. 27(2), 25(1) and 7(6) American Convention on Human Rights), supra note 86, para. 35, Neira Alegría et al. Case, Judgment of January 19, 1995. Series C No. 20, para. 82.

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188. The Court therefore finds that the State's enforcement of its domestic laws denied the victims the possibility of recourse to judicial guarantees; with that the State violated articles 25 and 7(6) of the Convention.

XIII. VIOLATION OF ARTICLE 5 (RIGHT TO PERSONAL INTEGRITY)

189. Article 5 of the Convention provides as follows:

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.
[...]
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.

190. Arguments of the Commission:

a) the system of keeping prisoners in isolation, confined to their cell for the first year of incarceration, and of prohibiting visits from consular officials, is a violation of articles 5(1) and 5(2) of the American Convention, as it constitutes cruel, inhuman, and degrading punishment that violates their right to personal integrity;
b) as the Convention's aim is proper respect for human dignity, it favors sentences whose aim is rehabilitation rather than punishment. Life imprisonment without any rehabilitative program will invariably cause irreversible decline. Execution of the sentence "must take into account each prisoner's individual circumstances"; in other words, the prisoner's state of mind must be analyzed and he should receive periodic treatment and check-ups;
c) the penalties established in the counter-insurgency laws are in many cases disproportionate to the seriousness of the offense. Sentences should be proportionate and humane;
d) "uninterrupted confinement to cell [for one year] is not listed among the sentences catalogued in Peru's Penal Code [… since] it is not a penalty [but rather] a method of executing a punishment consisting of deprivation of freedom." This type of incarceration

can only be ordered by a judicial authority, and strictly for reasons of security or to maintain order or discipline within the jail or penitentiary, and only for as long as is strictly necessary to get the emergency situation under control; or as a disciplinary measure imposed

following proceedings in which the principles of due process were observed. In any case, the confinement to cell ordered under these circumstances must be approved and supervised by a physician during its execution; and

e) under Article 27(1) of the Convention, a State may not invoke a state of emergency to avoid its "obligations under international law."

191. Arguments of the State:

a) this point was not addressed in its response to the application;

b) it pointed out that the testimony of witness Héctor Salazar Ardiles, who testified before the Court as to the condition of the alleged victims at the Yanamayo Prison, was hearsay (supra 85.c); and

c) it then asserted that the alleged victims had not been kept in isolation cells, as the facilities at the prison were such that it would be impossible to keep an inmate in isolation. With that same communication, the State submitted an accounting of the visits the alleged victims had received in 1998.

192. In the instant case, Chilean citizen Jaime Francisco Castillo Petruzzi was held incommunicado, in the hands of government authorities, for 36 days before being brought before a court. Mrs. Pincheira Sáez, Mr. Astorga Valdez and Mr. Mellado Saavedra were held incommunicado for 37 days. This, combined with the Commission's allegations -which the State did not challenge– to the effect that when their statements were to be taken in the preliminary proceedings, the persons in question appeared in court either blindfolded or hooded, and either in restraints or handcuffs, is in itself a violation of Article 5(2) of the Convention.

193. Also, on January 7, 1994, the court of first instance convicted Mr. Castillo Petruzzi, Mr. Mellado Saavedra and Mrs. Pincheira Sáez of treason and sentenced them to life imprisonment. The highest appellate court upheld their convictions on May 3, 1994, and there sentenced Mr. Alejandro Astorga Valdez to life imprisonment as well. The lower court rulings also stipulated the terms of the incarceration, which included "continuous confinement to cell for the first year of incarceration, and then forced labor, which sentences they [the alleged victims] are to serve in solitary-confinement cells chosen by the Director of the National Bureau of Prisons."

194. The Court has held that "prolonged isolation and deprivation of communication are in themselves cruel and inhuman punishment, 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." [FN105]

[FN105] Velásquez Rodríguez Case, supra note 19, para. 156; Godínez Cruz Case, supra note 19, para. 164; Fairén Garbi and Solís Corrales Case, supra note 19, para. 149.

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195. The Court has also ruled that under "Article 5(2) of the Convention, every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to life and to humane

treatment. Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners." [FN106] Incommunicado detention is considered to be an exceptional method of confinement because of the grave effects it has on persons so confined. "Isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly vulnerable position, and increases the risk of aggression and arbitrary acts in prison." [FN107]

[FN106] Neira Alegría et al. Case, supra note 104, para. 60.
[FN107] Suárez Rosero Case, supra note 80, para. 90.

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196. In the Loayza Tamayo Case, the Court ruled that:

The violation of the right to physical and psychological integrity of persons is a category of violation that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors (...) The degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance. [FN108]

[FN108] Cf. Case of Ireland v. the United Kingdom, Judgment of 18 January 1978, Series A No. 25. para. 167 DE L; and Loayza Tamayo Case, supra note 4, para. 57.

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197. In that same case, the Court held that:

Any use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person […], in violation of Article 5 of the American Convention. The exigencies of the investigation and the undeniable difficulties encountered in the anti-terrorist struggle must not be allowed to restrict the protection of a person's right to physical integrity.

The Court added that "incommunicado detention, […] solitary confinement in a tiny cell with no natural light, […] a restrictive visiting schedule […] all constitute forms of cruel, inhuman or degrading treatment in the terms of Article 5(2) of the American Convention." [FN109]

[FN109] Loayza Tamayo Case, supra note 4, paras. 57-58.

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198. The terms of confinement that the military tribunals imposed upon the victims with enforcement of Article 20 of Decree-Law No. 25,475 and Article 3 of Decree-Law No. 25,744, constituted cruel, inhuman and degrading forms of punishment that violated Article 5 of the American Convention. Evidence supplied by the parties showed that in practice, some of the

conditions, such as the solitary confinement, changed at a given point in time. The fact that a change eventually came about does not alter the Court's finding.

199. The Court therefore finds that the State violated Article 5 of the Convention.

XIV. VIOLATION OF ARTICLES 1(1) AND 2 OF THE CONVENTION

200. Article 1(1) of the Convention provides that:

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

201. Article 2 states the following:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.

202. Arguments of the Commission:

a) under the 1992 Statute of the National Emergency and Reconstruction Government, the executive branch was given the power to govern, if it so chose, through Decree-Laws issued by the President. Under this system, norms were introduced to regulate how courts should prosecute terrorism-related crimes. Among these laws were Decree-Laws Nos. 25,475 and 25,659, which instituted "procedures manifestly incompatible with […] the fundamental rights guaranteed by the American Convention on Human Rights and the Universal Declaration." The repressive and emergency legislation put into force in Peru "is itself a violation and breach of the American Convention";
b) the State has violated Article 1(1) of the Convention by its failure to comply with its obligation to respect the rights and guarantees protected under the Convention and to ensure their free and full exercise;
c) the proceedings in the case "contain serious defects that vitiate them beyond remedy, and the judge in the case can and should declare them nullified ex officio. As one of the branches of government, the Judiciary has an obligation to ensure due process and to adopt the necessary means to that end";
d) so long as Decree-Law No 25,659, which classifies aggravated terrorism as treason, and Decree-Law No. 25,744, which establishes the procedural rules for treason cases, remain on the law books, the human rights guaranteed in articles 1(1), 8, 20 and 25 of the Convention, and the obligations set forth in Article 2 thereof will be violated; and
e) as part of the obligation to ensure human rights, the States Parties are to adopt laws for effective protection of the rights and freedoms established in the Convention. As the Commission pointed out, "this obligation implies positive action, in that States are obliged to

adopt new measures; it also implies negative action, in that States are obliged to abolish those laws that are incompatible with the Convention."

203. Arguments of the State:

a) "exceptional criminal laws had to be enforced to cope with the irrational violence of terrorist organizations," one of which was the MRTA. Through Decree-Law No. 25,418, the State instituted the National Emergency and Reconstruction Government", its immediate aim being "to pacify the country with a legal system capable of ensuring that drastic sanctions would be applied to terrorists," the ultimate goal being domestic tranquility and order. This was the context in which Decree-Laws Nos. 25,475 and 25,659 were promulgated;
b) the application must be dismissed as unfounded: the State "never failed to observe the minimum judicial guarantees of due process and judicial protection, although it acknowledges that the law it enforced was stiff and drastic and considered to be one of the essentials that Peru had in its arsenal to combat the subversive organizations that were destroying the country;"
c) internally, that Peruvian legislation has never been challenged and is still in force; and
d) the laws under discussion were in effect "long before the detention and prosecution of the citizens involved. […] Nevertheless, once detained and processed, they had available to them the minimum judicial guarantees that international human rights instruments require in exceptional emergency cases."

204. As this Court has pointed out, there can be no doubt that the State has the right and the duty to guarantee its own security. Nor is there any question that violations of the law occur in every society. But no matter how terrible certain actions may be and regardless of how guilty those in custody on suspicion of having committed certain crimes may be, the State does not have a license to exercise unbridled power or to use any means to achieve its ends, without regard for law or morals. The primacy of human rights is widely recognized. It is a primacy that the State can neither ignore nor abridge.

205. As the Court has stated, the States Parties to the Convention have a commitment not to adopt measures that violate the rights and freedoms recognized in the Convention. [FN110] The Court has established that a law can violate per se Article 2 of the Convention, whether or not it was enforced in the instant case. [FN111]

[FN110] International responsibility for the promulgation and enforcement of laws in violation of the Convention (Arts. 1 and 2 American Convention on Human Rights), Advisory Opinion OC-14/94 of December 16, 1994. Series A No. 14, para. 36, Suárez Rosero Case, supra note 80, para. 97.
[FN111] Suárez Rosero Case, supra note 80, para. 98.

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206. The Court maintains that by subjecting the victims in the instant case to proceedings that violated various provisions of the American Convention, the State failed to comply with the duty to "respect the rights and freedoms recognized [t]herein and to ensure […] the free and full exercise of those rights and freedoms," pursuant to Article 1(1) of the Convention.

207. Furthermore, the Court finds that the provisions of the emergency laws adopted by the State to deal with terrorism, in particular Decree-Laws Nos. 25,475 and 25,659 enforced in the case of the victims in the instant case, violate Article 2 of the Convention because the State has not taken proper domestic legal measures to ensure the free and full exercise of the rights recognized therein, and the Court so states. The general duty under Article 2 of the American Convention implies the adoption of measures of two kinds: on the one hand, elimination of any norms and practices that in any way violate the guarantees provided under the Convention; on the other hand, the promulgation of norms and the development of practices conducive to effective observance of those guarantees. Obviously, the State did not comply with its obligations under Article 2 of the Convention in the case of the laws invoked to prosecute the defendants.

208. The Court therefore finds that the State violated articles 1(1) and 2 of the Convention.

XV. ON ARTICLE 51(2)

209. Article 51(2) of the Convention provides that:

[...]
2. Where appropriate, the Commission shall make pertinent recommendations and shall prescribe a period within which the state is to take the measures that are incumbent upon it to remedy the situation examined.

210. The Commission requested that the Court find that the State violated Article 51(2) of the Convention by failing to comply with the recommendations that appeared in report 17/97, adopted under Article 50 of the Convention.

211. The State did not address this point in its answer to the application.

212. Pursuant to this article, the Commission's opinions and conclusions and the period it prescribes for the State to comply with its recommendations are incumbent upon the State if the case in question is not submitted to the Court for consideration. The Court has previously stated that no violation of Article 51(2) of the Convention can be imputed in cases submitted to it. [FN112]

[FN112] Loayza Tamayo Case, supra note 4, para. 82.
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213. In the instant case, the measures provided for in Article 51.2 of the Convention were not taken, so that the Court need not examine the alleged violation of this article.

XVI. ARTICLE 63(1)

214. Article 63(1) of the Convention provides the following:

If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

215. Arguments of the Commission:

a) the State must fully compensate the alleged victims for the "grave material and moral damages they suffered and [be required to] order their immediate release and to pay them full compensation;"
b) the Commission is seeking "the claimants' conditional release, with restrictions on their movements or whatever other restrictions the Peruvian State deems necessary;" and
c) to comply fully with this request, the State must also order that the proceedings be nullified so that the treason trials cease to have any legal effects; should the State decide to institute new proceedings, they should be conducted in the regular courts and in accordance with the rules of due process, which include the following:

the presumption of innocence; the right to be assisted by a defense attorney; the right to sufficient time to prepare a defense; the right to examine the witnesses present and to call other persons as witnesses; the right to appeal the judgment to a higher court; the right not to be tried a second time for the same facts; the right to have a public criminal proceeding and other judicial guarantees.

216. Arguments of the State:

a) the "crime of terrorism, in its various modalities, is a serious common crime that imperils the democracy of nations;"
b) the alleged victims were sentenced to life imprisonment "once their responsibility for the commission of the crime was established," in keeping with the ius puniendi of the State.
The Peruvian State had every right to prosecute those people for the crime they committed and to try them in accordance with the procedures established in its domestic laws. They could not be prosecuted for another crime, such as terrorism for example, since the acts they committed fell within the scope of Decree Law 25,659. The State would have been at fault had they been brought to trial charged with another crime;
c) the final ruling in that case became res judicata;
d) the criminal activities in which the alleged victims engaged "inflicted serious material damage and caused the loss of precious human lives, forcing the State to adopt exceptional measures to deal with them." It is ironic that the State is being asked to compensate "the authors of abominable crimes of lese humanité, and even order their release; the precedent this would set would seriously imperil the stability of democratic governments struggling to combat subversive violence";
e) to claim procedural irregularities "is a breach of the sovereignty of Peru's domestic jurisdiction, perverts inter-American due process, and takes the side of those who would ignore the fact that domestic courts are in a better position to judge the facts and the law that applies to a

particular case," an assertion premised on the notion that international human rights protection is merely for the purpose of collaborating in or supplementing that protection;

f) the Inter-American Court is not a tribunal

that declares individuals innocent and does not have the right to order that criminals be released. The responsibility of the Inter-American Court […] is to judge the acts of a State […]. Given these facts, we are petitioning the Court to indicate what our responsibilities are […] as a State grappling with a particular set of social factors, as the law is not impervious to such factors. Clearly, acts of terrorism are an attack upon society; and

g) the request that the Court order [their] immediate release was "immaterial to the issue before the Court and previously before the Inter-American Commission on Human Rights" and was "not recommended in Confidential Report No. 17/97." There is an inconsistency between ordering a juridical act vacated, nullified, or expunged, which is tantamount to saying that "the juridical act never existed", and retrying the defendant "since one cannot be retried for the same facts."

217. As for the Commission's express request that the proceeding be nullified, the Court believes that certain observations are in order regarding the properties that every legal proceeding should have, the circumstances in the instant case and their consequences.

218. All litigation is a series of juridical proceedings that are chronologically, logically and teleologically interlinked. Some underpin or are the foundation of those that follow, and all are instituted for one ultimate purpose: to settle a difference by means of a judgment. Each kind of juridical proceeding has its own procedures, governed by rules that determine their institution and their effects. Finally, every proceeding must conform to the rules that require that it be instituted and that make the proceeding legal, a condition sine qua non for the proceeding to have legal effects.The validity of each juridical proceeding influences the validity of the whole, since each one is built upon the one that preceded it, and will in turn be the foundation of the one that follows it. That sequence of juridical proceedings culminates in the judgment that settles the controversy and establishes the legal truth with the authority of res judicata.

219. If the proceedings upon which the judgment rests have serious defects that strip them of the efficacy they must have under normal circumstances, then the judgment will not stand. It will not have the necessary underpinning, which is litigation conducted by law. The concept of nullification of a proceeding is a familiar one. With it, certain acts are invalidated and any proceedings that followed the proceeding in which the violation that caused the invalidation occurred, are repeated. This, in turn, means that a new judgment is handed down. The legitimacy of the judgment rests upon the legitimacy of the process.

220. It is important to distinguish the hypothetical under examination here from the hypothetical in which a court misapplies the law, incorrectly weighs the evidence, or does not adequately set forth the reasons or grounds for the judgment it hands down. In such cases, the judgment is valid and may ultimately hold up even if it is unfair or incorrect. Such judgments are built upon valid proceedings conducted in accordance with the law. They stand, even though they may contain errors in the understanding and application of the law. The same cannot be said of a judgment that lacks the proper procedural underpinnings, because such a judgment is built upon a foundation that cannot endure.

221. In the instant case, there are numerous violations of the American Convention, starting with the DINCOTE investigation and continuing through the proceedings in the military courts. This has been described, proven and settled in the preceding chapters of this judgment. In effect, the proceeding was conducted before a jurisdictional body that cannot be considered a "tribunal previously established by law" with jurisdiction over acts and defendants such as those in the case that concerns us: the judges and prosecutors in that proceeding were "faceless"; the defendants did not have defense counsel of their choosing in the period after they were taken into custody, and the defense attorneys who ultimately assisted them were not given an opportunity to confer with their clients in private, to have advance knowledge of the case, to bring forth evidence for the defense, to refute the prosecution's evidence, and to adequately prepare their case. Clearly, the proceedings in this case did not fulfill the minimum requirements of "due process of law", which is the very essence of the judicial guarantees established under the Convention. Failure to fulfill the requirements of due process renders the proceedings invalid. With that, the judgment is automatically invalid, as it does not meet the requirements for it to stand and have the effects that normally follow from an act of this nature. It is up to the State, then, within a reasonable time period, to order a new trial that ab initio satisfies the requirements of due process of law, is heard by a tribunal previously established by law (the regular courts), with full guarantees of a hearing and defense for the accused. The Court is not ordering their provisional release because such a preventive measure is for the competent domestic court to adopt.

222. In an earlier case, the Court held that the State

is obliged in accordance with the general duties to respect rights and adopt provisions under domestic law (Article 1(1) and (2) of the Convention), to adopt such measures as may be necessary to ensure that violations such as those established in the instance case never again occur in its jurisdiction. [FN113]

[FN113] Suárez Rosero Case, supra note 80, para. 106.

This Court also found that domestic laws that place civilians under the jurisdiction of the military courts are a violation of the principles of the American Convention. Therefore, the State is to adopt the appropriate measures to amend those laws and ensure the enjoyment of the rights recognized in the Convention to all persons within its jurisdiction, without exception. [FN114]

[FN114] Suárez Rosero Case, supra note 80, para. 87.

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223. As for the Commission's request that the victims be compensated, the Court considers that the State must pay the expenses and costs that the victims' relatives incurred by reason of these proceedings. To that end, based on principles of equity, the Court estimates those costs and expenses to be a total of US$10,000.00 (ten thousand United States dollars), or its equivalent in

Peru's national currency. Consequently, each of the four family groups concerned would receive US$2,500.00 (two thousand five hundred United States dollars).

224. For execution of the order of the Court set out in the preceding paragraph, the Court shall call upon the Inter-American Commission on Human Rights to determine which relatives of the victims incurred expenses and costs in connection with these proceedings and to so inform the State so that it might disburse the corresponding payments.

225. As for other forms of compensation, the Court considers that the present judgment is in itself a meaningful and important form of compensation and moral satisfaction for the victims and their relatives. [FN115]

[FN115] Suárez Rosero Case, Reparations, supra note 17, para. 72.

XVII. OPERATIVE PARAGRAPHS

226. Now therefore,

THE COURT

Unanimously

1. Finds that in the instant case, the State did not violate Article 20 of the American Convention on Human Rights.

Unanimously

2. Finds that the State violated Article 7(5) of the American Convention on Human Rights.

By seven votes to one,

3. Finds that the State violated Article 9 of the American Convention on Human Rights.

Judge Vidal-Ramírez dissenting.

Unanimously

4. Finds that the State violated Article 8(1) of the American Convention on Human Rights.

Unanimously

5. Finds that the State violated Article 8(2)(b), (c), (d) and (f) of the American Convention on Human Rights.

By seven votes to one

6. Finds that the State violated Article 8(2)(h) of the American Convention on Human Rights.

Judge Vidal-Ramírez dissenting.

Unanimously

7. Finds that it was not proven in the instant case that the State violated Article 8(3) of the American Convention on Human Rights.

By seven votes to one

8. Finds that the State violated Article 8(5) of the American Convention on Human Rights.

Judge Vidal-Ramírez dissenting.

Unanimously

9. Finds that the State violated articles 25 and 7(6) of the American Convention on Human Rights.

By seven votes to one

10. Finds that the State violated Article 5 of the American Convention on Human Rights.

Judge Vidal-Ramírez dissenting.

Unanimously

11. Finds that the State violated articles 1(1) and 2 of the American Convention on Human Rights.

Unanimously

12. Finds that the violation of Article 51(2) of the American Convention on Human Rights alleged in the instant case need not be examined.

Unanimously

13. Finds the proceedings conducted against Mr. Jaime Francisco Sebastián Castillo Petruzzi, Mrs. María Concepción Pincheira Sáez, Mr. Lautaro Enrique Mellado Saavedra and Mr. Alejandro Luis Astorga Valdez are invalid, as they were incompatible with the American Convention on Human Rights, and so orders that the persons in question be guaranteed a new trial in which the guarantees of due process of law are ensured.

Unanimously

14. Orders the State to adopt the appropriate measures to amend those laws that this judgment has declared to be in violation of the American Convention on Human Rights and to ensure the enjoyment and exercise of the rights recognized in the American Convention on Human Rights to all persons subject to its jurisdiction, without exception.

Unanimously

15. Orders the State to pay a sum totaling US$10,000.00 (ten thousand United States dollars), or its equivalent in Peruvian national currency, to those next of kin of Mr. Jaime Francisco Sebastián Castillo Petruzzi, Mrs. María Concepción Pincheira Sáez, Mr. Lautaro Enrique Mellado Saavedra and Mr. Alejandro Luis Astorga Valdez who show proof of having incurred costs and expenses by reason of the instant case. The procedure followed shall be the one described in paragraph 224 of this Judgment.

Unanimously

16. Decides to oversee compliance with the orders given in this Judgment.

Judge Vidal-Ramírez informed the Court of his Partially Concurring and Partially Dissenting Opinion. Judge de Roux-Rengifo informed the Court of his Concurring Opinion. Both are attached to this Judgment.

Done in Spanish and English, the Spanish text being authentic, in San José, Costa Rica, on May 30, 1999.

Hernán Salgado-Pesantes
President

Antônio A. Cançado Trindade
Máximo Pacheco-Gómez
Oliver Jackman
Alirio Abreu-Burelli
Sergio García-Ramírez
Carlos Vicente de Roux-Rengifo

Fernando Vidal-Ramírez
Judge ad hoc

Manuel E. Ventura-Robles
Secretary

So ordered,

Hernán Salgado-Pesantes
President

Manuel E. Ventura-Robles
Secretary

PARTIALLY CURRING AND PARTIALLY DISSENTING OPINION OF JUDGE VIDAL-RAMIREZ

My partially concurring and partially dissenting vote on this case was for the reasons I explained during the course of the deliberations, which were basically the following:

1. Peru signed the Convention on July 27, 1977, when the Military Government was in the process of preparing the ground for the return of democratic government and had convened the Constitutional Assembly that would eventually pass the 1979 Constitution. In the sixteenth final provision, that Constitution declared that Peru ratified the Convention and accepted the jurisdiction of the Commission and the Court. Peru officially deposited its instrument of ratification on July 28, 1978. On January 21, 1981, once the Government and Congress elected in 1980 had taken office, Peru filed the instrument acknowledging the binding jurisdiction of the Commission and of the Court, without reservation.

2. The first acts of terrorist violence occurred during the Military Government's final months, by which time elections had already been called for the restoration of democratic government. The Sendero Luminoso in the Andean region and the Tupac Amaru Revolutionary Movement [Movimiento Revolucionario Tupac Amaru (MRTA)] in the lowlands made incursions into Lima and other populated areas, where they began to stage dynamite attacks, assaults, kidnappings and other criminal acts.

The Government reacted to the terrorist violence by ordering states of emergency that had to be repeatedly extended, in accordance with Article 27 of the Convention and the 1979 Constitution (Article 231).

3. The terrorist violence took a terrible toll on life in Peru and prompted enactment of laws classifying terrorism as a crime and establishing increasingly more severe penalties. These laws invested the police with the kind of authority and power that made them more effective in the war on terrorism and enabled them to bring terrorists to trial, where they cases were heard in the civil courts by civilian judges.

4. By 1990 terrorism had made significant headway and inflicted considerable damage. It had ravaged the countryside and had infiltrated the cities. Lima, in particular, was in a state of emergency.

The Government had to combat the terrorist violence using a strategy whose legal underpinning was a very stringent and intimidating system of laws that, although intended to protect citizens and institutions, could clash with the Convention by curtailing some of the rights and guarantees recognized therein.

5. For reasons of internal politics, on April 5, 1992, the President of the Republic dissolved Congress and proceeded to call elections for a Constitutional Convention that would give Peru a new constitution. In this way, the Executive Power was called upon to legislate by way of decree-laws.

On May 7, 1992, Decree-Law No. 25,475 was put into effect and established a new legal description of the crime of terrorism and related crimes; the penalties for those crimes, one of which was life imprisonment; rules to govern investigations of terrorist activities, which put such investigations in the hands of the National Police; norms for indicting and trying terrorists in the regular courts, but with the identity of the judges and prosecutors kept confidential; rules for the defense; rules for execution of sentence; and finally, visitation rules.

Shortly thereafter, specifically on May 17, 1992, Decree-Law No. 25,499 called the Ley de Arrepentimiento [Repentance Act] was put into effect. It provided for reduced sentences, immunity and even pardons for those who, having engaged in the commission of crimes classified as terrorism, helped to combat it. Once Congress was installed, with Law No. 26,220 of August 19, 1993, other provisions were enacted to supplement the Repentance Act. Under Law No. 26,345, of August 31, 1994, terrorists were given until November 1, 1994, to avail themselves of the Repentance Act.

Although these measures yielded results, terrorism continued to escalate and peaked in July 1992, when a car bomb exploded near an apartment building on Calle Tarata in the Miraflores district of Lima. Many people died in the fire that consumed the building.

6. Decree No. 25,659, which took effect on August 14, 1992, classified the crime of aggravated terrorism under the nomen iuris of treason, with a penalty of life imprisonment. Effective that date, the military courts had jurisdiction in such cases, starting with the examining phase. The new law also provided that judicial guarantees could not be invoked during either the investigation or trial phase. It is important to note that Law No. 26,248, in effect since November 26, 1993, once again made the remedy of habeas corpus available to those charged with treason.

Under Decree-Law No. 25,148, in force since September 11, 1992, the crime classified in Decree Law No. 25,659 was to be prosecuted in the summary proceeding established by the Military Code of Justice. The judge of inquiry would have a maximum of 10 days in which to deliver a judgment. It also provided that motions to nullify rulings could be filed with the Supreme Court of Military Justice.

In mid September of 1992, the ideologue and head of the Sendero Luminoso was captured. It was then that the criminal activities of that terrorist organization began to taper off. The same was not true, however, of the MRTA, which stepped up its terrorist activities with assaults and kidnappings. It remained active despite the arrest and trial of a number of its leaders. The MRTA seized the residence of Japan’s Ambassador in Lima and held hostage hundreds of people who were there for the reception to celebrate Japan’s national holiday in December of 1997.

7. Once the Constitutional Congress had completed its work and a referendum was held on the 1993 Constitution, the latter took effect on December 30, 1993. As with the 1979 Constitution, its fourth final provision reaffirmed Peru's adherence to the provisions of the Convention.

The 1993 Constitution makes a distinction between treason and terrorism, although both carry the death penalty (Article 140). However, it is careful not to deviate from the treaties to which Peru is party. Under the new Constitution, military courts continue to have jurisdiction over both crimes (Article 173).The distinction between the two crimes makes it possible to classify aggravated terrorism, one form of the more generic crime of terrorism, as treason.

8. In August 1996, Law No. 26,655 created a commission to evaluate and propose to the President the granting of pardons and commutation of sentences for those convicted of treason based on insufficient evidence, where it might be reasonably presumed that they had no association with any terrorist activities or organizations. This commission worked until December 31, 1998 and thanks to its proposals miscarriages of justice in trials that mistakenly ended to convictions have been corrected and those who suffered unduly have been compensated.

With this partially concurring opinion, I have explained what terrorism has meant for the Peruvian people and the extraordinary lengths to which Peru was forced to go to stamp out the terrorist violence and pacify the country.

Nevertheless, given the provisions of the Convention and the fact that they are binding upon the Peruvian State, I have concurred in the Court's finding that the proceedings instituted under the emergency laws against the Chilean citizens who, as members of the MRTA, took up arms to threaten the lives of Peruvians and the safety of the citizenry, were invalid.

But for the same reasons, I cannot concur with the Court's finding to the effect that the Peruvian State violated Article 9 of the Convention:

1. Article 9 of the Convention embodies the principle nullum crimen sine lege, nulla poena sine lege, which informs the criminal justice systems of the countries of the inter-American system for the protection of human rights. In Peru, that principle is embodied in Article 2, subparagraph d of paragraph 24 of the 1993 Constitution, just as it was in the 1979 Constitution (Art. 2.20.d).
2. Decree-Law No. 25,659, which classifies aggravated terrorism as treason, describes the distinctive features that distinguish aggravated terrorism from generic terrorism, the legal description of which appears in Article 2 of Decree-Law No. 25,475.

In effect, Decree Law No. 25,659 specifies the aggravating circumstances that make simple terrorism treason: "a) Use of car bombs or similar explosive devices, weapons of war or similar weapons that kill people or inflict physical injury or affect their mental health or damage public or private property, or any other means that pose a serious threat to the public; b) Storage or unlawful possession of explosive materials, ammonium nitrate or the elements used to manufacture it, or willing provision of materials or elements that can be used in the manufacture

of explosives, their use in the acts provided for under the previous subparagraph (Article 1).” It adds that “The following shall constitute treason: a) membership in the ranks of the leadership of a terrorist organization, either as leader, chief or the like; b) membership in armed groups, bands, death squads or similar groups in a terrorist organization, and charged with the physical elimination of persons; c) supplying, providing, disseminating reports, data, plans, projects and other documents or facilitating terrorists’ access to buildings and premises in one’s charge or custody and thus helping to bring about the destruction described in subparagraphs a) and b) of the preceding article (Article 2)."

Having thus described the aggravating circumstances that transform simple terrorism into treason, Decree-Law No. 25,659 stipulates that treason shall carry the penalty of life imprisonment.

The crime described in Article 2 of Decree Law No. 25,475 is terrorism, whereas the crime described in Decree-Law No. 25,659 is aggravated terrorism, whose nomen iuris is treason. The military courts have been able to use this distinction to acquit or to decline jurisdiction in the case of persons accused of aggravated terrorism and to remand them to the regular courts, which has jurisdiction to prosecute simple terrorism.

3. Decree-Law No. 25,659 was in force on October 14 and 15, 1993, when the National Police detained the Chilean citizens. Therefore, the crime of aggravated terrorism with which they were charged was covered in the applicable law, as was the penalty it carried. At the time of their conviction, May 3, 1994, the applicable punishment was life imprisonment.

For the very same reasons I concurred with some of the findings of this judgment, I do not agree with the Court’s finding that the State violated Article 8(2)(h) of the Convention. In the consideranda of the judgment, which summarizes the facts, it was shown that the Chilean citizens did have recourse to a higher court, even though this was the military justice system.

For the same reasons, I must also dissent from the Court’s finding that the State violated Article 8(5) of the Convention.

While criminal proceedings should be public, as Peru’s Constitution recognizes, proceedings such as those instituted in the case of the Chilean citizens, or those that ought to be instituted, cannot necessarily be public and the circumstances surrounding this case certainly fit the exception allowed under Article 8(5) of the Convention.

Finally, I disagree with the Court’s finding that the State violated Article 5 of the Convention, for the following reasons:

1. In addition to the emergency provisions that Peru created to stamp out terrorist violence and further the country’s pacification, it also established sentencing guidelines for those convicted of the crime of aggravated terrorism constituting treason. These guidelines and regulations, like any others enacted in Peru, must be published in order to take effect. They thus find their way into the public domain.

2. These are the provisions that, in my judgment, the judgment should have taken into consideration, not the testimony from the attorneys of the two Chilean citizens. Theirs was a purely second-hand account, with no basis in fact, especially since the statement itself acknowledged that their knowledge of the treatment the convicted men received was pure hearsay.

Fernando Vidal-Ramírez
Judge ad hoc

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE DE ROUX-RENGIFO

I must begin with some comments concerning the judgment in the present case; one that concerns violations of the American Convention committed by Peru in trying four civilians –the victims in the instant case- in the military criminal courts.

The preamble to the American Convention begins by describing democratic institutions as the framework for a system of personal liberties and rights which the Convention is intended to reinforce. Article 29(c) de la Convention, moreover, provides that no provision of the Convention shall be interpreted as "precluding […] rights or guarantees that are […] derived from representative democracy as a form of government." These provisions (and also perhaps the one contained in Article 32(2) concerning the limitation of each person's rights by the demands of the general welfare in a democratic society) articulate the Convention's commitment to representative democracy, one that goes well beyond anything that Article 23, which recognizes the political rights (the right to vote and to be elected to office, and so on) to which every person is entitled, might encompass.

Thus, the American Convention establishes three sets of provisions for the protection of human rights: the first is set out in the articles that refer to the various rights and freedoms protected (articles 3 to 25); the second consists of articles 1(1) and 2, which establish the duty to respect and guarantee those rights, and to adopt the legislative or other measures necessary to give them effect; and third set, as the preceding paragraph suggests, somehow establishes an association between the protection of those rights and a democratic political system of government.

To give military courts the authority to prosecute civilians is, first of all, to deviate from the democratic principle of separation of powers * , because by so doing the executive branch is being given a function that is the purview of another branch of government, the judiciary. Indeed, in the situation submitted to the Court, the extraordinary method used in deviating from that principle was particularly objectionable: the institution that is the quintessence of the executive and coercive power of the State was given the sensitive job of compiling evidence on certain facts, determining the probative value of that evidence and, based on a given body of laws, determining which facts had been proven, so as to infer their effects in law. Clearly, some of the business of the State is not being driven by principles of modern democratic government, a

situation that threatens to weaken the structure and functioning of an even broader cross-section of democratic institutions.

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* The abbreviated space for opinions of this type is not the proper place to address the intimate relationship that exists between what the Convention calls "democratic institutions" and the principle of separation of powers.

However, judgments that find States responsible for violations of the American Convention that specifically involve the linkage that exists between the protection of human rights and democratic government and institutions will have to wait until more case law on that linkage has been developed. In the interim, the Court has based its condemnation of the practice of military courts prosecuting civilians on the solid grounds that Article 8(1) of the Convention provides. I do not believe any objection could be made to the Court's argument.

On the other hand, I do have reason to take issue with the Court's logic in asserting that the State violated Article 8(2)(h) of the American Convention, concerning the "right to appeal the judgment to a higher court."

For this issue, the Court used deductive reasoning. It departed from a premise that the Court established earlier in the judgment, which is that the State failed to respect the "guarantee of a competent, independent and impartial tribunal, previously established by law," upheld in Article 8(1) of the Convention. It then noted that "[I]f the court of second instance fails to satisfy the requirements that a court must meet to be a fair, impartial and independent tribunal previously established by law, then the phase of the proceedings conducted by that court cannot be deemed to be either lawful or valid." From there it concluded that because the guarantee of a competent judge had been violated in the instant case, so also had the right to appeal the judgment to a higher court. In other words, the Court inferred the violation of Article 8(2)(h) of the Convention from the violation of Article 8(1).

The American Convention on Human Rights has taken pains to separate the right to a hearing by a competent, independent and impartial tribunal previously established by law (Article 8(1)) from the right to enjoy an array of specific procedural guarantees (Article 8(2)), among them the right to appeal a judgment to a higher court (Article 8(2)(h)). To follow this normative plan, the Court needed to examine the alleged flaws in the nature and structure of the domestic courts that tried the victims (in light of Article 8(1)) and the inadvertent errors and noncompliance on the part of those courts in practice and in relation to each specific procedural guarantee. This is precisely what the Court did, except in the case of the guarantee recognized in Article 8(2)(h).

Because they were so egregious, the problems in the nature and structure of the domestic courts that tried the victims overshadowed the entire procedural picture presented to this Court. All the same, the Court should have done a thorough examination of that picture from the particular angle of Article 8(2)(h).

Trials of civilians conducted by military criminal courts are objectionable inasmuch as they violate the guarantee of the competent tribunal previously established by law. While they may

also violate the right to appeal to a higher judge or court (as happens, for example, with military proceedings in which there is no higher court), it is also possible that they may not. Denying the right to appeal to a higher court would be another breach of the Convention, in addition to the violation of Article 8(1). But if there were no higher court to which to appeal, any finding of a violation of Article 8(2)(h) would have to be omitted in order to respect the rigorous distinctions in the law that the American Convention makes.

The combination of factors in the instant case allows the Court to conclude that the victim's right to a court of second instance was not respected, but not because the courts that heard this case were part of the military system of justice, but rather because they did not function as tribunals that re-examine all the facts in a case, weigh the probative value of the evidence, compile any additional evidence necessary, produce, once again, a juridical assessment of the facts in question based on domestic laws and give the legal grounds for that assessment. It is only for this last failure -and even though I do not agree with the consideranda that led the Court to its finding- that I concur with the Court's finding that the State did, indeed, violate Article 8(2)(h) of the American Convention.

Carlos Vicente de Roux-Rengifo
Judge

Manuel E. Ventura-Robles
Secretary