In Durand and Ugarte Case,

the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), pursuant to Articles 29 and 55 of the Rules of Procedure of the Court (hereinafter "the Rule"), issues the following judgment:

I. INTRODUCTION TO THE CASE

1. When submitting this application before the Court, the Inter-American Commission of Human Rights (hereinafter "the Commission" or "the Inter-American Commission") relied upon Articles 50 and 51 of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and Article 26 together with the next Rules of Procedure of the Court in force [FN1]. The Commission stated this case to entitle the Court to decide whether the State of Peru (hereinafter "the State" or "Peru") had violated the following Articles of the Convention: 1(1) (Obligation to Respect Rights), 2 (Duty to Adopt the Clauses of National Law), 4 (Right to Life), 7(6) (Right to Personal Freedom), 8(1) (Judicial Guarantees), 25(1) (Judicial Protection) and 27(2) (Suspension of Guarantees), to the detriment of Mr. Nolberto Durand Ugarte and Mr. Gabriel Pablo Ugarte Rivera. The Commission asked the Court to demand Peru to undertake the necessary investigations for to identify, judge, and punish those who were guilty of committing these violations; to inform on the whereabouts of Mr. Durand Ugarte and Mr. Ugarte Rivera corpses, and to give them back to their relatives. Finally, the Commission asked the Court to demand the State to make full moral and material reparation and indemnification to the relatives of Nolberto Durand Ugarte and Gabriel Pablo Ugarte for the grave damage sustained as a result of the multiple violations of the rights recognized in the Convention and also

[to pay] for all expenses incurred by the victims relatives and representatives before the Commission and the Inter-American Court in processing the case.

In the final plea brief, the Commission stated the alleged violation of Article 5(2) of the American Convention.

[FN1] Proceedings approved by the Court in its XXIII Regular Session, held from January 9 to 18, 1991 and reformed on January 25 and July 16, 1993 and December 2, 1995.

II. COMPETENCE OF THE COURT

2. The Court is competent to have knowledge of the present case. Since July 28, 1978 Peru has been a State Party to the American Convention, and it acknowledged the mandatory competence of the Court on January 21, 1981.

III. PROCEEDINGS BEFORE THE COMMISSION

3. On April 27, 1987, the Commission received a complaint on alleged violations of human rights to the detriment of Mr. Durand Ugarte and Mr. Ugarte Rivera. On May 19 of the same year the corresponding sections of such accusation were sent to the State, according to Article 34 of the Rules of the Commission, and requested information on internal recourse exhaustion.

4. On January 19, 1988 the Commission reiterated to the State the petition to submit the corresponding information of the case. On next June 8, it insisted on the petition, indicating that, if no answer was received, it would consider the implementation of Article 42 of its Rules, wherein it stipulates that

[t]he facts indicated in the petition and whose relevant parts have been conveyed to the Government of the State concerned if the maximum deadline set by the Commission pursuant to the Article 34, paragraph 5, shall be considered truthful, said Government would not render the corresponding information as long as other certainty elements would not result in another conclusion.

On February 23, 1989 once again the Commission requested this information. On next May 31, the petitioners asked that denounced actions be taken for granted.

5. Peru submitted a brief dated September 29, 1989 wherein it stated that

[c]oncerning cases 10.009 and 10.078 of public domain they are in a judicial process before the Military Exclusive Court of Peru, pursuant to the laws in force, it must be stated that the internal jurisdiction of the State has not been yet exhausted, so it would be convenient for the Inter-American Court of Human Rights to wait until the closing of said cases, before taking a definitive stand on them.

6. On June 7, 1990, the Commission asked the State information for internal recourses exhaustion, the proceedings before the military Court and the whereabouts of Mr. Durand Ugarte and Mr. Ugarte Rivera, but it did not respond to this requirement.

7. On March 5, 1996, the Commission approved Report No. 15/96, which was sent to the State on May 8 of the same year. In the operative paragraphs of said report, the Commission decided:

1. TO DECLARE the State of Peru responsible for the violations to the detriment of Gabriel Pablo Ugarte Rivera and [Nolberto] Durand Ugarte, of the rights to personal freedom, life, and an effective judicial protection, as well as judicial guarantees of due legal process that are recognized, respectively, by Articles 7, 4, 25 and 8 of the American Convention. Likewise, in the present case, the Peruvian state has not fulfilled the obligation to respect the rights and guarantees stipulated by Article 1(1) of the American Convention.
2. TO RECOMMEND to the State of Peru to pay an adequate, prompt, and effective indemnification to compensate the victims' relatives for the moral and material damage as a result of the facts denounced and proven by the Commission and the Inter-American Court of Human Rights.
3. TO REQUIRE the Government of Peru that within 60 days after the notification of the current report, to communicate to the Inter-American Commission of Human Rights, the measures that would have been adopted in the present case, pursuant to the recommendations mentioned in the previous paragraph.
4. TO CONVEY the present report in keeping with Article 50 of the American Convention and to communicate to the Government of Peru that it does not have authorization to publish it.
5. TO SUBMIT this case to the consideration of the Inter-American Court of Human Rights if, within sixty days, the Peruvian State will not comply with the recommendation stated in paragraph 2.

8. On July 5, 1996 the State sent to the Commission a copy of the Report developed by a Task Force composed of representatives of various branch offices of the State. According to the Commission and based on said Report, it was evident that Peru had not followed its recommendations.

IV. PROCEEDINGS BEFORE THE COURT

9. On August 8, 1996, the application was submitted to the Court. The Commission appointed Mr. John S. Donaldson as delegate, Mr. Alvaro Tirado Mejía as alternate delegate, and Mr. Domingo E. Acevedo as advisor; whereas, Mr. Ronald Gamarra, Katya Salazar, José Miguel Vivanco, Viviana Krsticevic, Ariel Dulitzky, and Marcela Matamoros were appointed as assistants. On March 9, 1998, the Commission appointed Helio Bicudo and Domingo E. Acevedo as new delegates. Based on a note received on June 18, 1998 Mrs. Matamoros communicated to the Court her resignation to participate in the present case.

10. On August 23, 1996, the Secretariat of the Court (hereinafter "the Secretariat"), after a preliminary examination of the application undertaken by the President of the Court (hereinafter "the President"), informed it to the State.

11. On September 6, 1996 Peru informed the Court about the appointment of Mr. Jorge Hawie Soret as agent.

12. On September 19, 1996, the President, at the request of the State, extended the deadline for the appointment of the judge ad hoc until October 8, 1996. On the 4th of the same month and year, Peru appointed Mr. Fernando Vidal Ramírez as Judge
ad hoc.

13. On September 20, 1996, the State submitted a brief wherein it filed seven preliminary objections and requested the Court, based on the resulting objections, to arrange for the application file.

14. On October 29, 1996, the Commission submitted a reply to the preliminary objections and requested to Court to underestimate them as a whole.

15. On November 22, 1996, the State requested an extension of the deadline to respond to the application, which was granted until December 20, 1996. On November 26, 1996, the State submitted its reply to said application wherein it requested the possibility of "sending in an additional brief enough documentation to prov[e] its statements". In this connection, on December 3, 1996, the President of the Court granted the extension requested until January 6, 1997.

16. On January 6, 1997, Peru submitted a note related to the offering of evidence and on January 15, 1997, it sent "two leaflets with subversive nuances [entitled Pronouncements and Day of Heroism!] wherein [the] names of Nolberto Durand Ugarte and [Gabriel] Pablo Durand Rivera, appeared as participants who never gave up during the riots" that took place in San Juan Bautista prison, known as El Frontón (hereinafter "El Frontón"), and it also asked the Court to accept said documentation as evidence.

17. On January 22, 1997 the Inter-American Commission submitted some observations to the brief of the State of January 6, 1997, pointing out that it represented "an extension of the application reply filed by Inter-American Court of Human Rights, which does not harmonize with what was foreseen by the Rules of Procedure of the Court, particularly Article 37".

18. On March 18, 1997, the Secretariat, at the request of the Commission, asked Peru to send the following documentation: a list of prisoners delivered by the Chief of Identification of San Juan Bautista Prison to the 2nd Permanent Instruction Judicial Court of the Navy, a resolution of July 17, 1987 issued by the 6th Correctional Court of Lima; besides some majority and minority opinions issued by the Investigating Commission of the Congress of Peru about the facts of June 18 and 19, 1986. On May 19, 1997 the State reported difficulties to find July 17, 1987 decision, caused by a fire which took place in 1993, when files inside the Sixth Correctional Court of Lima were completely destroyed, but it also said it would try to find a copy or submit written proof from the Superior Court of Justice of Lima to confirm destruction of the file. On May 20, 1997, the State submitted the list and requested opinions. Until now, the decision of July 17, 1987 has not been submitted yet. In documentation submitted on January 24, 1999 there is a note dated

January 6, 1998 indicating that "the Sixth Court presently has been deactivated, [and] the staff who worked there points out that the Books from 1988 were destroyed during the fire some years ago in the attic of Record Files, not being able to determine if the file was sent to the Files of the Court or to the Court of Origin".

19. On September 28, 1998 the State submitted a brief related to the judicial situation of Mr. Nolberto Durand Ugarte and Mr. Gabriel Pablo Ugarte Rivera.

20. On October 26, 1998, the State, at the request of the Secretariat, submitted a brief related to a judicial situation of Mr. Nolberto Durand Ugarte.

21. On November 9, 1998, the Secretariat, following instructions by the President, asked the State, in keeping with Article 44 of the Rules of Procedure to submit some documentation regarding the filed habeas corpus recourse and charges of terrorism against Mr. Durand Ugarte and Ugarte Rivera as evidence for a better decision.

22. On November 27, 1998, the Inter-American Commission, by means of the Decision of the President, was asked, in view of said request in the application brief, to provide detailed information on evidence produced in Neira Alegría Case, asking for the inclusion of the evidence in this case.

23. On December 14, 1998, the Commission sent a brief wherein it indicated the documents of evidence produced in Neira Alegría Case, to be included in the evidence of this case. On January 11, 1999, the Secretariat sent said brief to the State and extended the deadline until the 22nd of the same month and year to submit observations it may deem relevant. To this date no brief has been submitted to this regard.

24. On January 6, 1999, the State requested a deadline extension to submit evidence for a better decision request, said extension was granted until January 22nd of the same year. On January 24, 1999, Peru submitted a pronouncement dated October 28, 1986 of the Court of Constitutional Guarantees concerning the action of habeas corpus, documentation regarding several procedures to find out about the actions related to the habeas corpus recourses and the case on terrorism, as well as documentation provided by the National and Corporate Penal Court for Cases of Terrorism, regarding Mr. Durand Ugarte and Mr. Ugarte Rivera. On March 3, 1999, the evidence was again requested to the State for a better solution which was previously asked for. To the date of this judgment, the State had not submitted the file processed for charges of terrorism against Mr. Durand Ugarte and Mr. Ugarte Rivera, or the documentation related to the habeas corpus recourse on their behalf in February 1986.

25. On April 7, 1999, the Court requested the OAS Secretary General for information related to the notification about the state of emergency or suspension of guarantees by Peru, decreed between June 1, 1986 and July 20, 1987. On May 19, 1999 Mr. Jean-Michel Arrighi, Director of the International Law Department of the OAS General Secretariat, informed that he had not received any notification to this regard.

26. On May 28, 1999, the Court issued a preliminary objections judgment.

27. On June 10, 1999 the Secretariat asked the Commission for a definite list of witnesses and experts who should be summoned at the public hearing. On June 29, 1999 the Commission informed that Mrs.Virginia Ugarte Rivera and the expert Robin Kirk would attend said hearing. On September 15, 1999, the Commission reported that said expert would not attend "for reasons beyond her control".

28. On June 25, 1999, the Secretariat, following instructions by the President, asked the State for information on the merits on the fact and right of the "Decision of NOT HAVING EVIDENTIAL FORCE FOR AN ORAL TRIAL" indicated in notices No. 544.98.INPE-CR-1 of September 18, 1998 and No. 635.98.INPE-CR-P of October 21, 1998, reiterating the request of sending the file related to the process followed against the defendants on charges of terrorism.

29. By means of the Decision of the President of August 4, 1999, the Inter-American Commission together with the State were summoned to attend a public hearing to be held at the seat of the Court on next September 20 to hear the statement by the witness before the Commission, and the parties were told to submit its final oral statements on the merits of the case, immediately after such evidence was received.

30. On September 20, 1999 the Court held a public hearing to be informed about the statement by the witness proposed by the Inter-American Commission.

Attended before the Court:

by the Inter-American Commission of Human Rights:

Domingo E. Acevedo, delegate;
Viviana Krsticevic, assistant;
María Claudia Pulido, assistant; and
Carmen Herrera, assistant.

As a witness proposed by the Inter-American Commission:

Virginia Ugarte Rivera

The State did not attend the public hearing despite being summoned.

31. On September 21, 1999, the Secretariat, following President's instructions, based on the powers conferred upon him by Article 44 of the Rules of Procedure of the Court, asked the Commission, as evidence for a better resolution, for the information related to the process followed on charges of terrorism against Mr. Nolberto Durand Ugarte and Mr. Gabriel Pablo Ugarte Rivera between June 18, 1986 and July 17, 1987 and, particularly, all information or documentation about the participation of Mr. Miguel Talavera Rospigliosi, attorney of the alleged victims in said process during the period. On October 4, 1999, the Commission submitted the above-mentioned information.

32. On September 20, 1999, the President informed the Commission that it had a thirty-day deadline to submit the final arguments.

33. On October 20, 1999, the Commission submitted its final argument brief.

34. On January 10, 2000 the Secretariat, following instructions by the President, informed the State that the deadline was granted to present final written arguments on the merits of the case until February 11 of the same year. On said date, the State submitted its final argument brief.

35. On June 9, 2000 the President decided to incorporate in the evidence in this case part of the evidence produced in Neira Alegría Case (infra para. 38).

V. DOCUMENTARY EVIDENCE

36. Together with the application brief, the Commission submitted a copy of 11 documents with the same number of annexes. [FN2]

[FN2] cf. "Barbarism is not fought with barbarism". Events in prisons in June 1986. Congress of the Republic of Peru. Alan García Pérez, Majority opinion of the Investigative Commission of the Congress of Peru on the events on June 18 and 19, 1986, in the prisons of Lurigancho, El Frontón and Santa Bárbara; habeas corpus recourse filed on February 26, 1986 by Virginia Ugarte Rivera on behalf of her brother Gabriel Ugarte Rivera; brief of the habeas corpus recourse filed on June 26, 1986 by Virginia Durand Ugarte on behalf of her son Nolberto Durand Ugarte and her brother Gabriel Ugarte Rivera; judgment of June 27, 1986 issued by the First Correction Court of Callao; judgment of July 15, 1986 issued by the First Correctional Court of Callao of the Supreme Court of Justice of Callao; judgment of August 13, 1986 issued by the First Penal Court of the Supreme Court of Callao; pronouncement of October 28, 1986 issued by the Court of Constitutional Guarantees; nominal relation of prisoners by terrorism; birth certificate of Nolberto Durand Ugarte; birth certificate of Gabriel Pablo Ugarte Rivera; and a report prepared by the Task Force composed of representatives of the Ministries of Justice, Interior, Defense, and Foreign Relations, as well as the Justice Department and the Judicial Branch of July 1996 in relation to the case No.10.009 before the Inter-American Court of Human Rights regarding Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera.

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37. When submitting its reply to the application, the State attached copy of two leaflets. [FN3]

[FN3] cf. leaflets entitled "Pronouncements" and "Day of Heroism".

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38. The following documentary and witness evidence produced in Neira Alegría Case were incorporated to the evidence of this case (supra para. 35): Minority opinion by the Congressional Investigative Commission of the Republic of Peru on the events of June 18 and 19, 1986, in

Lurigancho, El Frontón, and Santa Bárbara (Lima, December 1987) including an assessment of the events in San Juan Bautista (Former Frontón), San Pedro (Former Lurigancho), and Santa Bárbara prisons and of the decisions made by the Government to this regard, news articles on the events in San Juan Bautista (Former Frontón), San Pedro (Former Lurigancho), and Santa Bárbara prisons; autopsies carried out on the corpses of some prisoners of "El Frontón" by doctors Augusto Yamada, Juan Herver Kruger, and José Ráez González; and a file processed in the Military Exclusive Court related to the investigation of the events in San Juan Bautista prison on June 18 and 19, 1986. Likewise, the following statements and expert reports rendered during the public hearings held at the seat of the Court on July 6 and 10, 1993 on the merits of Neira Alegría et al Case:

a) Testimony of Sonia Goldenberg (journalist)

As journalist, she interviewed Jesús Mejía Huerta who told her how after the bombing of the prison only 70 prisoners were alive; that they were called in groups and some executions took place, that he had eight or ten bullet shots and was thrown, together with other wounded prisoners, into a ditch. Lately, the Blue Pavilion was bombed. Moreover, Juan Tulich Morales was interviewed by Mrs. Goldenberg who told her that he knew that the leading detainees were taken to San Lorenzo naval base and were executed.

b) Testimony of Pilar Coll (social worker)

In August 1987, she was assigned to an office of the Investigative Commission of the Congress in charge of gathering testimonies by the detainees' relatives in the prisons and survivors. Jesús Mejía Huerta told her in an interview, more openly, exactly what the previous witness had declared. She pointed out that some detainees' relatives knew that some survivors had already disappeared.

c) Judgment of Guillermo Tamayo Pinto Bazurco (civil engineer)

In 1987, the Center of Projects and Constructions, from which he was President, was hired by the commission of the Congress in charge of investigating the events in the prisons to technically assess what had happened in the Blue Pavilion from an engineering point of view. He visited El Frontón, whose Blue Pavilion was demolished. The total demolition was carried out by means of plastic explosives that were placed at columns' bottom. He also declared having observed tracks of the expansive wave outside the building, as well as the existence of 20 meters of tunnels that did not affect structure strength; there were no traces of explosions.

d) Opinion by Enrique Bernardo Cangahuala (civil engineer)

The deponent stated that he was hired by the commission of the Senate to carry out an assessment, from a civil engineering point of view, on the situation that took place in San Juan Bautista prison. After visiting the place and gathering antecedents, he got involved in the report preparation. The Engineering Association adopted this report, where they found that the tunnels did not lead to the coast's openings or evidence of explosives in the Pavilion columns was available. With the help of ten workers, it would have been possible to eliminate all the debris in

the pavilion within a month. If the intention of using explosives had been to clear the Pavilion, they would have been placed on the walls. According to their his opinion, explosives were placed to demolish the building. There is no evidence of a possible explosion inside the building. A plastic explosive could not cause a casual dynamite sympathetic explosion. There was also the possibility that people could use the tunnels as shelter but could not leave them.

e) Testimony of Ricardo Aurelio Chumbes Paz (attorney and court judge)

During the period of the facts he was a Judge in charge of preliminary of the stage of criminal proceedings of Callao. On June 18, 1986, he listened on the radio the news on the riots in El Frontón, and, at about 1 p.m. the President of the Supreme Court entrusted him with observing the facts, reporting them afterwards, but not being entitled for making decisions. Navy officials denied him means to move to the Penal Island. At 3:30 or 4 p.m., he received an habeas corpus in his office presented by the prisoners' attorney, and at about 9:30 p.m. a vessel was ready to take him to the Island. He interviewed the prison's director, who told him that the Island was under Navy control. He also interviewed the Vice-Minister of the Interior who informed him that the Government, by means of the Council of Ministers, had entrusted the Armed Forces with subduing the riots. After that, there were explosions and a blackout. Then, he approached a fence about 50 meters away from the prison and started shouting that prisoners' delegates should show up, but there was no reply. He was not allowed to speak to the Commander in Chief of the military operation, and while he was boarding the vessel at dawn, he heard a series of explosions. Three days later, he found out on mass media about the deaths caused by the actions to subdue the riots. He tried to go back to the prison but he was not allowed to do it because the prison had become a Restricted Military Zone. In some other rioting cases, lethal weapons were not needed to subdue the uprisings. Prisoners of El Frontón could not escape anyway. Guarantee or habeas corpus recourses in the specific case of El Frontón were inefficient to protect the life, physical integrity, and fundamental rights of individuals. While removing the corpses, fingerprints, tooth prints and footprints are usually taken, and photographs and fingerprints are taken when a prisoner goes to jail.

f) Testimony of José Antonio Burneo Labrín (attorney and professor of the human rights course in Universidad Mayor de San Marcos)

In 1986, he was director of the Juridical Department of the Comisión Episcopal de Acción Social (CEAS) of the Catholic Church. Two or three weeks after the events, Mrs. Alegría, the mother of Victor Neira Alegría and the father of Edgar Zenteno Escobar and William Zenteno Escobar, went to this office asking for information on the whereabouts of their relatives. Thus, he presented an habeas corpus recourse before the Twentieth First Court of Instruction of Lima, on July 16, 1986. The Chairman of the Joint Command of the Armed Forces and the General Commander of the Navy declared that said information should be requested to the penal authorities or to the Special Judge of the Navy in charge of body removal. The President of the National Penal Council submitted a list of detainees in El Frontón on the day of the events, including 152 inmates, among them Víctor Raúl Neira Alegría and the Zenteno brothers, and also reported on the availability of 27 safe and sound detainees and seven wounded people. The judge determined that habeas corpus did not proceed, a decision that was appealed, and the Correctional Court of Lima by two votes against one decided that there was no cause for the

appeal. On August 25, 1986 an extraordinary appeal was filed before the Supreme Court, and the Penal Court of this Trial decided to declare no nullity. CEAS filed an extraordinary appeal before the Constitutional Guarantees Court, and four of its members voted in favor of, that is, only one vote was missing to reach nullity because five favorable votes are required. Therefore, the national instance was exhausted. He advised the family to appeal before the Inter-American Commission.

g) Testimony of César Delgado Barreto (attorney)

This witness was elected Senator in 1985 and served as member of the Human Rights Justice Commission of the Senate. After the events in the prisons, at the request of the President of the Republic, he served in a bicameral investigative and multipartisan commission of thirteen members working for four months was appointed in which he took part. In the riots of El Frontón at first, the Republican Guard and then the Navy Infantry played an active role; at the first three rockets were launched, and later plastic explosives were used. In his opinion, there was disproportion in the means used because it was unnecessary to use explosives. The commission had the support from a group of engineers who prepared a report on the demolition. He does not know about any investigation to determine the whereabouts of Neira Alegría and the Zenteno brothers. Reports of on majority and minority opinions by the commission agreed upon the facts and disagreed upon the political constitutional point of view regarding the liability of the Ministers who approved the participation of the Joint Command in subduing the riots. One of the survivors informed a third party about rioter executions after they surrendered, but once he was summoned to confirm its version, he refused to do so.

h) Testimony of Rolando Ames Cobián (B.A. Political Science)

He was Senator in 1987 and appointed President of the Congress commission to investigate the events that took place during the riots in the three prisons. The commission strictly performed the investigation. Reports on majority and minority opinions agreed on the facts; the difference lies in the responsibility pointed out by each of them at the highest government level, regarding repression in prisons. The Government declared not taking rebellion in the three prisons as a police problem, but as “the great confrontation between the Government and Sendero Luminoso … because public releases and statements by the President of the Republic are clear in detailing events, Sendero Luminoso versus the Government”. All of this made possible for the subduing to be carried out in the fastest possible way by the Joint Command of the Armed Forces. Two thirds of the Blue Pavilion that were standing were demolished with dynamite placed at the outer columns thus producing an absolutely unnecessary toll of dead people among prisoners who were not actively resisting. There was no interest in looking for wounded people or other people inside the tunnels, even entrance to the prison was not allowed until one year later. Neira Alegría and the Zenteno brothers were not among the prisoners who surrendered, but they appeared in the list provided to the commission by the National Penitentiary Institute. Riots' survivors refused to declare before the commission. The Congress adopted the investigating commission majority report. The final explosion that demolished the prison, took place when there was no strong attack, but this was already over, and as a result of sympathetic dynamite explosion, but due to the explosions of the building columns. Besides the 28 prisoners who surrendered on the same day of the events, a day after one or two more prisoners appeared and three days later some

others did too. The investigative commission asked for information on the investigation undertaken by the Supreme Council of Military Justice, but the Naval Court did not provide any and even refused to provide the names of the officials who were in charge of the operation. The commission did have evidence related to the fact that prisoners had dynamite and tried to get information to explain why diverse means, like tear or enervating gas, were not used, and it was told that there was no time to apply them because of the urgency to subdue the riots that same night. There was no possibility for prisoners to escape.

i) Testimony of José Ráez González (surgeon)

At the request of the Navy, the Legal Medicine Institute was asked to designate two experts to carry out studies on corpses in El Frontón, and under those circumstances, he worked in the island from February to April 1987 and examined about 90 corpses. The objective of the legal doctor is to determine the cause of death and to help in the identification. The corpses had undergone all the stages of primary putrefaction, some were in mummification stage, and others had lost all soft parts and there were only fragments of the bodies. In many cases it was not possible to determine the cause of death because there only bone remains, and in other cases death was caused by multiple fractures. In some cases, remnants of clothes, size, sex, age, and dental remains were described. It is not within the scope of the doctor to keep in touch with the relatives' victims; identification is the Investigating Department´s duty. He was able to take fingerprints of some of the bodies. Crushing caused an overwhelming majority of the deaths. Once expert investigations were over, the deponent handled the protocols, summaries, and comments to the Naval Judge and signed the death certificates. There are many factors that avoid taking fingerprints of a corpse. He does not remember to have seen burning scars on the corpses.

j) Testimony of Augusto Yamada Yamada (Chief Doctor of the Pathological Anatomy of the Naval Hospital, Navy Officer and Captain of the Navy Health Frigate)

On June 19 and 20, 1986, he began doing autopsies in El Frontón. The police took fingerprints, and an odontologist took odontographs. He prepared autopsy protocols and the death certificates and followed orders by the Navy judge. Of the 38 autopsies he subscribed, in 17 a weapon-inflicted wound has been determined as the cause of death, and in 21, crushing, in some cases bullet wounds were multiple, and the shots were fired at a short distance. The Investigative Police was responsible for the identification. In four death certificates, the names of the deceased provided by the judge were added. No splinters were found in the bodies. The corpses were almost complete, except three who had no heads. He carried out the autopsies on June 19 and 20, several in July, and five on January 22, 1989.

k) Testimony of Juan Kruger Párraga (Anatomy-Pathologist)

Until 1989, he was the head of the Pathology Department of the Navy Medical Center, and his rank is Ship Captain. The purpose of an autopsy, among others, is to determine the cause of death, corpse identification does not concern the physician but the Investigative Police. He was asked to do the autopsies in El Frontón. The first time he went there was on July 5, 1986, and the last one on January 22, 1987. He did 23 autopsies and in most of them he pointed out the “stage of putrefaction” of the corpses, and that many of them had multiple fractures as a result of

crushing; none of the autopsy protocols he signed identified any person. Several odontologists took odontographs when dental pieces were found. The medical statement was submitted to the Navy Judge. Some of the corpses had civilian clothes on, but this information was not included in the protocols. There were no weapon-inflicted wounds in the corpses. Due to the corpse putrefaction stage, it was not possible to determine if death occurred on the 18 or 19. Each autopsy lasted two or more hours. A few of the corpses showed burns.

l) Judgment of Robert H. Kirschner (doctor and forensic pathologist)

He was Assistant Chief Examining Doctor and deputy principal of Cook County, Chicago, Illinois at the moment of rendering his statement. He has done over 7,000 autopsies throughout. In the case of El Frontón, authorities must, as usual, get fingerprints of the inmates, and it would have been easier to compare them with those of the corpses, as well as odontographs, tattoos, and old scars; therefore, family help is very important. On June 20, it would have been very easy, if the necessary information had been available, to identify all the corpses. It is very important to take photographs and prepare drawings of the disaster place before removing the corpses, even to identify the cause of death. Autopsies were very professional, but there was neglect by the people in charge of the identification; even now many identifications could be possible, even without exhumation, especially if families cooperate. There are a few cases in which identification is not possible. An internal blast would leave perceptible traces on the body.

m) Judgment of Clyde C. Snow (doctor and forensic-anthropologist)

Since 1984 he has been called several times outside the United States, to investigate mass disappearances or executions in Argentina, Bolivia, Chile, Guatemala, El Salvador, Iraq, Kurdistan, and former Yugoslavia. Many of these cases were even more difficult than El Frontón case because there was a list of prisoners and in penal records there should have been physical descriptions, fingerprints, dental evidence, etc. Somehow mummification makes identification easier, in particular through fingerprints and skin scars. Statistically, it is not possible for a doctor to have found 17 corpses among 96 presenting bullet wounds and that the other two doctors have not found any. In a building bigger than the Blue Pavilion corpses were removed and identified in two or three weeks. If he had been called to identify the corpses of El Frontón, first he would have gathered all the information on the victims and afterwards he would have taken photographs of the bodies in the places where they were found. Even seven months after the incident, it would had been possible to identify more than 90 percent of the bodies, and that even now these would be possible by gathering all the data on fingerprints and tooth prints and, in some cases by exhuming the bodies.

39. At the request of the Commission, the Court asked the State for some documents related to the case, of which the State only provided some (supra para. 18). [FN4]

[FN4] cf. a list delivered by the Head of the Identification Department from San Juan Bautista Penitentiary to the 2nd Permanent Instruction Court of the Navy. Majority opinion by the Investigating Commission of the Congress of Peru about the events on June 18 and 19, 1986, in Lurigancho, El Frontón, and Santa Bárbara prisons, Lima, December 1987. Minority opinion by

the Investigating Commission of Peru about the events on June 18 and 19, 1986; in Lurigancho, El Frontón and Santa Bárbara prisons, Lima, December 1987.

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40. The State submitted two notices related to the juridical situation of Durand and Ugarte. [FN5]

[FN5] cf. notice No. 544.98.INPE-CR-P from the Ministry of Justice on September 18, 1998; and notice No. 635.98. INPE-CR-P from the Ministry of Justice on October 31, 1998.

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41. At the request of the President, the Commission submitted a document as evidence, for a better resolution. Such document gathered information related to the process on charges of terrorism followed against Mr. Durand Ugarte and Ugarte Rivera and to the habeas corpus recourse filed as a result of the riot subduing. [FN6]

[FN6] cf. note of October 1999 from the Legal Defense Institute.

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42. The Commission submitted a newspaper article attached to the brief besides the assumptions of Article 43 of the Rules of Procedure. [FN7]

[FN7] cf. article entitled "Tribunal ordered 'freedom' to three killed defendants in El Frontón," published in “La República” newspaper on Friday, July 31, 1987.

VI. TESTIMONIAL EVIDENCE

43. At a public hearing, held on September 20, 1999, the Court listened to the following witness statement, on behalf of the Inter-American Commission:

Testimony of Virginia Ugarte Rivera, mother and sister of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera, respectively.

Her brother Gabriel Pablo was arrested in his apartment, on February 14, 1986 at 2:00 a.m. She never knew who was responsible for his detention. She found out when she found the house in a complete mess and a neighbor told her how civil policemen had taken him away. Neighbors were afraid of warning her because they had been threatened by the captors. In her searching, she went to Tahuantisuyu police station, but she was told that he was not there, and continued unsuccessfully looking for him at Independencia, Cachitá, Rimac, Sixth and Breña police stations. When she came back to her house, on the same day, her niece told her that policemen, some dressed in military uniforms while others in civilian clothes, had taken his son Nolberto away in a white truck, together with other persons around 11:00 a.m. while working as a

salesman. She did not know where his son was until 8 days after his detention, precisely during an interview with Esther Moreno, mayor of Independencia, only for being recommended to speak to the corresponding mayor, who at the same time advised her to meet with Senator Genaro Ledezma. The Senator gave her a letter for DINCOTE to look for them, and afterwards he himself accompanied her. At that moment, she knew about their whereabouts and 15 days later, she was able to see them at DINCOTE; they were mistreated and with swollen and deformed faces as a result of the beatings, according to what his son and brother told her. They stayed around 15 to 18 days at DINCOTE, and then they were transferred to the Sixth Police Station, later to the Justice Palace of Lima, and finally they were taken to El Frontón, at the end of February. When she visited them on Saturdays and Sundays at the political prisoners' section in El Frontón prison she, together with other relatives' prisoners were threatened by the guards. Thanks to the advice by the priest from her community, she was able to hire Doctor Miguel Talavera as her relatives' attorney. Two habeas corpus actions were filed to free them. She found out on the radio about the uprisings in El Frontón on June 18, 1986. Once at Callao, many prisoners' relatives were shouting for them not to be killed, but they could see too much smoke on the island. Around 10:00 a.m., the police and the army, wearing hoods, took away the prisoners' relatives who were at Callao on trucks. So she stayed until 3:00 or 4:00 p.m., but she did not know anything about what had happened to her relatives in the incident. She did not know about their relatives' fate on the media. Her attorney indicated that they were maybe taken to San Lorenzo or that they were set free. They filed an habeas corpus recourse before the Callao Court. She looked for their names in the list of deceased people during the riots, that were available at the Palace of Justice, but she was not able to find them there. She went to the Central Morgue where corpses were taken after the uprisings, but her relatives' bodies were not there. Those at the Central Morgue were "all burned, head and hair burned too, some of them were crushed and some destroyed". She was not able to find them either among the corpses at Huachipa cemetery where she looked among the dead bodies. None of the authorities gave her an explanation about her relatives' fate. Their bodies were never given to her and on the newspaper she found out that after the riots her son and brother were declared judicially not guilty. Later on, she suffered from a partial paralysis of her body and was hospitalized for several months and stated that she was afraid for what could happen to her after submitting her statement before the Court.

VII. EVIDENCE ASSESSMENT

44. Once evidence described was gathered, the Court shall determine the general criteria, most of them developed by the jurisprudence of this Tribunal, about evidence appraisal in this case.

45. In an international tribunal such as the Inter-American Court whose one of the main tasks is to protect human rights, the proceedings had some peculiarities that differentiated it from a national law process, being the latter less formal and more flexible than this one, without disregarding legal certainy and process balance between the parties. [FN8]

[FN8] cf. Castillo Petruzzi et al Case. Judgment of May 30, 1999. Series C No. 52, para. 60; Castillo Páez Case. Reparations (art. 63(1) Inter-American Convention on Human Rights).

Judgment of November 27, 1998. Series C No. 43, para. 38; Loayza Tamayo Case. Reparations (art. 63(1) Inter-American Convention on Human Rights). Judgment of November 27, 1998. Series C No. 42, para. 38; Paniagua Morales et al Case. Judgment of March 8, 1998. Series C No. 37, para. 70; Caballero Delgado and Santana Case, Preliminary Objections. Judgment of January 21, 1994, Series C No. 17, para. 44; and Cayara Case, Preliminary Objections. Judgment of February 3, 1993. Series C No. 14, para. 42.

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46. On the other hand, it is necessary to bear in mind how international jurisdiction of human rights differs from penal justice and must not be confused with it. Whenever the States submit themselves before the Court, they are never subjected to a criminal proceeding because the Court does not punish liable parties for the violation of human rights. On the contrary, its function is to declare that a human right has been violated to the detriment of some persons, to protect the victim and to determine the reparation of damages caused by the States submitted to the international responsibility resulting from said violation. [FN9]

[FN9] cf. Paniagua Morales et al Case, supra note 8, para. 71; Suárez Rosero Case, Judgment of November 12, 1997. Series C No. 35, para. 37: Fairen Garbi and Solís Corrales Case. Judgment of March 15, 1989. Series C No. 6, para. 136; and Godínez Cruz Case. Judgment of January 20, 1989. Series C No. 5 para. 140; Velázquez Rodríguez Case. Judgment of July 29, 1988. Series C No. 4, para. 134.

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47. Besides direct evidence, whether by testimony, documentary or by an expert, international tribunals –as well as the internal ones- are entitled to ground their decisions on circumstantial evidence, hints, and assumptions, whenever sound conclusions can be reached about the facts subjected to an examination. To this regard, the Court has stated that

to exercise its jurisdictional functions, to obtain and assess the necessary evidence in the decision making process of the cases that could, under some circumstances, use both circumstantial evidence, hints, and assumptions whenever sound conclusions could be reached based on the facts. [FN10]

[FN10] cf. Villagrán Morales et al Case. Judgment of November 19, 1999. Series C No. 63, para. 69. Castillo Petruzzi et al Case, supra note 8, para. 62; Loayza Tamayo Case, supra note 8, para. 51; Paniagua Morales et al Case, supra note 8, para. 72; Blake Case. Judgment of January 24, 1998. Series C No. 36 paras. 47 and 49; Gangaram Panday Case. Judgment of January 21, 1994. Series C No. 16, para. 49; Fairén Garbi and Solís Corrales Case, supra note 9. para. 133; Godínez Cruz Case, supra note 9, para. 136; Velázquez Rodríguez Case, supra note 9, para. 130.

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48. Likewise, as pointed out by the Court, appreciation evidence criteria before an international court of human rights have a larger scope; because the international liability of a

State to determine the violation of rights of a person gives the court more flexibility in evaluating relevant facts of the submitted evidence based on logic rules and experience. [FN11]

[FN11] cf. Villagrán Morales et al Case, supra note 10, para. 72; Castillo Petruzzi et al Case, supra note 8, para. 83; Blake Case, supra note 10, para. 50; Castillo Páez Case. Judgment of November 3, 1997. Series C No. 34 para. 39; and Loayza Tamayo Case. Judgment of September 17, 1997. Series C No. 33, para. 42.

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49. The Court must evaluate documents and testimony submitted in the case.

50. Concerning the documentary evidence produced by the Commission and the State (supra para. 36 and 37), the Court acknowledges the evidence value of the documents submitted that, besides that, they were not objected or argued.

51. This Court considers the parties should provide the requested evidence to the Tribunal whether documentary, testimony, by an expert or any other category. The State and the Commission should render the legal probative elements required -as evidence for a better decision or at the request of the party- so the Tribunal can have the largest amount possible of judgment elements to be aware of the facts and to motivate further resolutions. To this regard, it is mandatory to take into account that in human rights violation the plaintiff may not have the evidence that could only be gathered with State cooperation. [FN12]

[FN12] cf. Neira Alegría et al Case. Judgment of January 19, 1995. Series C No. 20, para.65; Gangaram Panday Case, supra note 10, para. 49; Godínez Cruz Case, supra note 9, paras. 141 and 142; and Velázquez Rodríguez Case, supra note 9, paras. 135 and 136.

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52. In this case, on several occasions the State omitted to provide the requested documentation. Therefore, the following documents were not available: file processed on the charges of terrorism against Ugarte Rivera and Durand Ugarte; decision of July 17, 1987, besides information about fact motives and rights of said decision reflected in notices No. 544.98.INPE-CR-P from the Ministry of Justice and No. 635.98.INPE-CR-P from the Ministry of Justice on September 18, 1998 and October 31, 1998, respectively. Under those circumstances, Peru disregarded handing relevant documentation to the Tribunal for fact acknowledgement.

53. Virginia Ugarte Rivera testimony is only admitted as long as it agrees with the intention of the proposed interrogatory by the Commission and shall be assessed within the group of evidence in this proceeding, according to the principle of “reasoned judgment”.

54. Evidence resulting from Neira Alegría Case, added to evidence in this case (supra para. 38) shall be similarly assessed within the context of the corresponding evidence to these proceeding and in keeping with the rules of “reasoned judgment”.

55. Documentary evidence produced by the Commission, at the request of the Court, as evidence for a better decision, shall be evaluated in similar terms mentioned in previous paragraphs.

56. Regarding notices No. 544.98.INPE-CR-P and No. 635.98.INPE-CR-P from the Ministry of Justice, of September 18, 1998 and October 31, 1998 respectively, that were untimely submitted by the State, the Court considers them useful documentation to render information about the proceeding of terrorism followed against Durand Ugarte and Ugarte Rivera in Peru, and incorporated into the evidence of the present case, in compliance with Article 44 (1) of the Rules of Procedure, and will be assessed within the context of the whole evidence in the present case, and in accordance with the rules of "reasoned judgment".

57. Considerations stated in the previous paragraph are also applicable to the newspaper article untimely submitted by the Commission, on January 22, 1997, containing information related to Durand Ugarte and Ugarte Rivera situation.

58. Peru Political Constitution of 1979, the Organic Law of Military Justice (Executive Order No. 23201) and the Code of Military Justice (Executive Order No. 23214) are considered useful for the resolution of this case, therefore added to probative antecedent as stipulated by Article 44(1) of the Rules of Procedure. [FN13]

[FN13] cf. Political Constitution of Peru approved on June 12, 1979, Organic Law of Military Justice (Executive Order No. 23201) of July 28, 1980: and Code of Military Justice (Executive Order No. 23214) of July 24, 1980.

VIII. PROVEN FACTS

59. Based on document examination and witness statement, as well as declarations stated by the State and the Commission, in the development of proceedings, this Court considers the following facts as proven:

a. on February 14 and 15, 1986, Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were detained respectively by members of the Department Against Terrorism -DIRCOTE- under suspicion of having participated in acts of terrorism; [FN14]
b. Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were detained without any warrant or having been found guilty of a flagrant felony; [FN15]
c. Mr. Gabriel Pablo Ugarte Rivera was denied the right to have a defense attorney because he was forced to expressly give up this right; [FN16]
d. once police investigation went through, Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were sent to the 39 Instruction Court of Lima, on March 4, 1986, when a criminal proceeding was started for the alleged crime of terrorism, and file No. 83-86 was opened. Durand Ugarte and Ugarte Rivera were transferred to El Frontón by means of a warrant. [FN17]
e. on February 25 and 26, 1986, Virginia Ugarte Rivera filed two habeas corpus recourses before the 46th Instruction Judicial Court of Lima, one on behalf of her son Nolberto Ugarte and

the other of her brother Gabriel Pablo Ugarte Rivera, wherein she asked for the protection of the physical integrity of her relatives, free access to a defense attorney, and immediate freedom of the detainees. Said recourses were declared groundless. [FN18]

f. on June 18, 1986 simultaneous uprisings took place at three penal centers of Lima: the Social Re-Adaptation Center -CRAS- "Santa Bárbara", the Social Re-Adaptation Center -CRAS- San Pedro (former "Lurigancho"), and the Blue Pavilion from San Juan Bautista CRAS, (former El Frontón), where Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were detained; [FN19]

g. prisoners took over the pavilions, after taking as hostages some of the members of the Republican Guard and some of the weapons they had. Under those circumstances, negotiations developed between the penitentiary authorities in coordination with competent judicial authorities and rioters to know their claims; [FN20]

h. the President of the Republic of Peru summoned the Council of Ministers to an extraordinary session on June 18, 1986, also attended the Joint Command of the Armed Forces. This meeting was held within the juridical framework pointed out by Executive Order No. 012-86-IN, dated June 2, 1986, which "extende[d] the Emergency State... in the Province of Lima and Constitutional Province of Callao [and decreed that] in those provinces internal order should be controlled by the Armed Forces. In this meeting it was decided that after the intervention of the Peace Commission to obtain rioters' surrender, the Joint Command of the Armed Forces should be ordered to subdue the uprisings. [FN21]

i. on June 19, 1986, the President of the Republic issued Supreme Order No. 006-86-JUS, wherein it declared the above mentioned prisons as "restricted military zone" and formally, they remained under the jurisdiction of the Joint Command of the Armed Forces, while emergency state extended in compliance with Supreme Order No. 012-86-IN. This standard forbade the entrance of civilian and judicial authorities to El Frontón, giving to the Navy of Peru absolute control of the prison. Said order was published on the next day in the official newspaper, on June 20, 1986, with the explicit indication of being in force since its issuing (on June 19, 1986) even though military operations performed on June 18 and 19 were over and the riot was controlled; [FN22]

j. the Navy and the Republican Guard, under the Joint Command, were entrusted with subduing the riots at El Frontón. Military operations started at 3:00 on June 19. The Special Operation Task Force (FOES) carried out the demolition of the Blue Pavilion causing great number of deaths and wounded prisoners. The Blue Pavilion was an isolated area of the prison, where the events took place. There was an evident disproportion between the riots danger and actions taken to subdue it; [FN23]

k. Supreme Order No. 006-86-JUS allowed that exclusive military court to get knowledge of the events resulting from the subduing of the riots, not excluding the common jurisdiction. On August 27, 1986, the Supreme Court settled the competence debate stating that corresponding knowledge of the process should be placed on the military court. [FN24]

l. the 2nd Navy Permanent Instruction Court started a proceeding to determine the possible penal responsibility of Navy's members who subdued the uprisings. On June 6, 1987 the cause was acquitted, and it was determined that there was no responsibility among the defendants; such decision was confirmed on the 16 of the same month and year by the Permanent Council of the Navy. By decision of the Supreme Council of Military Justice the proceeding was reopened to implement some missing proceedings, none of them had any relationship with the identification

of the detainees. It definitively concluded on July 20, 1989 reaching the decision that there was no responsibility among those who subdued the riots; [FN25]

ll. according to the proceeding discussed in the military court, 111 persons died (bone remains of 14 persons and 97 corpses) and 34 survivors who surrendered, amounting to a total of 145 persons, while the unofficial list handed by the President of the National Penitentiary Council included 152 inmates before the riots. Removal of debris was carried out from June 20, 1986 to March 31, 1987; [FN26]

m. identification of bodies was not carried out diligently enough after the riot subduing, and no help was requested from victims' relatives to this end. Out of 97 corpses only 7 were identified after autopsies. According to many protocols of autopsies crushing and multiple traumas appeared as the causes of inmates' death. Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera are not included in the list of survivors, and their corpses were never identified; [FN27]

n. regarding the uprisings at El Frontón and the other two prisons, the National Congress of Peru designated an investigating commission, which was formally founded on August 7, 1987. In December of that year, a report by majority and another by minority were submitted to the Congress by this commission; [FN28]

ñ. in keeping with the Organic Law of the Peruvian Military Justice (Executive Order No. 23.201), "Military Justice Tribunals represent an outstanding body of the Armed Institutes". Judges belonging to the Exclusive Military Court are, at the same time, members assigned to active service according to Articles 6, 22, and 31 of said Executive Order. Besides, it is mandatory to be an attorney to be a member of the military court, with the exception of those who were part of the Military Juridical Body; [FN29]

o. on June 26, 1986 Virginia Ugarte filed an habeas corpus recourse before the First Instruction Judicial Court of Callao on behalf of her son Nolberto Durand Ugarte and her brother Gabriel Pablo Ugarte Rivera, asking for the investigation and clarification of their whereabouts, as well as for respecting the following rights: life, personal integrity, and communication access. [FN30]

p. habeas corpus stated the director of the National Penitentiary Institute and the San Juan Bautista CRAS director (Former El Frontón) as liable parties and in its proceedings the followings measures were adopted:

i) on June 27, 1986 the First Instruction Court of Callao declared such recourse as unfounded;

ii) on July 15, 1986, the First Correctional Tribunal of the Supreme Court of Callao confirmed the judgment;

iii) on August 13, 1986 the First Penal Hall of the Supreme Court declared "no nullity" in the judgment issued by the Correctional Tribunal that confirmed the verdict of June 27, 1986;

iv) on October 28, 1986 the Constitutional Guarantees Tribunal “declared that the Supreme Court of Justice decision unchanged, and that the right of the plaintiff to restate the action was prevailing"; [FN31]

q. Supreme Orders No. 012-86-IN of June 2, 1986, wherein the State of Emergency was "extended in the province of Lima and in the Constitutional Province of Callao [and decreed internal order" under the control of the Armed Forces] in said provinces, and No. 006-86 JUS of June 19, 1986, wherein

it was declared restricted military zone under the jurisdiction and competence of the Joint Command of the Armed Forces in the Penitentiary facilities of "San Juan Bautista" (former El Frontón), "San Pedro" (former Lurigancho), and “Santa Bárbara” of Callao while the state of emergency is in force by means of Supreme Order No. 012-86-IN of June 2, 1986.

they did not suspend the habeas corpus recourse explicitly, but it was inefficient due to a prohibition stating that civil judges were not allowed to enter the prisons because they were restricted military zones; and because stipulations prevented the investigation and determination of the whereabouts of the people who benefited from the filed recourse [FN32];

r. Nolberto Durand Ugarte and Gabriel Ugarte Rivera were exempted from any responsibility and ordered to set free. However, such an order was void at that moment because those persons were already missing, a situation that still continues to the present time. [FN33]

[FN14] cf. Testimony of Virginia Ugarte Rivera before the Court on September 20, 1999 and brief of habeas corpus filed on February 26, 1986 by Virginia Ugarte Rivera on behalf of her brother Gabriel Ugarte Rivera.

[FN15] cf. Brief of habeas corpus filed on February 26, 1986 by Virginia Ugarte Rivera on behalf of her brother Gabriel Ugarte Rivera.

[FN16] cf. Brief of habeas corpus filed on February 26, 1986 by Virginia Ugarte Rivera on behalf of her brother Gabriel Ugarte Rivera.

[FN17] cf. List handed by the Head of Identification of San Juan Bautista prison to the 2nd Permanent Instruction Court of the Navy where a proceeding was started due to the events in El Frontón; habeas corpus filed on February 25, 1986 by Virginia Ugarte Rivera and her testimony before the Court on September 20, 1999; notices No. 544.98. INPE-CR-P from the Ministry of Justice and No. 635.98. INPE-CR-P from the Ministry of Justice, September 18, 1998 and October 31, 1998, respectively; and Judgment of the First Instruction Court of Callao on June 27, 1986.

[FN18] cf. Habeas corpus filed on February 26, 1986 by Virginia Ugarte Rivera on behalf of his brother Gabriel Ugarte Rivera; and a brief of the Legal Defense Institute in October 1999.

[FN19] cf. Majority opinion by the Investigating Commission of the Congress of Peru on the events on June 18 and 19, 1986; at Lurigancho, El Frontón and Santa Bárbara prisons, Lima in December, 1987, p. 29; Minority opinion by the Investigating Commission of the Congress of Peru on the events on June 18 and 19, 1986 at Lurigancho, El Frontón, and Santa Bárbara prisons. Lima, in December, 1987, p. 50; Testimony by Virginia Ugarte Rivera before the Court on September 20, 1999; a list handed by the Head of Identification of San Juan Bautista penitentiary to the 2nd Permanent Instruction Court of the Navy where a proceeding was started due to the events at El Frontón.

[FN20] cf. Majority opinion by the Investigating Commission of the Congress of Peru about the events on June 18 and 19, 1986, at Lurigancho, El Frontón, and Santa Bárbara prisons, Lima, in December, 1987, pp. 29, 110, 112, 115, 116, 121, 124 to 132; and Minority opinion by the Investigating Commission of the National Congress of Peru about the events on June 18 and 19, 1986, at Lurigancho, El Frontón, and Santa Bárbara prisons. Lima in December, 1987, pp. 21, 131, 132, 133, 135, 136, 142 to 153.

[FN21] cf. Majority opinion by the Investigating Commission of Peru, about the events on June 18 and 19, 1986, at Lurigancho, El Frontón, and Santa Bárbara. Lima, December, 1987, pp. 54-55, 228 and from 253 to 257; Minority opinion by the Investigating Commission of Peru,

regarding the events on June 18 and 19, 1986, at Lurigancho, El Frontón, and Santa Bárbara prisons. Lima, December, 1987, pp. 13, 22, 23, 28, 50 from Minorities' Observations and 158 and 257; and Executive Order 012-86-JUS of June 2, 1986.

[FN22] cf. Supreme Order No. 006-86-JUS of June 19, 1986; Supreme Order 012-86-IN of June 2, 1986; Majority opinion by the Investigating Commission of the Congress of Peru, about the events on June 18 and 19, 1986, at Lurigancho, El Frontón, and Santa Bárbara prisons. Lima, December, 1987, pp. 232 and 234; Minority opinion by the Investigating Commission of the Congress of Peru, regarding the events on June 18 and 19, 1986, at Lurigancho, El Frontón, and Santa Bárbara prisons, Lima, December, 1987, pp. 47 and 52 from the Minorities' Observations and 250, 251, 257 and 270; testimony of Ricardo Aurelio Chumbes Paz, and studies by Guillermo Tamayo Pinto Bazurco, Enrique Bernardo Cangahuala submitted to the Court in Neira Alegría et al Case.

[FN23] cf. Majority opinion by the Investigating Commission of the Congress of Peru, regarding the events on June 18 and 19, 1986, at Lurigancho, El Frontón, and Santa Bárbara prisons, Lima, December, 1987; para. 134, 135 to 167, 238, 255, and 257; Minority opinion by the Investigating Commission of the Congress of Peru, regarding the events on June 18 and 19, 1986, at Lurigancho, El Frontón, and Santa Bárbara prisons, Lima, December, 1987; para. 48, 50 to 54 from Minority's Observations and 134, 156 to 189 and 277 to 281; Supreme Order No. 012-86-JUS of June 2, 1986; testimonies of Ricardo Aurelio Chumbes Paz, César Delgado Barreto, Rolando Ames Cobián, Guillermo Tamayo Pinto Bazurro, and Enrique Bernardo Cangahuala before the Court in Neira Alegría Case and newspaper's articles on the events that took place at San Juan Bautista prison (former El Frontón), San Pedro (former Lurigancho), and Santa Bárbara.

[FN24] cf. Majority opinion by the Investigating Commission of the Congress of Peru, regarding the events on June 18 and 19, 1986; at Lurigancho, El Frontón, and Santa Bárbara. Lima, December, 1987; pp. 144, 153, 218, 235, and 257; and Minority opinion by the Investigating Commission of the Congress of Peru, regarding the events on June 18 and 19, 1986, at Lurigancho, El Frontón, and Santa Bárbara. Lima, December, 1987, pp. 53 from Minority's Observations and 238.

[FN25] cf. Proceeding held at the military jurisdiction on the possibilities of a penal responsibility of the Navy members who subdued the riots.

[FN26] cf. List handed on June 18, 1986 by the Head of Identification of San Juan Bautista penitentiary to the 2nd Permanent Instruction Court of the Navy where a proceeding had started because of the events at El Fronton; proceedings held at the military court on the possible penal responsibility of Navy members who subdued the riots; autopsies made to inmates' bodies at El Frontón by doctors Augusto Yamada, Juan Herver Kruger, and Jose Ráez González; Majority opinion by the Investigating Commission of the Congress of Peru, regarding the events on June 18 and 19, 1986 at Lurigancho, El Frontón, and Santa Bárbara prisons. Lima, December, 1987, pp. 167 and 168; and Minority opinion by the Investigating Commission of the Congress of Peru; about the events on June 18 and 19, 1986 at Lurigancho, El Frontón, and Santa Bárbara. Lima, December, 1987, pp.188, 189 and 283.

[FN27] cf. Minority opinion by the Investigating Commission of the Congress of Peru, regarding the events on June 18 and 19, 1986, at Lurigancho, El Frontón, and Santa Bárbara. Lima, December, 1987, pp. 23 and 24 by the Minority' Observations and 281 to 283; testimonies of Ricardo Aurelio Chumbes Paz, Augusto Yamada, Juan Herver Kruger, and Jose Ráez González and the studies rendered before the Court by Robert H. Kirschner and Clyde C. Snow during

Neira Alegría Case; autopsies done to inmates' bodies from El Frontón by doctors Augusto Yamada, Juan Herver Kruger, and Jose Ráez González; and the nominal relationship of defendant inmates on charges of terrorism evacuated from El Frontón after the events of June 18, 1986.

[FN28] cf. Majority opinion by the Investigating Commission of the Congress of Peru, regarding the events on June 18 and 19, 1986; at Lurigancho, El Frontón, and Santa Bárbara. Lima, December, 1987; and Minority opinion by the Investigating Commission of the Congress of Peru, regarding events on June 18 and 19, 1986, at Lurigancho, El Frontón, and Santa Bárbara. Lima, December, 1987.

[FN29] cf. Political Constitution of Peru of 1979; Executive Order No. 23.201 Organic Law of the Military Justice of Peru; and Executive Order No. 23.214 Code of Military Justice.

[FN30] cf; habeas corpus filed on June 26, 1986 by Virginia Ugarte Rivera on behalf of her son Nolberto Durand Ugarte and her brother Gabriel Ugarte Rivera resulting from events at the penitentiaries on June 18 and 19, 1986.

[FN31] cf. Judgment of June 27, 1986 issued by the First Instruction Judicial Court of Callao; Judgment of July 15, 1986 issued by the First Correctional Tribunal of Callao; Judgment of August 13, 1986 issued by the First Penal Hall of the Supreme Court; and Pronouncement of October 28, 1986 issued by the Guarantees Constitutional Tribunal.

[FN32] cf. Supreme Order No. 012-86-IN and Supreme Order No. 006-86-JUS of 2 and 19 June, 1986, respectively, testimony of Ricardo Aurelio Chumbes Paz before the Court in Neira Alegría et al Case; Majority opinion by the Investigating Commission of the Congress Peru, regarding the events on June 18 and 19, 1986, at Lurigancho, El Frontón, and Santa Bárbara prisons. Lima, December, 1987, pp. 144 to 150; and Minority opinion by the Commission of the Congress of Peru, regarding the events on June 18 and 19, 1986; at Lurigancho, El Frontón, and Santa Bárbara prisons. Lima, December, 1987, pp. 165 to 170.

[FN33] cf. Article entitled 'Tribunal orders 'freedom' to 3 defendants who died at El Frontón", published in 'La Republica" newspaper on Friday, July 31,1987; testimony of Virginia Ugarte Rivera before the Court on September 20, 1999; and notices No. 544.98. INPE-CR-P from the Ministry of Justice and No. 635.98.INPE-CR-P from the Ministry of Justice, of September 18, 1998 and October 31, 1998, respectively.

IX. PREVIOUS CONSIDERATIONS ON THE MERITS

60. In its final arguments the State declared that the Commission and the Court made an "evident mistake" for not having gathered the present proceedings in Neira Alegría et al Case (No. 10.078), which determines that "the first one to qualify, prejudges on another case because of similar facts". So, "[t]his pre-judgment determines the impossibility [that] the same affiliated person issues judgment again, because it only adjusted to previous criteria". Likewise, it stated how in Neira Alegría Case, "There was not an individual analysis of how allegedly human rights were violated by those responsible for opening said case". It added that "the Inter-American Commission in the present case [has] stopped being a local impartial, objective and deliberating instance; thus the Inter-American Court, when assessing this omission, has also stopped being an impartial, objective, controversy, and judging instance."

Consequently, the Court when stating the merits of this case, would be violating the principle non bis in idem.

61. The Court considers that this issue has been solved in the judgment about the preliminary objections issued on May 18, 1999, which is definitive and unappealable, so it underestimates the argument.

X. VIOLATION OF ARTICLE 4(1) (RIGHT TO LIFE)

62. Regarding the violation of Article 4(1) of the Convention, the Commission stated that:

a) Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were detained at El Frontón prison on June 18, 1986 after the riot was subdued, as stated in the list submitted by the President of the Penitentiary National Council to the Instructional Judge of the 21st Court of Lima. This can be confirmed in the list handed by the Head of Identification of the Penal to the 2nd Permanent Instruction Court of the Navy and in the testimony of relatives and attorneys;
b) after subduing the riots, Durand Ugarte and Ugarte Rivera were not under control of authorities, and their names did not appear in the list of survivors, so one can presume that as a result of the bombings at the prison and under what was established in the autopsies done to the non-identified bodies, said persons died as a result of the crushing.
c) "even though the State had the right and duty to subdue the riot, its suffocation was carried out by a disproportionate use of force [… making] the State responsible for the arbitrary life privation of those persons who died because of demolition of San Juan Bautista prison and, in particular, due to the violation of the right to life to the detriment of Nolberto Durand Ugarte and Gabriel [Pablo] Ugarte Rivera";
d) there was a Navy decision of Peru and of the police forces to deal "in any possible way" with the riots and the rioters. The kind of the military attack used against the Blue Pavilion of El Frontón was absolutely out of proportion in relation to the danger caused by the riots; therefore; its demolition was ordered being aware that maybe some inmates had surrendered, been wounded, or hidden in the building; and
e) violations of the right to life by the members of the Peruvian Navy against the inmates which were at El Frontón, took place in three different ways: as a consequence of the disproportionate means used to re-establish the order at the prison; due to summary executions by members of the Navy of the Peru, after surrendering, and through the demolition of the prison´s Blue Pavilion.

63. The State stated that:

a) the Commission, in all alleged arguments, only offers insufficient statements and seeks to transfer to the State the burden of proof to impair allegations lacking evidence content;
b) the riots subduing was performed by the Navy of Peru, and it was implemented in different stages, bearing in mind that

once the peaceful preservation methods were exhausted, it was needed to gradually reduce the distribution space of the prison, to the extent of keeping inmates in a tractable and reduced space, [...] The purpose was to have them (all of them) repressed but mainly alive and scared.

There was never disproportion of means employed, but an execution of a preconceived scheme to subdue the riots demanding weapons and members of the Navy. Operations were implemented within the legal and conventional framework that empowers every State to defend the principle of authority and security of its citizens;

c) the existence of 28 safe and sound inmates after the riots' crushing operations and the fact that on the following days five inmates showed up from the debris, who were helped and later on imprisoned at the penitentiary center "Castro Castro," ratifies the argument that under all circumstances the life and physical integrity of inmates who surrendered during and after the subduing were respected.; and

d) the accusation stating that riot subduing entailed an evident disproportion between the danger it supposed and the actions taken to subdue it, proves to be false due to the following reasons: the struggle against subversion, during those years was waged at different levels, being a clash between elements enforcing authorities and terrorists the most ostensible; citizens were experiencing stressing times, terrorist leaders showed an "unbelievable cruelty and ferocity" which demanded the organization of the nation and of its defense mechanisms to face said situation; "intervened" or imprisoned terrorists in the penitentiary transformed it into a "nobody zone", where the authority principle was totally disregarded. Due to this context, when extreme cases such as the above-mentioned take place, when civil forces overflow, then it is necessary to call for the support of the armed forces.

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64. Article 4 of the Convention states, that

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

65. Regarding the State' argument on the burden of proof, this Court has said that "in proceedings on violations of human rights, the defense of the State can not lean on the plaintiff impossibility to gather evidence that, in many cases, can not be obtained without the cooperation of the State" [FN34] and, in particular has stated "the State has the control of the means to clarify the facts that took place in its territory". [FN35] In that sense, the Court considers that in this case, it is not the Inter-American Commission' responsibility to prove the whereabouts of Durand Ugarte and Ugarte Rivera, because penitentiaries and investigations were under the exclusive control of the State. As a consequence, the burden of proof falls upon the State.

[FN34] cf. Neira Alegría et al Case, supra note 12 para. 65; Gangaram Panday Case, supra note, 10 para. 49; Godínez Cruz Case, supra note 9, para.141; and Velázquez Rodríguez Case, supra note, 9 para.135.

[FN35] cf. Neira Alegría et al Case, supra note 12, para. 65; Godínez Cruz, supra note 9, para. 142; and Velázquez Rodríguez Case, supra note 9. para. 136.

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66. According to the proven facts, Durand Ugarte and Ugarte Rivera were detained by charges of terrorism in the Blue Pavilion at El Frontón penitentiary center, on June 18, 1986 (supra para. 59. f.).

67. To investigate the facts related to the uprisings subduing, the Congress of the Republic of Peru designated an Investigating Commission to carry out the task and that submitted two reports one by majority, another by minority. In the conclusion of the report by majority, in paragraph 14, it is stated that "based on the results it is concluded; however, that there was a disproportionate use of weapons. Final demolition after surrendering occurred at 14:30 on the 19th , would not have any logic explanation and consequently would have been unjustified". Similarly, the report by minority stated in the section related to some previous details, that

4. [i]t is proven that the government when not fulfilling its obligation to protect human life, gave orders which brought about the consequences of an unjustified toll.
a. the decision to subdue the riots through military force, in the most decisive and peremptory period, meant to seriously and unnecessarily risk the life of hostages and inmates [and]
b. [m]ilitary force used was disproportionate in relation to the existing danger and the different implemented ways to attack did not reveal any precaution to reduce the human costs of the crushing.

68. Based on the above and in compliance with Court witness and expert statements, it has been proven that the Blue Pavilion was demolished by the Peruvian Navy forces. They resorted to a disproportionate use of force in relation to the supposedly danger that riot represented (supra para. 59. j), said situation caused the deaths of many of the detainees by crushing, according to the corresponding autopsies. Likewise, it was possible to determine as stated in the Congress report by minority that there was no interest by the corresponding authorities to rescue . the detainees who were alive after the demolition. Besides, there was a lack of arrangements to identify the corpses taking into consideration that only a few of them were identified in the following days after the conflict was concluded, and the corpses recovering process lasted around nine months.

69. This Court has stated on other occasions that

[u]ndoubtedly, the State has the right and duty to guarantee its own security. It is also out of discussion that every society suffers from infraction upon its legal order. However, despite the seriousness of certain actions by inmates and their responsibility for some felonies, it is not admissible that power can be exerted in such a limitless way or that the State can use any proceedings to reach its objectives, without respecting law and morality. No State activity can be grounded on disregarding human dignity. [FN36]

[FN36] cf. Godínez Cruz Case, supra note 9, para.162; and Velázquez Rodríguez Case, supra note 9, para. 154.

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70. In spite of accepting the possible detainees' responsibility for committing serious crimes besides and being armed, while in the Blue Pavilion of El Frontón prison, these facts

are far from constituting [...] sufficient elements to justify the amount of force used in this and in other rioted prisons and that it was understood like a political clash between the Government and Sendero Luminoso true or alleged terrorists [...] which probably led to Pavilion demolition, with all of its consequences, including the deaths of detainees who eventually had ended up surrendering and a clear disregard to look for survivors and afterwards rescuing corpses. [FN37]

[FN37] Neira Alegría et al Case, supra note 12. para.74.

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71. Based on the circumstances that surrounded the riots' subduing at El Frontón, mainly regarding the disproportionate use of force by Peruvian Navy and the fact that for 14 years the whereabouts of Nolberto Ugarte and Gabriel Pablo Ugarte Rivera has been unknown, it is possible to conclude that their lives were arbitrarily deprived by Peruvian authorities in violation of Article 4 of the Convention. [FN38]

[FN38] cf. Castillo Páez Case, supra note 11 para. 72; Blake Case, Preliminary Objections. Judgment of July 2, 1996. Series C No. 27, para. 39; Neira Alegría et al Case; supra note 12, para. 76; and Caballero Delgado and Santana Case, supra note 8, para. 56.

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72. As a consequence, the Court concludes that the State violated, to the detriment of Nolberto Durand Ugarte and Gabriel Ugarte Rivera, Article 4(1) of the Convention.

XI. ARTICLE 5(2). RIGHT TO HUMANE TREATMENT

73. Regarding the violation of Article 5(2) of the Convention, the Commission stated that:

a) Peru is responsible for the forced disappearance of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera and, in order to establish grounds for their argument, it referred to what it was stated, inter alia, in the Inter-American Convention on Forced Disappearance of People, in the Statement on Protection of all People against Forced Disappearances approved by the UN General Assembly and the UN Task Force on Forced or Involuntary Disappearances;
b) it is fully proven that Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were at El Fronton prison on the day of the events, because their names appeared in the official list of the prison and their relatives had visited them;
c) Mrs. Virginia Ugarte Rivera filed on June 26, 1986 an habeas corpus recourse on behalf of her son and brother. Said recourse was the object of several petitions and concluded on October 28, of 1986 when the Court of Constitutional Guarantees stated as inalterable the decision of the Supreme Court of Justice which had sustained the unlawfulness of the habeas corpus;

d) their relatives lost communication with Durand Ugarte and Ugarte Rivera starting from the participation of Navy forces and to this date their whereabouts is unknown; therefore, they have disappeared. It was added that there was no possibility of escape; and
e) in the final arguments the forced disappearance (which includes mistreatment, humiliation, and torture suffered by the detainees) is related to the violation of the right to humane treatment. According to above mentioned it is relevant to state that the forced disappearance of Durand Ugarte and Ugarte Rivera, by State agents, violates Article 5(2) of the Inter-American Convention.

74. The State did not explicitly refer to Article 5(2) of the Convention, but mentioned that under all circumstances life and physical integrity of the inmates who surrendered during and after the riots were respected.

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75. Article 5 of the Inter-American Convention, states that:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

76. The Court considers that the fact that the violation of Article 5(2) of the Convention was not discussed in the application brief of the Commission does not prevent if from being examined by the Tribunal, according to the general principle of iura novit curia right, "used repeatedly by the international jurisdiction in the sense that a judge is entitled and even has the obligation to implement the corresponding legal dispositions in a proceeding, even when the parties are not explicitly invoked". [FN39]

[FN39] cf. Castillo Petruzzi et al Case, supra note 8, para. 166; Blake Case, supra note 10. para. 112; Godínez Cruz Case, supra note 9, para. 172; and Velázquez Rodríguez Case, supra note 9, para. 163.
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77. As stated, the Commission asked the Court to declare that forced disappearance of Durand Ugarte and Ugarte Rivera by the Peruvian State agents also produced the violation of Article 5(2) of the Convention. This Court observes that effectively Durand Ugarte and Ugarte Rivera were imprisoned in the Blue Pavilion in El Frontón and were in the official penitentiary list, and that after the riots their relatives were not aware of their whereabouts, and State authorities refused to render information thereof, as well as to establish the identity of the missing persons, despite they were under their custody.

78. The Court stated, as has already done in another case, that

if someone could understand that when human life is deprived, it also damages humane treatment, this is not the sense [of Article 5] used by the Convention, in essence, nobody should be exposed to torture, suffering, or cruel, inhumane, or degrading treatment, and every person deprived from liberty should be treated with due respect regarding the inherent dignity of mankind. [FN40]

[FN40] Neira Alegría et al Case, supra note 12, para. 86.

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79. In this case it is not proven that Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were exposed to mistreatment or that their dignity was hurt by Peruvian authorities while they were detained at El Frontón penitentiary. The Court reached an identical conclusion regarding Neira Alegría Case, where same arguments like those in this application were stated. It is evident that there was excessive use of force to subdue the riot, and this constitutes vulnerability of the principle on proportion that should exist between the situation to be solved and the means employed to this end (supra paras. 67, 68, and 70). Based on this disproportion, there is no reason to suppose torture or cruel, inhumane, or degrading treatment, notions with their own juridical content that are not inferred by a necessary and automatic arbitrary way of deprivation of life, even in aggravating circumstances such as the current situations.

80. As a result, this Court considers that it has not been proven yet that The State violated Article 5(2) of the Inter-American Convention to the detriment of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera.

XII. VIOLATION OF ARTICLES 7(1) AND 7(5) (RIGHT TO PERSONAL FREEDOM)

81. Regarding the violation of Articles 7(1) and 7(5) of the Convention, the Commission stated that on February 14 and 15, 1986, Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera, respectively, were detained by some members of the Directorship against Terrorism, without a warrant or having found them guilty of a flagrant felony, under suspicion of having participated in terrorists acts.

82. On the other hand, the State stated that related subversion issue investigation involved a task of intelligentsia including a follow-up to find out about other terrorists and to identify higher-ranking persons within the corresponding organizations. Thus, it considered as arbitrary that the Commission demanded

mediation by a warrant at such level implies the exhaustion of previous stages of investigation at intelligentsia, police and Attorney General levels in which statement of alleged author must be disregarded. To this end the complaint shall become formal without the inclusion of this important element of investigation and instruction to be later opened with the detention order to present the judicial order, just after the possibility of interceding the one involved [...]

83. Article 7 of the Inter-American Convention states that:

1. Every person has the right to personal liberty and security
[...]
4. 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.

84. The Court considers that even when violation of Articles 7(1) and 7(5) of the Convention was not reflected in the application of the Commission, this does not prevent it from being stated before the Court, if based on the result of proven facts indicates that such violation was indeed produced. As a consequence, the Tribunal will analyze the way the capture was carried out, and how this lasted until the moment detainees were taken before a judicial authority.

85. In this case, as stated by the Commission, Durand Ugarte and Ugarte Rivera were detained by members of the police without a warrant or having been found guilty of any felony, and they remained isolated for eight days, according to Mrs. Virginia Ugarte Rivera statement before the Court. To this regard, the Tribunal has said that nobody could be deprived of personal liberty "but for causes, cases or circumstances explicitly reflected in the law (material aspect), and strictly subjected to proceedings objectively defined thereof (formal aspect)". [FN41]

[FN41] Gangaram Panday, supra note 10, para. 47.
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86. Mr. Nolberto Durand Ugarte detention took place on February 14, 1986 and Gabriel Pablo Ugarte Rivera's on the 15thon the same month and year. Both were taken to the corresponding judicial agency on March 4, 1986, such date has been taken for granted because the criminal proceeding was started on that date (supra para. 59.d) and because there was not any denying documentation submitted by the State.

87. The Court states that Durand Ugarte and Ugarte Rivera were detained by members of the Directorship against Terrorism, without intervention of flagrance or warrant. The State stated that the detention was not arbitrary. The Court, through a Secretariat note CDH-10 009/178 of June 25, 1999 by President instructions, asked the State to send the file opened against Nolberto Ugarte Durand and Gabriel Pablo Ugarte Rivera for charges on terrorism. But the State never provided this note that could have proven the existence of a detention warrant and other relevant elements to the determination of the related fact thereof. When it was referred to the facts it was done in an ambiguous way because juridical standard was not detailed that could be used as grounds for said detention.

88. As has occurred in other proceedings before the Court, this has to express its conclusions "disregarding the valuable help from a more active participation of the State, which would have meant, to adequately provide the defense". [FN42]

[FN42] cf. Godínez Cruz Case, supra note 9, para. 143; and Velázquez Rodríguez Case, supra note 9, para. 137.

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89. Thus, the Court has considered as true the following facts

by virtue of the principle of [...] silence from the plaintiff or an elusive or ambiguous reply can be interpreted as acceptance of the facts of the application, at least while the opposite would not appear in the warrant or from the legal conviction. [FN43]

[FN43] cf. Godínez Cruz, Case, supra note 9, para. 144; Velázquez Rodríguez Case, supra note 9, para.138.

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90. The Court points out that Article 2 paragraph 20 literal g of the Political Constitution of Peru of 1979, then in force, states that:

No one could be detained but by a written commandment and motivated by the judge or by police authorities in flagrant felony.
In every case the detainee must be available, within 24 hours or distance term, to the corresponding court.
Terrorism, espionage, and illegal drug traffic cases in which preventive detention can be carried out by police authorities of the presumed liable parties, in a term not over fifteen natural days, rendering information to State Attorney's Office and to the judge, who can assume jurisdiction before due date.

91. The Court considers that even though the facts stated in the application regarding the fact that Nolberto Durand and Gabriel Pablo Ugarte Rivera were detained without a warrant or having been found guilty of flagrant felony, or lessened by the State also, the Peruvian Constitution itself exempted cases of terrorism from this rule. On the other hand, and regarding the accused detention term, it is convenient to observe that the quoted constitutional notion only authorized detention by a term not over 15 days with the obligation to render an account to the State Attorney's Office and the corresponding jurisdictional agency. As has been previously stated (supra para. 59.d and 86), Mr. Durand Ugarte was presented before the competent jurisdictional agency on March 4, 1986, that is, 17 days after his detention. Mr. Ugarte Rivera on that same day, that is, 18 days after his detention, both cases after elapsed the 15 days term allowed by the Political Constitution of Peru and, as a result, violating Article 7(5) of the Convention.

92. As a consequence, the Court states that the State violated, to the detriment of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera, Articles 7(1) and 7(5) of the American Convention.

XIII. VIOLATION OF ARTICLES 7(6) AND 25(1) (JUDICIAL PROTECTION)

93. Regarding the violation of Articles 7(6) and 25(1) of the Convention, the Commission stated that:

a) the Court has interpreted Article 25 of the Convention to guarantee, inter alia, a simple and prompt recourse or any other effective recourse for the protection of the fundamental rights of the person;
b) the right to effective tutorship includes habeas corpus or freedom protection, while allowing that a different authority from the one ordering and implementing deprivation of liberty, to determine detention legality. For a recourse to become effective, it must be ideal not only to solve alleged violation, but it must not also be illusory. In a concrete case, even when habeas corpus was an ideal recourse for the judicial authority to investigate and be aware of the situation of the missing people, Peruvian tribunals were limited to establish legality of detention and disregarded their obligation to inform victims' whereabouts, which was the fundamental objective of the recourse promoted by Mrs. Ugarte Rivera;
c) Article 7(6) the Convention guarantees the access to this kind of recourses to protect the right to personal freedom and Article 27(2) of the Convention, regarding suspension of guarantees in states of emergency, it excludes the possibility for "the indispensable judicial guarantees" to be ineffective for the protection of the non abolished rights among which there are the habeas corpus and protection proceedings;
d) regarding the limitation of access to a simple and rapid recourse, in the case of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera, it offers an identical situation to Neira Alegria Case. In the latter, the Court stated that the State had violated "Articles 7(6) and 27(2) of the Convention; under the implementation of the Supreme Order No. 012-86-IN and Supreme Order No. 006-86-JUS of June 2 and 6 [rectius 19], 1986, who declared the state of emergency in Lima and Callao provinces and a Restricted Military Zone in three penitentiaries, among them in San Juan Bautista". To this regard, the Court has stated that
even though such orders did not suspend an habeas corpus proceeding or recourse [...] in fact, the fulfillment of both orders produced the inefficiency of the quoted protective instrument thus its suspension is to the detriment of alleged victims. Habeas corpus was the ideal proceeding for the judicial authority to investigate and find out about the whereabouts of three persons to which this case refers, [FN44] and
e) the Court must clarify, in this case, that the State is responsible for the violation of Articles 7(6), 25(1), and 27(2) of the Convention.

[FN44] Neira Alegría et al Case, supra note 12, para. 77.
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94. The Stated said that:

a) habeas corpus, as conceived in various legislations, "regulates cases of ARBITRARY DETENTION that Durand Ugarte and Ugarte Rivera could resort to" because motives of their detention have been detailed in the corresponding investigation and had a warrant to proceed to their reclusion, so qualifications of jurisdictional order, in these cases, turned out to be proper for a legal framework; and

b) since the relatives of Durand Ugarte and Ugarte Rivera have not exercised the proceedings of alleged death statement or since the beginning of legal succession has not been provided for to exercise the compensation which the legal Peruvian order acknowledges, the internal recourse has not been exhausted, and this determines a lack of competence of the Court.

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95. Article 25(1) of the American Convention stipulates that:

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.

96. Article 7(6) of the American Convention determines 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.

97. On the other hand, Article 27 of the Convention stated that:

1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin.

2. The foregoing provision does not authorize any suspension of the following Articles: Article 3 (Right to Juridical Personality), Article 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 6 (Freedom from Slavery), Article 9 (Freedom from Ex Post Facto Laws), Article 12 (Freedom of Conscience and Religion), Article 17 (Rights of the Family), Article 18 (Right to a Name), Article 19 (Rights of the Child), Article 20 (Right to Nationality), and Article 23 (Right to Participate in Government), or of the judicial guarantees essential for the protection of said rights.

98. During El Frontón mutiny, Supreme Orders No. 012-86-IN and No. 006-86-JUS on June 2 and 19, 1986, respectively, were implemented in Peru, declaring the extension of the state of emergency in Lima and Callao provinces, and establishing them a Restricted Military Zone under of the Joint Command of the Armed Forces control, three penitentiaries, among them El Frontón, while the state of emergency lasted.

99. Regarding suspension of guarantees or state of emergency declarations in time of war, public danger, or other emergency cases, it is important to refer to Article 27 of the Inter-American Convention. The Court has stated that if suspension of guarantees has been duly decreed, and that "all action of public powers surpassing the limits that must be stated in the dispositions stating the state of exemption is illegal". [FN45] The limitations imposed to the obligations of the State respond to “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 to strict limits imposed by the Convention or derived from it”. [FN46]

[FN45] Habeas Corpus under Guarantees Suspension, Advisory Opinion OC-8/87 January 30, 1987. Series A No. 8, para. 38.
[FN46] Judicial Guarantees in states of emergency. Advisory Opinion OC-9/87 on October 6, 1987. Series A No. 9, para. 21.

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100. Said supreme orders did not suspend, in an expressed way, the habeas corpus recourse stated by Article 7(6) of the American Convention, but the State fulfillment of said decrees produced, in fact, the inefficiency of said recourse, by virtue of ordinary judges, cannot be allowed to enter the penitentiaries for being restricted military zones, and such dispositions prevent investigations and determination of the whereabouts of persons in favor of which the recourse has been filed. In this case, habeas corpus was the ideal proceedings that could be effective, thus enabling judicial authority to investigate and find out about the whereabouts of Durand Ugarte and Ugarte Rivera. State allegation is not valid in the sense that it acknowledges the internal legal order, such as a statement of alleged death or the opening of the corresponding legal succession. These resources served other purposes, related to the successive regime, and "not the clarification of a disappearance violating human rights". [FN47]

[FN47] Durand and Ugarte Case, Preliminary Objections. Judgment of May 28, 1999. Series C No. 50. para. 35.

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101. Likewise, the Court has reiterated every person has the right to a simple and prompt recourse or any other effective recourse before a competent judge or tribunal for protection against acts that violate his fundamental rights.

it constitutes one of the fundamental pillars, not only of the American Convention but also of the Government of Laws itself in a democratic society in the sense of the convention [...] Article 25 is closely related to the general obligation of Article 1(1) of the American Convention by attributing protection functions to the internal law of States Parties. [FN48]

[FN48] cf. Castillo Petruzzi et al Case, supra note 8. para.184; Castillo Páez, supra note 11. para. 82 and 83; Paniagua Morales et al Case, supra note 8. para. 164; Blake Case, supra note 10.para. 102; and Suárez Rosero Case, supra note 9, para. 65.

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102. Besides, the Court has stated that

the inexistence of an effective recourse against violations of the acknowledged rights by the Convention constitutes a transgression thereof by the State Party in which such situation took place. It must be pointed out that, in that sense, for the existence of said recourse, it is not sufficient to be anticipated by the Constitution or the law or shall be formally accepted, but it should be really ideal to determine whether a violation of human rights had been committed and do whatever it takes to solve it. [FN49]

[FN49] Judicial guarantees in state of emergency, supra note 46, para. 24.
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103. The above is not only valid under normal circumstances, but also under particular circumstances. Within the unrepealable judicial guarantees, habeas corpus represents the best means "to control the respect of life and humane treatment, to avoid his disappearance or indetermination of his detention place, as well as to protect someone against cruel, inhumane, or degrading punishment or treatment". [FN50]

[FN50] cf. Habeas corpus under guarantees suspension, supra note 45, para. 35, Judicial guarantees on state of emergency, supra note 46, para. 31; Castillo Petruzzi et al Case, supra note 8, para. 187; Suárez Rosero, supra note 9, para. 63; and Neira Alegría et al Case, supra note 12, para. 82.
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104. Habeas corpus recourse, filed by Mrs.Virginia Ugarte Rivera on June 26, 1986 on behalf of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera identifying the director of the National Penitentiary Institute and the director of El Frontón prison as responsible, was stated on the grounds of not knowing the whereabouts of her son and brother since the subduing of the riots, arguing they could have been kidnapped or killed. This recourse was declared baseless on June 27, 1986, due to judge consideration that beneficiaries were processed and detained under orders stemming from regular proceedings, opened on March 4, 1986 by charge on terrorism, within instruction No. 83-86 before the 39th Court of Instruction of Lima. Besides it was taken into account that, according to the minute of June 18, 1986 issued by the director of El Frontón prison, such official received the order to leave the situation in the hands of the Joint Command of the Armed Forces.

105. According to what it was stated, on July 15, 1986 the First Correctional Tribunal of the Superior Court of Justice of Callao issued liberty deprivation imposed on Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera "to make mention to a detention warrant issued within the proceeding on charges of terrorism" confirmed that the decision was appealed and considered the habeas corpus recourse on behalf of said persons baseless. On August 13, 1986 the First Hall of the Penitentiary of the Supreme Court stated "no nullity" of the application issued by the

Correctional Tribunal. Finally, on October 28, 1986 the Constitutional Tribunal of Guarantees, in view of the recourse of nullification filed, declared the decision of the Supreme Court of Justice “unalterable".

106. The Court has interpreted Articles 7(6) and 27(2) of the Convention. In advisory opinion OC-8 of January 30, 1987 it has sustained that "habeas corpus and protection proceedings are those judicial guarantees indispensable for the protection of some rights whose suspension is forbidden by Article 27(2) besides they are aimed at preserving legality in a democratic society". [FN51]

[FN51] Habeas corpus under suspension of guarantees, supra note 45, para. 42.

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107. In advisory opinion OC-9, this Tribunal has stated that

indispensable judicial guarantees for the protection of human rights not capable of suspension, according to Article 27(2) of the Convention, are those particularly referred to explicitly in Articles 7(6) and 25(1), considered within the context and according to Article 8 principles, and also inherent to the preservation of the Government of Laws, even under the exceptional legality resulting from the suspension of guarantees. [FN52]

[FN52] Judicial guarantees in states of emergency, supra note 46, para. 38.

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108. Criteria in said advisory opinions are applied to this case, due to the implementation of Supreme Order No. 012-86-IN and No. 006-86-JUS. These declared emergency state and a restricted military zone, as well as the effective control of El Frontón prison, under the Armed Forces, which produced the suspension of habeas corpus recourse violating the American Convention.

109. In relation to the above mentioned, it could be said that habeas corpus action on June 26, 1986 was ineffective, on occasion of the disappearance of Durand Ugarte and Ugarte Rivera resulting from the events on June 18, 1986.

110. Based the above-mentioned considerations, the Court concluded that the State violated dispositions of Articles 7(6) and 25(1) of the American Convention, to the detriment of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera.

XIV. VIOLATION OF ARTICLES 8(1) AND 25(1) (THE RIGHT TO A HEARING WITH DUE GUARANTEES BY A COMPETENT, INDEPENDENT, AND IMPARTIAL TRIBUNAL AND THE RIGHT TO AN EFFECTIVE RECOURSE)

111. Regarding the violation of Articles 8(1) and 25(1) of the Convention, the Commission stated that:

a) Article 8 of the Convention involved different rights and guarantees that have as their main purpose to protect the right of every person to a fair process and to make sure the State judicially ensures the rights.
b) Gabriel Pablo Ugarte was denied the right to an attorney when was declaring before the police;
c) military tribunals aware of the case acted "in open contradiction to the autonomy and impartial principles which must inform [to them] to comply with what it is stipulated in the Convention". Impartiality and independence of the tribunal are key topics of minimal guarantees of justice administration and Article 8 must always be interpreted in the widest terms, in compliance with the purpose and aim of the treaty.
d) military tribunals are not independent, impartial, or competent bodies, because they belong "according to the Peruvian Organic Law of Military Justice [Executive Order No. 23.201] to the Ministry of Defense; that is, it is an special court subordinated to an agency of the Executive Branch". Judges in the military exclusive court are, similarly, members of the Armed Forces in active duty, (Articles 22 and 31 of Executive Order No. 23.201). Besides, it is not necessary to be an attorney to become a tribunal member of this court. Thus, it is logic to say that if the judicial post depends on the military rank or the status of active officer, decisions adopted by the judge or tribunal shall be affected by an interest incompatible with justice. This might imply that an officer could lack the needed autonomy and impartiality to investigate events such as the ones in El Frontón.
e) proceedings before the military exclusive court constitutes an effective recourse to protect the victims and relatives' rights and repair the damages caused. In this case events were not investigated, and the liable parties were not punished either. The War Hall of the Supreme Council of the Ministry of Justice concluded that those who participated in subduing the riots had no responsibility. On the other hand, authorities did not make the necessary efforts to save the largest amount of lives possible after the prison was demolished, they did not implement the proper proceedings for the identification of bodies.
f) since the State was responsible for the victims and their relatives, the proceedings in the military exclusive court for the clarification of the facts, identification of bodies, and administration of justice, and since no diligent investigation of the facts was carried out, they were denied the access to an effective recourse; and
g) on July 17, 1987 the Sixth Correctional Tribunal of Lima decided that Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera were "innocent, solving the case and set them immediately free". Said decision was inefficient because they were missing.

112. On the other hand, the State stated that:

a) the argument lacks evidentiary basis regarding the fact that the detainees have been denied the access to an attorney and that they have been forced to expressly give up this right. Clearly, in writing, in this case those concerned disregarded such a possibility. The plaintiff has the burden of proof to lessen the value of said event;
b) in this case, the defendants were declared not guilty on the grounds of the in dubio pro reo principle, which is not the equivalent of a non guilty verdict;

c) the military justice was in charge of the investigations leading to the determination of responsibilities in the reviewed events. This process had publicity and respected the corresponding guarantees.

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113. Article 8(1) of the American Convention states that:

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

114. Article 25(1) of American Convention states that:

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.

115. The Court shall first examine the argument of the Commission regarding the military process to investigate the facts and determine the probable liable parties of actions related to the subduing of the riots in El Frontón. Regarding this process, the Commission stated that military tribunals were in open contradiction with autonomy and impartiality principles.

116. The Court has had the opportunity to refer to the military jurisdiction and has stated that it has been established by diverse legislation to maintain the order and discipline within the armed forces. Even, such functional jurisdiction states that this legislation is enforced for soldiers who have committed a felony or offense exerting their functions and under some circumstances. In this sense it was defined in the Peruvian legislation itself (Article 282 of the 1979 Political Constitution). [FN53]

[FN53] Castillo Petruzzi et al Case, supra note 8, para. 128.

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117. In a democratic Government of Laws the penal military jurisdiction shall have a restrictive and exceptional scope and shall lead to the protection of special juridical interests, related to the functions assigned by law to the military forces. Consequently, civilians must be excluded from the military jurisdiction scope and only the military shall be judged by commission of crime or offenses that by its own nature attempt against legally protected interests of military order.

118. In this case, the military in charge of subduing the riots that took place in El Frontón prison resorted to a disproportionate use of force, which surpassed the limits of their functions thus also causing a high number of inmate death toll. Thus, the actions which brought about this

situation cannot be considered as military felonies, but common crimes, so investigation and punishment must be placed on the ordinary justice, apart from the fact that the alleged active parties had been military or not.

119. In spite of the above, the State ordered to the military justice to be in charge of the investigation of the serious events in El Frontón, which carried out such investigation and dismissed the process followed against the liable military parties.

120. The Commission stated that the military exclusive court does not offer the minimal guarantees of independence and impartiality as stipulated in Article 8(1) of the Convention. Thus, it does not constitute an effective recourse to protect the victims and relatives' rights and to repair damages violating also Article 25.

121. This Court has stated that:

[a]rticle 25 is closely related to the general obligation of Article 1(1) of the American Convention, to ascribe protection functions to the internal law of the States Parties, of which it is inferred that the State bears the responsibility to design and recognize an efficient recourse, but at the same time to assure duly implementation of said recourse by its judicial authorities. [FN54]

[FN54] cf. Villagrán Morales et al Case, supra note 10, para. 237; Cesti Hurtado Case. Judgment of September 29, 1999. Series C. No. 56, para. 121; Castillo Petruzzi et al Case, supra note 8 para. 184; Castillo Páez Case, supra note 11 para. 83; Paniagua Morales et al Case, supra note 8, para. 164; Blake Case, supra note 10. para. 102; and Suárez Rosero Case, supra note 9, para. 65.

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122. Regarding the proven facts of this case, victims or their relatives did not have an effective recourse that could guarantee their rights leading among other things to a lack of identification of the liable parties during proceedings followed by the military court and the failure to use due diligence to identify and establish the victims' whereabouts. The data involved in the rulings allow considering the investigation of events in El Frontón in anticipation by military tribunals was simply formal.

123. To this regard, this Tribunal has sustained that in view of every violation of rights protected by the Convention, the duty to investigate

must be carried out seriously and not as a simple formality deemed in advance to be unfruitful. It must have a sense and be assumed by the State as its own juridical duty not as simple proceedings on particular interests, which depend on procedural initiative by the victims or their relatives or the private delivering of the probative elements without public authority looking effectively for truth.” [FN55]

[FN55] Villagrán Morales et al Case, supra note 10, para. 226; Godínez Cruz Case, supra note 9, para. 188; and Velázquez Rodríguez Case, supra note 9, para. 177.

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124. This same criterion has been endorsed by the Committee of Human Rights of the United Nations on several occasions wherein it has stated that:

the Party State has the obligation to investigate the alleged violations of human rights, in particular the forced disappearance of people and the violations of the right to life, and to bring criminal charges, to judge, and punish the liable parties of said violations. Said obligation is only applicable a fortiori in cases in which the active parties of these violations have been identified. [FN56]

[FN56] United Nations, Committee of Human Rights. Arhuacos vs. Colombia, para. 8.8 August 19, 1997, CCPR/C/60/D/612/1995; and United Nations. Committee of Human Rights. Bautista vs. Colombia, para. 8.6, November 13, 1995, CCPR/C/55/D/563/1993.

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125. Regarding the statement on partiality and dependence of military justice, it is reasonable to consider that military court officials who acted in the leading process to investigate the events in El Frontón lacked the required independence and impartiality as stipulated in Article 8(1) of the Convention to efficiently and exhaustively investigate and punish the liable parties.

126. As has been stipulated (supra para. 59 ñ), the courts that had knowledge of the facts related to these events "constitute a high Body of the Armed Institutes" [FN57] and the military men who were members of these tribunals were, at the same time, members of the armed forces in active duty, a requirement to be part of military tribunals. Thus, they were unable to issue an independent and impartial judgment.

[FN57] Executive Order No. 23201; Organic Law of Military Justice, Preliminary Title I.

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127. On the other hand, the Court states that since the date of the riot subduing in El Frontón prison, the relatives of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera ignored their fate and did not have access to an effective recourse to investigate the facts, identify, and punish the liable parties.

128. The Court has said that "Article 8(1) of the Convention must be interpreted in an open way so that said interpretation be endorsed both in the literal text of that standard as well as in its essence." [FN58] With this interpretation, said text

also includes the right of the victims' relatives to judicial guarantees since "every act of forced disappearance deprives the victims of the protection of the law and causes great suffering to

them and their relatives" (Statement by the United Nations on the Protection of Every Person against Involuntary Disappearance, Article 1(2)). [FN59]

[FN58] Blake Case, supra note 10, para. 96.
[FN59] Blake Case, supra note 10, para. 97.

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129. This Tribunal has also stated that:

based on Article 8 of the Convention it is understood that victims of violations of human rights, or their relatives, must be able to be heard and act on their respective proceedings, both looking for the clarification of facts and the punishment of the liable parties and a proper compensation". [FN60]

[FN60] Villagrán Morales et al Case, supra note 10, para. 227.

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130. As a consequence, Article 8(1) of the American Convention, in connection with Article 25(1) thereof, confers to victims' relatives the right to investigate their disappearance and death by State authorities, to carry out a process against the liable parties of unlawful acts, to impose the corresponding sanctions, and to compensate damages suffered by their relatives.

131. Based on the above, the Court declared that the State violated, to the detriment of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera and their relatives, Articles 8(1) and 25(1) of the American Convention.

XV. NON-COMPLIANCE OF ARTICLES 1(1) AND 2 (OBLIGATION TO RESPECT RIGHTS AND DUTY TO ADOPT DOMESTIC LEGAL EFFECTS)

132. As for non-compliance of Articles 1(1) and 2 of the Convention, the Commission stated that:

a) The State had violated the obligation to respect and guarantee the rights protected in the Convention. International Law of Human Rights imposes an obligation of lack of action, that is, State agents must refrain from taking actions that could invade the scope of liberty guaranteed in every of the rights listed in the treaty, and an obligation to take action in order to ensure every person a full enjoyment and exercise of said rights;
b) violations of the Convention regarding Articles 4, 7(6), 8, 25(1), and 27(2) entailed the violation of Article 1(1) of the Convention; and
c) the Convention in its Article 2 explicitly engages the States to adopt legislative dispositions or any other kind to enforce the rights and freedoms recognized in said Convention. On the one hand, said disposition compels the State to adopt new measures and, on the other hand, to revoke any incompatible legislation with the Convention. As a result, if Peru keeps Executive Order No. 23.201 (Organic Law of Military Justice) in its legislation, which

contradicts the rights guaranteed in Articles 8 and 25 of the Convention, similarly violates its obligations according to Article 2 thereof.

133. The State claims that:

a) Article 29 of the Universal Declaration of Human Rights, Articles 28 and 33 of the American Declaration and Duties of Man, Article 2 of the European Convention, and Articles 29 and 32 of the American Convention must be taken into consideration to define its consubstantiality in relation to the right to life.
b) the duty to respect the fundamental liberties and rights not only applies to public authorities, but also to every individual. By ensuring the fundamental right of the individual to recognize his dignity as a human being, he is also imposed the fundamental duty of providing his fellow men with a similar treatment. Under no circumstances, access to illegal recourses can be provided. According to the duty of non abusing the right itself, every individual must exert his rights taking into consideration, to a reasonable extent, other's interests and, in any case, without abusive purposes. At the same time, there is an equality duty so that anybody can raise his status over another's;
c) the events on June 18 and 19, 1986 during the subduing of the riots in El Frontón, are framed within the scope of the domestic control standards that Peru, as every sovereign State, is entitled and has the obligation to exert to protect the principle of authority and common welfare of its citizens; and
d) it is necessary to consider circumstances under which the facts took place and the inmate mutiny, the State - after exhausting initial proceedings and the excessive intervention of Police Forces - ordered the needed intervention of the Armed Forces. An important premise to consider is the dangerousness posed by rioters, who had weaponry such as explosives, provisions, and medical supplies, and kept two hostages, one of them finally died inside the collapsed building.

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134. Article 1(1) of the Convention stipulates that

[t]he 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.

135. Article 2 of the Convention determines that

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.

136. In the same sense, in other case the Court has stated that:

[r]egarding people's law, a customary rule prescribes that a State, which has entered into an international agreement, must introduce in its national law the necessary assumed modifications to ensure the execution of obligations assumed. This rule is universally valid and has been considered by the jurisprudence as an evident principle ("principe allant de soi"; Echange des populations grecques et turques, avis consultatif, 1925, C.P.J.I., Series B. No. 10, p. 20). In this sequence of ideas, the American Convention states the obligation of every State Party to adapt its national law to dispositions of said Convention, to guarantee the rights recognized therein. [FN61]

[FN61] Garrido and Baigorria Case. Reparations. Judgment of August 27, 1998. Series C No. 39, para. 68.

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137. In this sense, in another case the Court stated that

[t]he general duty of Article 2 of the American Convention implies the adoption of measures in two ways. On the one hand, derogation of rules and practices of any kind that imply the violation of guarantees in the Convention. On the other hand, the issuance of rules and the development of practices leading to an effective enforcement of said guarantees. [FN62]

[FN62] Castillo Petruzzi et al Case, supra note 8, para. 207.

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138. The Court warns that, based on this judgment, the State violated Articles 4(1), 7(1), 7(5), 7(6), 8(1) and 25(1) of the American Convention, to the detriment of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera; therefore, it has not fulfilled its general duty of respecting the rights and freedoms recognized therein and of ensuring its free and full exercise, as stipulated in Article 1(1) of the Convention. Also, in the present case Article 2 of the Convention was violated, because the State had not taken appropriate measures of its internal law which allow making effective the rights established on the said Convention.

139. As a consequence, the Court concludes that the State has failed to comply with the general obligations of Articles 1(1) and 2 of the American Convention on Human Rights.

XVI. ENFORCEMENT OF ARTICLE 63(1)

140. Regarding the implementation of Article 63(1) of the Convention, the Commission asked the Court to arrange for

a) Peru to carry out an investigation to identify, judge, and punish the liable parties of the violations in this case;
b) Peru to inform about the whereabouts of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera and to inform their relatives;

c) Peru to properly compensate the relatives of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera, both financially and morally as a result of damages from the violations of rights recognized in the Conventions; and
d) Peru to pay expenses incurred by the victims' relatives and representatives because of their participation both before the Commission and the Court. Moreover, in its final allegations it asked for the compensation of expenses by the relatives and petitioners in the internal seat.

141. The State did not mention said requests before the Commission.

142. Article 63(1) of the American Convention states that

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.

143. The Court considers that the State is compelled to investigate facts prompting the violations. Even, if internal order difficulties supposedly prevent the identification of the liable parties due to the nature of their offenses, the right of the victims' relatives to know about their fate and the whereabouts of their mortal remains. Therefore, the State should meet these fair expectations with any of its available resources. Besides the obligation to investigate, there is another obligation to prevent any possible commission of involuntary disappearance and punish the liable parties.

144. It is evident in this case that the Court cannot ensure those damaged to fully enjoy their violated rights and freedoms. However, the compensation of the consequences causing the violation of specific rights is legal and must include a fair compensation of expenses that the victims' relatives would have incurred in to pay for any related proceedings.

145. To determine compensation, the Court shall need information and enough probative elements, so it is legal to start the corresponding procedural stage. To this end, it entrusts its President with adopting the necessary measures.

XVII. OPERATIVE PARAGRAPHS

146. Now therefore,

THE COURT

unanimously,

1. declares that the State violated, to the detriment of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera, Article 4(1) of the American Convention on Human Rights.

by six votes against one,

2. declares it has not been proven that the State violated, to the detriment of Nolberto Durand Ugarte Rivera, Article 5(2) of the American Convention on Human Rights.

Judge Carlos Vicente de Roux Rengifo disagrees.

unanimously,

3. declares that the State violated, to the detriment of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera, Article 7(1) and 7(5) of the American Convention on Human Rights.

unanimously,

4. declares that the State violated, to the detriment of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera, Articles 7(6) and 25(1) of the American Convention on Human Rights.

unanimously,

5. declares that the State violated, to the detriment of Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera, as well as their relatives, Articles 8(1) and 25(1) of the American Convention on Human Rights.

unanimously,

6. declares that the State has failed to comply with the general obligations of Articles 1(1) and 2 of the American Convention on Human Rights regarding the violations of the substantive rights included in the above decisions in this judgment.

unanimously,

7. decides that the State is compelled to make every possible effort to locate and identify the victims' mortal remains and deliver them to their relatives, as well as to investigate the facts and process and sanction the liable parties.

unanimously,

8. decides that the State must compensate damages caused by the violations.

unanimously,

9. decides to open the stage of reparations; therefore, it entrusts its President with adopting timely necessary measures.

Judge Carlos Vicente de Roux Rengifo informed the Court his Partially Dissenting Opinion and Judge Fernando Vidal Ramírez told the Court his Reasoned Opinion, attached to this judgment.

Written in Spanish and English, certifying the text in Spanish, in San José, Costa Rica on August 16, 2000.

Antônio A. Cançado Trindade
President

Máximo Pacheco-Gómez
Hernán Salgado-Pesantes
Alirio Abreu-Burelli
Sergio García-Ramírez
Carlos Vicente de Roux-Rengifo

Fernando Vidal-Ramírez
Judge ad hoc

Manuel E. Ventura-Robles
Secretary

So ordered,

Antônio A. Cançado Trindade
President

Manuel E. Ventura-Robles
Secretary

PARTIALLY DISSENTING OPINION OF JUDGE DE ROUX RENGIFO

Upon carrying out an evidentiary assessment related to Article 5 of the American Convention, the Court has concluded

[i]n this case, it has not been proven Nolberto Durand Ugarte and Gabriel Pablo Ugarte Rivera had been subjected to mistreatment or that their dignity had been damaged by Peruvian authorities while they were detained in El Fronton penitentiary [...] It is evident that there was a disproportionate use of force to subdue the riots. However, from this disproportion it can not be inferred that authorities used cruel, inhumane, or degrading treatment; concepts that their own juridical content, and that they cannot be necessarily and automatically inferred from an arbitrary deprivation of life, even under aggravating circumstances such as the current ones.

I regret to withdraw myself from the transcribed conclusion. In its recent jurisprudence on evidence appraisal (including the one having an effect on the judgment related to this opinion), this Court has stated the following three criteria: 1) an international court of human rights has a significant scope of flexibility when assessing evidence, according to logic rules and based on experience; 2) international courts can largely base their decisions on circumstantial or indirect evidence, on presumptions as long as these means can give rise to solid conclusions on the facts; 3) in processes of violations of human rights the State defense can not be grounded on the failure

of the plaintiff to gather evidence because, very frequently, these can not be obtained without the cooperation of the State itself, which precisely has the availability of the necessary resources to clarify the facts that have taken place in its territory. I consider that, if these criteria are strictly and rigorously applied to evidentiary appraisal in the present case, the conclusion about the matter at hand will differ from that of the Court.

The latter is right when stating based only the disproportion of means used by the State to subdue the riots in El Frontón prison, it cannot be inferred that there were cruel, inhumane or degrading treatment against Durand Ugarte and Ugarte Rivera. Nevertheless, in this case we not only know that there was disproportionate use of means, but we also know, with some precision, what kind of force were used by the State against inmates and in what way and sequence they were used, and we know or can reasonably infer what kind of effects, besides death, this force had on these people.

Upon analyzing the circumstances in this case, it is probable that between the time State agents attacked inmates as stated by the gathered evidence and the time of death of each of the inmates, almost everybody, if not all, bore moments, if not hours, of the most serious and severe anguish. Certainly, the overwhelming majority of inmates in El Frontón who lost their lives during the events in this case, were not only limited to confirm, before dying, that they were involved in a highly-risky situation, as the one the related to a typical penitentiary mutiny. They were also aware that they were deadly and mercilessly attacked without any possibility of surrender or escape. Those were able to escape, and were wounded in the debris of the demolished Blue Pavilion, for some hours or days, the situation was certainly more serious. Hypothetically, the victims' anguish and anxiety were indeed critical.

The value of indirect evidence, in general, and circumstantial evidence, in particular, is the result of a probability judgment. It is possible that Durand Ugarte and Ugarte Rivera had been shot first without being able to understand what the situation was. It is also possible that they undergone all the stages and manifestations of a chain of horror in El Frontón prison and that they died several days after the uprising began in the midst of most terrible physical and mental atrocities. The exact time of these events is uncertain. However, if the above evidence appraisal is used, there will grounds to conclude with a high level of certainty that Durand and Ugarte undergone severe moral and psychological suffering before dying as a result of inhumane and cruel treatment by the State during the riot subduing in El Frontón.

Consequently, I do not share the conclusion reached by the Court in the second operative paragraph of this judgment. In my opinion, the issue should have been stated as follows:

"THE COURT,

[...]
2. declares that the State violated, to the detriment of Nolberto Durand Ugarte and Gabriel Ugarte Rivera, Articles 5(1) and 5(2) of the American Convention about Human Rights".

Carlos Vicente de Roux-Rengifo
Judge

Manuel E. Ventura-Robles
Secretary

REASONED OPINION BY JUDGE VIDAL RAMÍREZ

I share the issuance of the judgment by reasoning out as follows:

The designation of the Judge ad hoc by the State, notified with the application does not imply that he assumes his representation because he becomes member of the Court in an individual capacity after previous oath. To become member of the Court as Judge ad hoc I've met same qualifications as the incumbent judges and, thus, I have been empowered with the same rights, duties, and responsibilities.

Therefore, from the disposition in Articles 55 and 52 of the American Convention and Article 10 from the Rules of Procedure of the Court and stipulated also by the decision of September 11, 1995 (Paniagua Morales Case vs. the Guatemalan Government).

Fernando Vidal-Ramírez
Judge ad hoc

Manuel E. Ventura-Robles
Secretary