Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	"Five Pensioners" v. Peru
Doc. Type:	Judgment (Merits, Reparations and Costs)
Decided by:	President: Antonio A. Cancado Trindade; Vice President: Sergio Garcia Ramirez; Judges: Hernan Salgado Pesantes; Oliver Jackman; Alirio Abreu Burelli; Carlos Vicente de Roux Rengifo; Javier de Belaunde Lopez de Romana Judge Maximo Pacheco Gomez advised the Court that, owing to circumstances beyond his control, he would be unable to attend the fifty-eighth regular session of the Court; therefore, he did not take part in the deliberation and signature of this judgment.
Dated:	28 February 2003
Citation:	Five Pensioners v. Peru, Judgment (IACtHR, 28 Feb. 2003)
Represented by:	APPLICANTS: Javier Mujica Petit and Maria Clara Galvis
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In the "Five Pensioners" case,

the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), pursuant to Articles 29, 55, 56 and 57 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure")** and Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), delivers this judgment.

** Pursuant to the Order of the Court of March 13, 2001, on Transitory Provisions for the Rules of Procedure of the Court adopted in the Order of November 24, 2000, this judgment is delivered according to the provisions of the Rules of Procedure of 2000, which entered into force as of June 1, 2001.

I. INTRODUCTION OF THE CASE

1. On December 4, 2001, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed before the Court an application against the State of Peru (hereinafter "the State" or "Peru"), arising from petition No. 12,034, received by the Secretariat of the Commission on February 1, 1998.

2. The Commissioned filed the application based on Article 51 of the American Convention, for the Court to decide whether the State had violated Articles 21 (Right to Property), 25 (Right to Judicial Protection) and 26 (Progressive Development) of the American Convention, in relation to the obligations established in Articles 1(1) (Obligation to Respect Rights) and 2 (Domestic Legal Effects) thereof, owing to the modification in the pension regime that Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Reymert Bartra Vásquez and Maximiliano Gamarra Ferreyra (hereinafter "the alleged victims", "the five pensioners" or "the pensioners") had been enjoying, in accordance with the Peruvian legislation up until 1992, and to non-compliance with the judgments of the Supreme Court of Justice and the Constitutional Court of Peru "that ordered the organs of the Peruvian State to pay the pensioners a pension in an amount calculated as established in the legislation in force when they began to enjoy a determined pension regime."

3. Furthermore, the Commission requested the Court to order the State to grant compensation for the non-pecuniary damage caused to the alleged victims, and to comply with the provisions of the judgments of the Supreme Court of Justice of Peru of May 2, June 28, September 1 and 19, and October 10, 1994, and those of the Constitutional Court of Peru of July 9, 1998, August 3 and December 21, 2000, so that the alleged victims and their next of kin would receive the differences in the amount of their pensions that had not been paid since November 1992, together with the respective interest, and also that they continue to be paid an equalized amount for their pensions. The Commission also requested the Court to order the State to annul and terminate, retroactively, the effects of article 5 of Decree Law No. 25792 of October 23, 1992. Lastly, the Commission requested the Court to order the State to investigate the facts, to establish responsibilities for the violation of human rights committed in this case, and to condemn the State to pay the costs and expenses incurred by processing the case in the internal jurisdiction and before the inter-American system.

II. COMPETENCE

4. Peru has been a State Party to the American Convention since July 28, 1978, and recognized the contentious jurisdiction of the Court on January 21, 1981. Therefore, the Court is competent to hear this case according to Articles 62 and 63(1) of the Convention.

III. PROCEEDING BEFORE THE COMMISSION

5. On February 1, 1998, Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Reymert Bartra Vásquez and Sara Castro, Mr. Gamarra's widow, and also the Human Rights Program of the Centro de Asesoría Laboral of Peru (hereinafter "CEDAL") and the Association for Human Rights (APRODEH), submitted a petition to the Inter-American Commission. This petition was expanded by the last two organizations on June 3, 1998.

6. On July 16, 1998, the Commission proceeded to open the case as No. 12,034.

7. On September 27, 1999, the Commission adopted Report No. 89/99, in which it declared the case admissible and, on October 18, 1999, it made itself available to the parties in order to reach a friendly settlement.

8. On March 5, 2001, in accordance with Article 50 of the Convention, the Commission adopted Report No. 23/01, in which it recommended the State:

1. To make adequate reparation to Messrs. Torres Benvenuto, Mujica Ruiz-Huidobro, Álvarez Hernández and Bartra Vásquez, and to the next of kin of Mr. Gamarra Ferreyra, in accordance with Article 63 of the American Convention, including both the pecuniary and the non-pecuniary aspects, for the violations of their human rights and, in particular,
2. To pay forthwith to Messrs. Torres Benvenuto, Mujica Ruiz-Huidobro, Álvarez Hernández and Bartra Vásquez, and to the next of kin of Mr. Gamarra Ferreyra, the difference in the amount of the equalized pensions that it has failed to pay them from November 1992 to the present. In order to calculate this difference, the State should take into consideration the amount of the pensions that it has been paying them, compared with the amount of the pensions that it should have paid them, based, as explained previously, on the acquired right of the victims to receive a retirement pension progressively equalized with the salary of the employee of the Superintendency of Banks and Insurance, who currently occupies the same position or a similar function to that of the said persons at the date of their retirement.
3. Thereafter, to pay to Messrs. Torres Benvenuto, Mujica Ruiz-Huidobro, Álvarez Hernández and Bartra Vásquez, and to the next of kin of Mr. Gamarra Ferreyra, an equalized pension calculated according to the parameters used up until August 1992; in other words, progressively equalized with the salary of the employee of the Superintendency of Banks and Insurance who currently occupies the same position or a similar function to that of the said persons at the date of their retirement.
4. To annul and cause to terminate retroactively the effects of Article 5 of Decree Law No. 25792 of October 23, 1992.
5. To conduct a complete, impartial and effective investigation into the facts in order to establish responsibilities for non-compliance with the said judgments delivered, in 1994, by the Supreme Court of Justice of Peru and, in July 1998, by the Constitutional Court; and, using criminal, administrative or other appropriate procedures, to ensure that those responsible receive the pertinent punishments that correspond to the gravity of the said violations.

9. On March 9, 2001, the Commission transmitted this report to the State and granted it a period of two months to comply with the recommendations. On May 31, 2001, the State requested an extension of four months, as of that day, to comply with the recommendations; this was granted. On May 14, September 10 and 27, 2001, the State informed the Commission of the actions it was taking to comply with the said recommendations.

10. On October 1, 2001, the State requested the Commission to agree to a further extension of two months to comply with the recommendations; this was granted the following day, to run from October 1, 2001.

11. In a communication of October 11, 2001, CEDAL indicated that it joined the Center for Justice and International Law (hereinafter “CEJIL”) as a co-petitioner in this case.

12. On December 3, 2001, the Commission decided to submit the case to the jurisdiction of the Court.

IV. PROCEEDING BEFORE THE COURT

13. The Commission filed the application before the Court on December 4, 2001.

14. Pursuant to Article 22 of the Rules of Procedure, the Commission designated Hélio Bicudo and Santiago Cantón as Delegates and Ignacio Álvarez and Ariel Dulitzky as legal advisers. Also, in accordance with Article 33 of the Rules of Procedure, the Commission indicated the names and addresses of the alleged victims and advised that they would be represented by Javier Mujica Petit of CEDAL and María Clara Galvis of CEJIL.

15. On January 11, 2002, the Secretariat of the Court (hereinafter "the Secretariat"), on the instruction of the President of the Court (hereinafter "the President"), and pursuant to Article 34 of the Rules of Procedure, requested the Commission to forward, within 20 days, several appendices to the application which were incomplete or illegible. On February 4, 2002, the Commission submitted these appendices.

16. On January 17, 2002, following the President's preliminary examination of the application, the Secretariat notified it to the State, together with its appendices, and informed the State of the time limits for answering it and designating its Agent for the proceeding. In addition, the same day, the Secretariat, on the instructions of the President and in accordance with the provisions of Article 18 of the Rules of Procedure and Article 10 of the Statute of the Court, informed the State of its right to appoint a judge ad hoc to take part in the consideration of the instant case. Also, on the same day, pursuant to the provisions of Article 35(4) and 35(1)(e) of the Rules of Procedure, the application was notified to the representatives of the alleged victims and their next of kin, and CEDAL and CEJIL, represented by Javier Mujica Petit and María Clara Galvis, respectively, so that they could present their brief on requests, arguments and evidence. Furthermore, pursuant to Article 35(1)(d) of the Rules of Procedure, the application was notified to the original claimant, Francisco Soberón, Director General of the Association for Human Rights (APRODEH).

17. On February 14, 2002, the State presented a note, in which it advised that it had appointed Javier de Belaunde López de Romaña as Judge ad hoc and Fernando Elías Mantero as its Agent.

18. On February 14, 2002, the representatives of the alleged victims and their next of kin forwarded a communication in which they requested an extension of 20 days to present the brief on requests, arguments and evidence (art. 35(4) of the Rules of Procedure). The following day, the Secretariat, on the instructions of the President, informed the said representatives that an extension had been granted until March 4, 2002.

19. On March 1, 2002, the Secretariat, on the instructions of the President, informed the parties that the name of the case had been changed from "Torres Benvenuto et al." to "Five Pensioners".

20. On March 5, 2002, the representatives of the alleged victims and their next of kin transmitted, via facsimile, the brief on requests, arguments and evidence. Then, on March 8, 2002, they presented the original of this brief, together with all its appendices, except the first and the fifth.

21. On March 15, 2002, Peru presented its answer to the application and on April 18, 2002, it transmitted the attachments corresponding to this brief. However, some pages of appendices 8 and 9 to the answer were illegible.

22. On March 20, 2002, the Secretariat transmitted the brief on requests, arguments and evidence to the State and to the Commission and informed them that when the pending appendices (supra para. 20) had been received by the Secretariat they would be forwarded. Also, on the instructions of the President, it granted them a non-extendible period of 30 days in which to present any comments they deemed pertinent.

23. On April 18, 2002, the Secretariat transmitted the answer to the application to the Commission, the representatives of the alleged victims and their next of kin, and the original claimant, informing them that, when the pending pages (supra para. 21) had been received by the Secretariat, they would be forwarded.

24. On April 22, 2002, the State transmitted its comments on the brief on requests, arguments and evidence presented by the representatives of the alleged victims and their next of kin. Subsequently, on April 30, 2002, Peru submitted the original of this brief with the respective appendices.

25. On April 22, 2002, the representatives of the alleged victims and their next of kin forwarded a copy of the powers of attorney for the proceeding before the Court granted by Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Reymert Bartra Vásquez and Sara Castro, Mr. Gamarra's widow, to Viviana Krsticevic, Javier Mujica Petit and María Clara Galvis.

26. On April 22, 2002, the Commission forwarded its comments on the brief on requests, arguments and evidence of the representatives of the alleged victims and their next of kin. The Commission also advised that Commissioner Marta Altolaguirre would also act as a delegate in the instant case, and indicated that it had received information that the State had "annulled the effects of article 5 of Decree Law No. 25792" and had complied with the provisions of the judgments delivered by the Supreme Court of Justice and the Constitutional Court of Peru, adding that "[t]his compliance [was] one of the fundamental elements of the substance of the [...] application."

27. On May 3, 2002, CEDAL presented a communication in which it requested that the testimony of Jorge Santistevan de Noriega should be substituted by the testimonial statement of Walter Albán Peralta. It also forwarded a copy of the fifth attachment to the brief on requests, arguments and evidence, which had been requested by the Secretariat, because it was illegible (supra para. 20), and attached the original powers of attorney granted by the alleged victims to Viviana Krsticevic, Javier Mujica Petit and María Clara Galvis (supra para. 25). On May 6,

2002, on the instructions of the President, the Secretariat informed the State and the Commission that they had until May 24, 2002, to formulate any comments they deemed pertinent on the request to substitute the witness, Jorge Santistevan de Noriega.

28. On May 21, 2002, the Commission, pursuant to Article 36(4) of the Rules of Procedure, submitted a brief with arguments "on the possible preliminary objection that it could be considered that the State of Peru had filed [...] in its brief answering the application." The same day, the representatives of the alleged victims and their next of kin submitted a brief on the same issue. On May 28, 2002, the representatives of the alleged victims and their next of kin transmitted the original of the said brief, with the attachment indicated in this document.

29. On May 22, 2002, the State presented its comments on the request to substitute the witness, Jorge Santistevan de Noriega (supra para. 27), and on the powers of attorney offered by the representatives of the alleged victims and their next of kin (supra paras. 25 and 27), indicating that the latter contained some irregularities. The same day, Peru presented another communication in which it referred to the information presented by the Commission (supra para. 26) regarding compliance with the judgments delivered by the Supreme Court of Justice and the Constitutional Court of Peru, and the annulment of article 5 of Decree Law No. 25792. On July 1, 2002, Peru presented the original of these communications.

30. On May 24, 2002, the Secretariat granted the State a period of 30 days to present, at the request of the Commission in the application brief, information on the amount of the monthly pension that it had paid to Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández and Reymert Bartra Vásquez, and to Maximiliano Gamarra Ferreyra or his next of kin since November 1992; and on the amount received as salary since November 1992 by the persons who occupied the following positions, or positions with similar functions, in the Superintendency of Banks and Insurance (hereinafter "the SBS" or "the Superintendency"):

a) Director General of Communications (the last position that Torres Benvenuto held in the SBS);
b) General Superintendent of Credits of the Superintendency of Banks and Insurance (the last position that Javier Mujica Ruiz-Huidobro held in the SBS);
c) Administrative Adviser to Senior Management (the last position that Guillermo Álvarez Hernández held in the SBS);
d) Technical Adviser to the Deputy Superintendency of Specialized Insurance Entities (the last position that Reymert Bartra Vásquez held in the SBS); and
e) Superintendent of Banks and Insurance (the last position that Maximiliano Gamarra Ferreyra held in the SBS).

31. On May 24, 2002, the Secretariat, on the instructions of the President, requested the representatives of the alleged victims and their next of kin to clarify the State's concerns regarding the powers of attorney granted by Javier Mujica Ruiz-Huidobro, Carlos Torres Benvenuto and Reymert Bartra Vásquez before the notary, Alfredo Aparicio Valdez (supra paras. 25, 27 and 29).

32. On June 3, 2002, the State presented the documents corresponding to appendices 8 and 9 of the brief answering the application (supra para. 21).

33. On June 14, 2002, the representatives of the alleged victims and their next of kin forwarded a communication with information on the situation of the powers of attorney granted by Javier Mujica Ruiz-Huidobro, Carlos Torres Benvenuto and Reymert Bartra Vásquez before the notary, Alfredo Aparicio Valdez (supra paras. 25, 27, 29 and 31). They also presented the original powers of attorney for the proceeding before the Court that Javier Mujica Ruiz-Huidobro and Reymert Bartra Vásquez had granted to Viviana Krsticevic, Javier Mujica Petit and María Clara Galvis on June 3 and 4, 2002.

34. On July 1, 2002, Peru presented a communication in which it transmitted part of the information requested by the Secretariat (supra para. 30) on the amounts earned as salary by the persons who had occupied similar functions or positions to those occupied by the alleged victims in the SBS. Subsequently, on July 17, 2002, the State presented documents with the information requested by the Secretariat (supra para. 30) on the amount of the monthly pension that it had paid to the alleged victims or to their next of kin since November 1992, and on the amounts earned as salary by the persons who had occupied similar functions or positions to those occupied by the alleged victims in the SBS.

35. On July 2, 2002, Carlos Torres Benvenuto presented a copy of the power of attorney for the proceeding before the Court that he had granted to Viviana Krsticevic, Javier Mujica Petit and María Clara Galvis on June 14, 2002.

36. On July 8, 2002, the Commission transmitted its final list of witnesses and expert witnesses for the public hearing on merits and possible reparations in this case. The following day, the representatives of the alleged victims and their next of kin transmitted their final list and endorsed the testimonial and expert evidence offered in the Commission's application.

37. On July 16, 2002, the President issued an Order in which he rejected the objections raised by the State with regard to the testimonial and expert evidence and admitted the testimonial and expert statements offered by the Commission and by the representatives of the alleged victims and their next of kin. He also summoned the parties to a public hearing to be held at the seat of the Court at 10 a.m. on September 3, 2002, to hear their arguments on possible preliminary objections, merits and possible reparations, and also the statements of the witnesses and expert witnesses proposed by the Commission and the representatives of the alleged victims and their next of kin.

38. On July 22, 2002, the representatives of the alleged victims and their next of kin presented a communication with information on the "current status of the case." Subsequently, on August 21, 2002, it transmitted the appendices mentioned in this communication.

39. On August 1 and 5, 2002, the Secretariat, on the instructions of the President and pursuant to Article 44 of the Rules of Procedure, requested the representatives of the alleged victims and their next of kin to present the following documents: copy of the proposal for a friendly settlement that they had submitted to the Executive Secretariat of the National Human

Rights Council of the Ministry of Justice of Peru; copy of decision No. 026-97/DP of the Office of the Ombudsman of Peru, and copy of the amicus curiae presented by the Office of the Ombudsman while the case was being processed before the Commission. They were given until August 16, 2002, to submit these documents.

40. On August 9, 2002, Delia Revoredo Marsano de Mur, summoned by the President of the Court to present an expert report at the public hearing (supra para. 37), advised that for work-related reasons, she would be unable appear before the said hearing.

41. On August 21, 2002, the representatives of the alleged victims and their next of kin presented a communication to which they attached, inter alia, the documents requested by the Secretariat on August 1 and 5, 2002 (supra para. 39), and the document entitled "Attestation" of the Office of the Fifth Provincial Criminal Prosecutor of Lima, regarding case 506010105-2002-7-0, which mentions Oscar Ochoa Rivera, as defendant accused of the offence of falsification of documents, and Martín Gregorio Oré Guerrero, as the aggrieved party, in order to prove that "an investigation is being processed before that office regarding the falsification of the signatures" on the powers of attorney of three of the alleged victims.

42. On August 21, 2002, the representatives of the alleged victims and their next of kin forwarded a communication, in which they requested the Court to authorize the participation of Walter Albán Peralta in the public hearing as an expert witness, rather than as a witness. In a note of August 22, 2002, the Secretariat requested them to forward the curriculum vitae of Walter Albán Peralta so that the Court could decide on their request. On August 23, 2002, the representatives of the alleged victims and their next of kin presented the said curriculum vitae.

43. On August 23, 2002, the Secretariat, on the instructions of the President, granted until August 27, 2002, for the Commission and the State to present their comments on the request of the representatives of the alleged victims and their next of kin mentioned in the preceding paragraph.

44. On August 27, 2002, the State presented a communication stating its opposition to the request of the representatives of the alleged victims and their next of kin that the statement of Walter Albán Peralta should be considered expert evidence and not testimonial evidence. In the same communication, Peru affirmed that, in accordance with the provisions of Article 21(1) of the Rules of Procedure, it had designated Mario Pasco Cosmópolis as Deputy Agent in this case. The following day, the Commission forwarded a communication in which it stated that it had no objection to the said request of the representatives.

45. On August 27 and 28, 2002, the representatives of the alleged victims and their next of kin advised that Walter Albán Peralta would be unable to take part in the public hearing. In his place, they requested that Daniel Soria Luján should be summoned as an expert witness and, to this end, they forwarded his curriculum vitae.

46. On August 29, 2002, the Secretariat, on the instructions of all the judges of the Court, informed the parties that the Court had rejected the request of the representatives of the alleged

victims and their next of kin to summon Daniel Soria Luján to provide an expert report at the public hearing.

47. On August 30, 2002, Carlos Rafael Urquilla Bonilla, representative of the organization, Human Rights in the Americas, presented an amicus curiae brief.

48. On September 2, 2002, the State presented a communication in which it referred to the allegation of failure to exhaust domestic remedies contained in the answer to the application. In this respect, it indicated that "in the instant case, any discussion of the validity of the application, in view of non-exhaustion of the procedure indicated in the internal jurisdiction of Peru, should be decided in conjunction with the judgment and taking into consideration all the evidence contributed by the parties."

49. The same day, Peru presented a communication in which it set out its considerations regarding the proposal for a friendly settlement presented by the representatives of the alleged victims and their next of kin to the Executive Secretariat of the National Human Rights Council of the Ministry of Justice of Peru, and the amicus curiae presented by the Office of the Ombudsman while the case was being processed before the Commission (supra paras. 39 and 41).

50. On September 3 and 4, 2002, the Court, at a public hearing on merits and possible reparations, heard the statements of the witnesses and the report of the expert witness proposed by the Commission and by the representatives of the alleged victims and their next of kin, respectively. The Court also heard the final oral arguments of the parties.

There appeared before the Court:

for the Inter-American Commission on Human Rights:

Marta Altolaguirre, delegate; and
Ignacio Álvarez, adviser.

for the alleged victims and their next of kin:

María Clara Galvis Patiño, lawyer, CEJIL; and
Javier Mujica Petit, representative, CEDAL.

for the State of Peru:

Fernando Elías Mantero, agent; and
Mario Pasco Cosmópolis, deputy agent.

Witnesses proposed by the Inter-American Commission on Human Rights:

Carlos Torres Benvenuto; and
Guillermo Álvarez Hernández.

Expert witness proposed by the representatives of the alleged victims and their next of kin:

Máximo Jesús Atauje Montes.

51. At the public hearing on merits and possible reparations, the President granted the parties 30 days to present their final written arguments.

52. On September 3, 2002, during the public hearing on merits and possible reparations, Máximo Jesús Atauje Montes also presented his written expert report.

53. On September 4, 2002, during the presentation of the final arguments of the parties to the public hearing on merits and possible reparations, the representatives of the alleged victims and their next of kin presented a document entitled "La seguridad social y los sistemas de pensiones en el Perú"[Social security and pension systems in Peru].

54. On September 5, 2002, the representatives of the alleged victims and their next of kin forwarded several documents they had offered during the public hearing on merits and possible reparations.

55. On October 2, 2002, the representatives of the alleged victims and their next of kin requested a 30-day extension for the presentation of their final written arguments. The same day, the Secretariat, on the instructions of the President, informed the parties that a non-extendible period to October 30, 2002, had been granted for the representatives of the alleged victims and their next of kin, the Commission, and the State to present their final written arguments.

56. On October 3, 2002, Juan Álvarez Vita, proposed by the Commission to provide an expert witness report at the public hearing on merits and possible reparations [FN1], transmitted an electronic communication presenting his expert report on this case. The following day, the Commission forwarded a communication to which it attached a copy of Mr. Álvarez Vita's expert report. On October 25, 2002, Mr. Álvarez Vita transmitted the original of this written expert report.

[FN1] Juan Álvarez Vita did not provide his expert report at the public hearing held on September 3 and 4, 2002, because the Inter-American Commission desisted from presenting this witness's expert report orally. The Court accepted that, instead, the report of this expert witness could be submitted in writing.

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57. On October 25, 2002, the Commission presented its final written arguments.

58. On October 29, 2002, Peru transmitted its final written arguments, together with the appendices. The same day, the State also presented a document entitled "Explicación de los regímenes laborales y pensionarios que se aplican en la República of Peru y análisis específico de la situación de cada uno de los pensionistas" [Explanation of labor and pension regimes

applied in the Republic of Peru and specific analysis of the situation of each of the pensioners], to which it added an attachment.

59. On October 30, 2002, the representatives of the alleged victims and their next of kin forwarded their final written arguments. On November 6, 2002, they presented the appendices to this brief.

60. On November 7, 2002, the State forwarded a communication in which it referred to the expert report presented by Máximo Jesús Atauje Montes in this case.

61. On November 18, 2002, Víctor Abramovich, Julieta Rossi, Andrea Pochak and Jimena Garrote, from the Center for Legal and Social Studies (CELS), and Christian Courtis, professor of the Law Faculty of the Universidad de Buenos Aires, presented a brief as amici curiae.

62. On February 24, 2003, the State presented a time-barred communication.

V. THE EVIDENCE

63. Before examining the evidence received, the Court will outline some considerations that, in light of the provisions of Articles 43 and 44 of the Rules of Procedure, are applicable to this specific case, most of which have been developed in its own case law.

64. First, it is important to point out that the principle of the adversary proceeding, which respects the right of defense of the parties, applies in matters pertaining to evidence. This principle is one of the foundations of Article 43 of the Rules of Procedure, as regards the time at which evidence must be submitted to ensure equality among the parties [FN2].

[FN2] Cf. Case of the Mayagna (Sumo) Awas Tingni Community. Judgment of August 31, 2001. Series C No. 79, para. 86.

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65. Furthermore, in the matter of receiving and weighing evidence, the Court has indicated previously that its proceedings are not subject to the same formalities as domestic proceedings and that, when incorporating certain elements into the body of evidence, particular attention must be paid to the circumstances of the specific case and to the limits imposed by respect for legal certainty and the procedural equality of the parties [FN3]. The Court has taken account of the fact that while international jurisprudence has always held that international courts have the authority to assess and evaluate the evidence according to the rules of sound criticism, it has always steered clear of making a rigid determination as to the quantum of the evidence needed to support a judgment [FN4]. This criterion is especially true for international human rights courts which, in order to determine the international responsibility of a State for the violation of a person’s rights, have considerable latitude to evaluate the evidence tendered regarding the facts of the case, in accordance with the principles of logic and on the basis of experience [FN5].

[FN3] Cf. Cantos case. Judgment of November 28, 2002. Series C No. 97, para. 27; Las Palmeras case. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of November 26, 2002. Series C No. 96, para. 18; and El Caracazo case. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of August 29, 2002. Series C No. 95, para. 38.
[FN4] Cf. Cantos case, supra note 3; El Caracazo case. Reparations, supra note 3; Hilaire, Constantine and Benjamin et al. case. Judgment of June 21, 2002. Series C No. 94, para. 65; and Trujillo Oroza case. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of February 27, 2002. Series C No. 92, para. 37.
[FN5] Cf. Cantos case, supra note 3; El Caracazo case. Reparations, supra note 3, para. 39; and Trujillo Oroza case. Reparations, supra note 4, para. 38.
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66. Based on the foregoing, the Court will proceed to examine and weigh all the elements of the body of evidence of the case, according to the principle of sound criticism and within the legal framework under consideration.

A) DOCUMENTARY EVIDENCE

67. When submitting its application brief (supra paras. 1 and 13), the Commission attached as evidence 69 appendices containing 87 documents [FN6].

[FN6] Cf. appendices 1 to 69 of the application brief filed the Commission on December 4, 2001 (folios 1 to 356 of the file of appendices to the application).
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68. The representatives of the alleged victims and their next of kin attached 7 appendices containing 13 documents to the brief on requests, arguments and evidence (supra paras. 20, 25 and 27) [FN7].

[FN7] Cf. appendices 2 to 7 of the brief of March 5, 2002, on requests, arguments and evidence of the representatives of the alleged victims and their next of kin, presented on March 8, 2002 (folios 216 to 255 of Tome I of the file on merits and possible reparations); appendix 1 of this brief presented by the representatives of the alleged victims and their next of kin on April 22, 2002 (folios 530 to 535 of Tome III of the file on merits and possible reparations); and a more legible copy of appendix 5 presented by the representatives of the alleged victims and their next of kin on May 3, 2002 (folio 576 bis of Tome III of the file on merits and possible reparations).
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69. As evidence, the State attached 60 documents contained in 9 appendices to its brief answering the application (supra paras. 21 and 32) [FN8].

[FN8] Cf. appendices 1 to 7 of the brief in answer to the application of March 15, 2002, presented by the State on April 18, 2002 (folios 314 to 470 of Tome II of the file on merits and possible reparations) and Appendices 8 and 9 of this brief presented on June 3, 2002 (folios 649 to 667 of Tome III of the file on merits and possible reparations).

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70. The State forwarded 6 documents when submitting its comments on the brief on requests, arguments and evidence of the representatives of the alleged victims and their next of kin (supra para. 24) [FN9].

[FN9] Cf. appendices 1 and 2 of the brief presented on April 22, 2002, by the State, with its comments to the brief on requests, arguments and evidence of the representatives of the alleged victims and their next of kin, transmitted by the State on April 30, 2002 (folios 558 to 571 of Tome III of the file on merits and possible reparations).

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71. The representatives of the alleged victims and their next of kin attached two documents contained in one appendix to the brief with arguments concerning a possible preliminary objection submitted by the State in its answer to the application (supra paras. 21 and 28) [FN10].

[FN10] Cf. appendix 1 of the brief of May 21, 2002, with the arguments of the representatives of the alleged victims and their next of kin on a possible preliminary objection presented by the State in the answer to the application, presented on May 28, 2002 (folios 639 to 644 of Tome III of the file on merits and possible reparations).

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72. The State attached two documents when presenting its brief with comments on the powers of attorney provided by the representatives of the alleged victims and their next of kin (supra paras. 25, 27 and 29) [FN11]. The representatives of the alleged victims and their next of kin attached two appendices containing 21 documents with the brief clarifying the powers of attorney (supra para. 33) [FN12].On July 2, 2002, Carlos Torres Benvenuto forwarded a copy of the power of attorney for the proceeding before the Court [FN13].

[FN11] Cf. appendices 1 and 2 of the State's brief of May 22, 2002 (folios 614 and 615 of Tome III of the file on merits and possible reparations).

[FN12] Cf. appendices 1 and 2 of the brief presented by the representatives of the alleged victims and their next of kin on June 14, 2002 (folios 676 to 706 of Tome IV of the file on merits and possible reparations).

[FN13] Cf. folios 786 and 787 of Tome IV of the file on merits and possible reparations.

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73. As evidence to help the Court make a more informed decision, Peru transmitted various documents (supra paras. 30 and 34) [FN14] regarding the amounts of the salary received by the

persons who had occupied similar functions or positions to those the alleged victims occupied in the SBS, and about the amount of the monthly pension that it had paid to the alleged victims or their next of kin since November 1992.

[FN14] Cf. folios 752 to 771 and 842 to 888 of Tome IV of the file on merits and possible reparations.

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74. The representatives of the alleged victims and their next of kin presented a brief on the "current status of the case" (supra para. 38), to which they attached 12 documents contained in 6 appendices [FN15].

[FN15] Cf. appendices 1 to 6 of the communication of July 22, 2002, of the representatives of the alleged victims and their next of kin, presented on August 21, 2002 (folios 959 to 995 of Tome IV of the file on merits and possible reparations).

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75. As evidence to help the Court make a more informed decision, the representatives of the alleged victims and their next of kin presented (supra paras. 39 and 41) three documents [FN16] and an attestation of the Office of the Provincial Criminal Prosecutor of Lima to prove that "an investigation is being processed before the said office into the falsification of the signatures" of the powers of attorney of the representatives of the alleged victims (supra para. 41) [FN17].

[FN16] Cf. folios 936 to 956 of Tome IV of the file on merits and possible reparations.
[FN17] Cf. folio 935 of Tome IV of the file on merits and possible reparations.

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76. On September 3, 2002, during the report of the expert witness at the public hearing (supra para. 52), the expert witness, Máximo Jesús Atauje Montes, also presented his report in writing, consisting of 151 pages with 10 documents attached as appendices [FN18].

[FN18] Cf. folios 1108 to 1258 of Tome V of the file on merits and possible reparations.

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77. On September 4, 2002, during the presentation of the final arguments of the parties at the public hearing (supra para. 53), the representatives of the alleged victims and their next of kin presented a 25-page document entitled "La seguridad social y los sistemas de pensiones en el Perú" [Social security and pension systems in Peru] [FN19].

[FN19] Cf. folios 1263 to 1287 of Tome V of the file on merits and possible reparations.

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78. The representatives of the alleged victims and their next of kin presented eight documents, which had been offered during the public hearing (supra para. 54) [FN20].

[FN20] Cf. folios 1292 to 1350 of Tome V of the file on merits and possible reparations.

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79. Juan Álvarez Vita, proposed by the Commission to give an expert witness report at the public hearing on merits and possible reparations (supra para. 56), forwarded his written expert report on this case [FN21]. The Commission also transmitted a copy of this document by facsimile [FN22]. The report analyzes economic, social and cultural rights.

[FN21] Cf. folios 1364 to 1406 of Tome VI of the file on merits and possible reparations.
[FN22] Cf. folios 1408 to 1449 of Tome VI of the file on merits and possible reparations.

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80. When presenting its brief with final arguments (supra para. 58), the State attached two appendices containing five documents as evidence [FN23].

[FN23] Cf. appendices 1 and 2 of the brief with the State's final arguments presented on October 29, 2002 (folios 1507 to 1530 of Tome VI of the file on merits and possible reparations).

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81. The State presented (supra para. 58) a document entitled "Explicación de los Regímenes Laborales y Pensionarios que se aplican en la República of Peru y análisis específico de la situación de cada uno de los pensionistas" [Explanation of labor and pension regimes applied in the Republic of Peru and specific analysis of the situation of each of the pensioners], to which it attached an appendix [FN24].

[FN24] Cf. folios 1552 to 1582 of Tome VI of the file on merits and possible reparations.

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82. When presenting their brief with final arguments (supra para. 59) the representatives of the alleged victims and their next of kin attached 11 appendices containing 13 documents as evidence [FN25].

[FN25] Cf. appendices 1 to 11 of the brief of October 30, 2002, of the representatives of the alleged victims and their next of kin, presented on November 6, 2002 (folios 1643 to 1724 of Tome VI of the file on merits and possible reparations).

B) TESTIMONIAL AND EXPERT EVIDENCE

83. On September 3 and 4, 2002, the Court received the statements of the witnesses and the report of the expert witness proposed by the Inter-American Commission on Human Rights and the representatives of the alleged victims and their next of kin (supra para. 50), respectively. The relevant parts of these statements are summarized below:

a. Statement by Carlos Torres Benvenuto, alleged victim

In January 1950, he began to work at the SBS and ceased to work for that institution on December 31, 1986. He was Director General; he worked at the SBS for a total of 37 years, 11 months and 15 days. He ceased working for the SBS because he had worked for more than 37 years and for family-related reasons.
With his pension, he covered the household expenses, the maintenance, food, education and health of all his family, composed of his six children, one of whom is still financially dependent on him. He intended to continue supporting his family, collecting the pension under the regime of Decree Law No. 20530, which authorized him to have a pension known in Peru as the "célula viva" [living cell], which consists in receiving the equivalent of the amount the person who currently occupies that position earns; this represents an equalized pension. The witness made contributions from his salary so as to receive a pension when he ceased working. The SBS created a pension fund in 1943, with which it covered the pensions of the institution's employees. In 1982, the SBS changed its labor regime, which was then public, and opted for a private regime. However, not all the employees changed their labor regime; there was a mechanism stipulating that those who wished to opt for the change could do so and those who did not wish to do so could remain under the regime in force. Employees could change regime or remain under the Decree Law No. 20530 regime. The witness remained under the previous regime with a reduced salary. Remaining under the previous regime meant retaining the right to a pension equalized with the salary of the active personnel.
The SBS began to make his pension payments as of the day he ceased working in the institution on December 31, 1986. The amount he received varied each year, in accordance with SBS regulations. The adjustments were made when the salary of the person occupying the position that he had held before retiring increased; this adjustment was sometimes made once or twice a year, according to the country's financial requirements at those times. The pension was paid from the SBS pension fund. The pension was paid for six and a half years, until September 1992, when the payments were abruptly discontinued without any notice, there was no communication at all, the SBS did execute any procedure to implement the reduction in the pensions, but abruptly reduced his pension to a sixth of the amount he had been receiving. He found out that the pension had been reduced when he went to collect it in September 1992; the amount was reduced to a gross sum of S.504.00 (five hundred and four soles), less deductions for insurance and S.100.00 (one hundred soles) for medical services, so that he received a net amount of S.308.00 (three hundred and eight soles), while in August of that year he had received S.2,450.00 (two thousand four hundred and fifty soles). This pension was his principal and only income. He thought that the amount would increase, because, under his pension regime, his pension was equalized every time the salary of the acting official was modified. He never thought that the amount of his pension would be reduced, because this "violates" the rights of the employee; a pension cannot be decreased.

The reduction in his pension produced serious financial consequences, because he had to sell his car, ask his friends for loans and, finally, he even had to sell his house and move to an apartment. He reduced his expenses, bought less food and medicines, it affected his children's schooling, it was a catastrophic situation. With regard to his children's schooling at that time, the pension he received was less than the amount he paid to the Colegio San Agustín in Lima, Peru, the school attended by his children.

This situation not only affected him financially, but also psychologically and socially.

As regards the repercussions on his health, the witness had a heart attack and was hospitalized for two months in a Peruvian social security hospital, because the SBS had taken away his medical insurance. In this institution, he had a medical insurance for which he paid approximately S.89.00 to S.100.00 (eighty-nine to one hundred soles) each month. The insurance was supposed to continue while he received his pension, but unfortunately he was deprived of this also.

Since the pension was reduced, several legal actions have been filed. Applications for amparo were filed and succeeded, but the SBS did not comply by making the payments; criminal proceedings were filed, as a result of which the SBS issued decisions that it did not fulfill. An appeal was filed before the Constitutional Court, which decided in his favor; recourse was had to the Office of the Ombudsman, which exhorted the Superintendent to comply with the judgments, but the latter did not do so. The Lawyers Professional Association was consulted as to whether what was happening was permitted and it upheld the pensioners, even the Minister of Economy and Finance himself sent a letter to the Superintendent, Dr. Puerta Barrea, urging him to comply with the judgments to avoid criminal proceedings. The witness has spoken directly with the different Superintendents, he has issued notarized letters trying to overcome the difficulties and reach an agreement, even losing some rights, but everything has been in vain. There have also been complaints to the press and protest activities in the entrance to the SBS, but there has been no response. In 1992, legal proceedings were filed against the SBS, which was the institution responsible for paying the pensions at that time. A few months later, in October 1992, Decree Law No. 25792 was promulgated. Since then, the SBS no longer pays the pension. The witness and the other pensioners were not a "burden" on the National Treasury, because they had their own income from the SBS pension fund. Then, as of November 1992, the Ministry of Economy and Finance (hereinafter "the MEF") paid the pensions until March 2002, when article 5 of the said Decree Law was annulled. Applications for protective measures were filed against the SBS, which was the entity that should pay the pensioners; the MEF was not named in the proceeding, because there was a tactic used by this Ministry and the SBS, since the SBS said that, according to article 5 of Decree Law No. 25792, the MEF should pay them the pension while the MEF alleged that the said article 5 did not create any obligation for it to pay the SBS pensioners and that the SBS should transfer the contributions, which were the appropriate resources to honor the payment of the pensioners. The Constitutional Court's judgment that ruled on the application for protective measures, delivered after 1994, and the judgment of the Supreme Court of Justice, ordered the rights of the pensioners to be restored, by paying them the pension they had been receiving in accordance with Decree Law No. 20530. The witness never incorporated the private sector regime. Currently, he receives a pension referred to the salary of an employee under the private sector regime.

In March 2002, the SBS issued decisions to which it attached a statement of the amounts due, which the five pensioners accepted; they were therefore paid the pensions accrued during the 10 years that the SBS had ceased to pay them; subsequently, he has received his pension every

month. Following a ten-year struggle, during which he suffered such penury, the witness states that he feels slightly comforted. The amount he received in repayment was more or less S.1,400,000.00 (one million four hundred thousand soles), which, in dollars would be approximately US$400,000.00 (four hundred thousand United States dollars), no type of legal interest was added to this amount. The SBS salaries are not raised by the pensioners and, according to the Decree Law No. 20530 labor regime, the witness should receive the salary of the person who occupies his position; this salary is about S.21,000.00 (twenty-one thousand soles), which is about US$6,000.00 (six thousand United States dollars). This payment is subject to one condition that mortifies the pensioners, because the last paragraph of article 3 of the SBS decision states that it is all subject to the judgment of the Inter-American Court, which means that they are still being threatened.

The witness requested the Court to deliver its judgment as soon as possible so that he could have peace of mind.

b. Statement by Guillermo Álvarez Hernández, alleged victim

He retired from the SBS when he was 55 years of age, in 1984; the last position he occupied was that of Administrative Adviser. The SBS, which until 1992 had adhered to the public sector labor regime of Decree No. 11377 and Decree Law No. 20530, changed labor regime, from a public statutory regime to a private labor law regime. The personnel who had been working under the public regime were given the choice of remaining with that regime, with its remunerations and pension expectations, or of changing labor regime and joining the private regime. The witness and the other pensioners, the alleged victims, remained in the regime of Decree Law No. 20530, which meant that they did not change regime. During the 36 years that he worked with the SBS, the witness contributed to its pension fund. The percentage of his salary that he contributed varied from 8% to 12% to 15% for the most senior positions in the SBS. The witness's position was one of the most senior in the institution. While he occupied that position, he believed that when he retired he would support himself with the pension that corresponded to him by law.

He ceased to work for the SBS owing to illness and because he had worked sufficient years to obtain a pension.

After leaving the SBS he received his complete pension for eight years. In 1984, his pension was approximately S.2,400.00 (two thousand four hundred soles), without including bonuses; this represented approximately US$1,400.00 (one thousand four hundred United States dollars). In September 1992, there was a quite significant reduction of 80% of his pension. This reduction was carried out arbitrarily, with no notice being given to the pensioners and without any legal basis. The witness learned of the reduction when he went to collect his cheque and instead of receiving approximately S.2,500.00 (two thousand five hundred soles), which he had been receiving, he was handed a cheque for S.504.00 (five hundred and four soles). He had never imagined that the amount of the pension could be reduced, because the pension law established how it should be equalized. The Constitution establishes that pensions should be equalized with the positions occupied by officials of the same level as the pensioners and there are also other laws, such as Decree Law No. 20530 and Law 23495 and its Regulation, which establish the same provisions in this respect.

Several legal proceedings were filed to make the State comply effectively with the payment of the pensions: an application for amparo was filed before the lower court, which was the sitting court at that time. This application was filed against the SBS; the MEF was never included,

because Decree Law No. 25792 was issued after the application for amparo had been filed, and subsequent laws are not retroactive. With Decree Law No. 25792, he began to receive his pension from the MEF. The said application for amparo was rejected, so an appeal was filed before the Superior Court, which upheld the pensioners; subsequently, the SBS appealed that decision and, in 1994, the Supreme Court of Justice upheld them and ordered that the whole pension should be paid in accordance with the decision establishing that amount, but it also indicated that the pensions should be equalized; these judgments were not implemented. Other actions were filed through temporary courts, which also upheld them. In 2000, the Constitutional Court, when deciding on the compliance proceeding, upheld the pensioners and ordered that the judgments of the Supreme Court of Justice of Peru should be complied with. The State did not respond to the failure to comply with the decisions and the pensioners sought answers, but did not receive them; they sent notarized letters to the State to try and reach an agreement, but they were never able to achieve this. In addition to these actions, they filed criminal proceedings to enforce the judgments of the Supreme Court of Justice and, as a result, the SBS issued administrative decisions in the case of the five pensioners, ordering that their pensions should be reimbursed, but these decisions were never implemented.

All of this made the witness and his family feel powerless, since they were unable to obtain any result. His family comprises his wife and two children, who are now 40 years of age and 32 years of age. With the pension, the witness paid his household expenses, his children's studies, the family medical insurance, and other expenses and items. Apart from the pension, he had no other income to support himself, because at his age it is difficult to obtain another income. The reduction of the pension caused him financial, psychological and non-pecuniary damage. His family had to decrease its monthly budget. His son studied in the Universidad del Pacífico, a private university, and had to transfer to the Universidad Garcilazo de la Vega, a State university. The reduction in the pension affected the mental health of his family and himself.

In view of the Commission's recommendations and the annulment of Decree Law No. 25792, the State paid the five pensioners the amounts it owed them for the ten years that it had reduced the pensions. The judgments did not include a statement of the amount owed; this was prepared by the SBS. The pensioners accepted the amounts that they were paid, but one article of the SBS decisions states that these payments are subject to the judgment of the Inter-American Court. This is a threat that it might be necessary to pay back part of the amount.

Currently, the amount of the witness's pension in dollars is approximately US$3,500.00 (three thousand five hundred United States dollars), without including bonuses, and he has received, in dollars, as repayment for the ten years that the pension was not paid correctly and with the corresponding equalizations approximately US$350,000.00 (three hundred and fifty thousand United States dollars) or US$380,000.00 (three hundred and eighty thousand United States dollars). This pension is not subject to income tax at present, but it is subject to "previal" tax. The salary of the acting official is subject to income tax.

In a recent television interview, when asked whether he considered it fair that, having had a salary of US$1,200.00 (one thousand two hundred United States dollars), his pension today could be US$3,600.00 (three thousand six hundred United States dollars) and that he had received a repayment of US$380,000.00 (three hundred and eighty thousand United States dollars), he answered that, in effect, "the pensions were high, the amounts received were high, but unfortunately that was the law, what the law established."

He would be grateful if the Court would decide that the article included in the SBS administrative decision of 2002, referring to the Court's judgment should be eliminated, so that he could enjoy peace of mind.

c. Expert report of Máximo Jesús Atauje Montes, economist and legal expert

The expert witness referred to loss of income, consequential damage, and the legal interest payments that, in his opinion, correspond to the alleged victims.

C) ASSESSMENT OF THE EVIDENCE

Assessment of the Documentary Evidence

84. In this case, as in others [FN26], the Court admits the probative value of those documents submitted by the parties at different stages of the proceedings, or as evidence to make a more informed decision, that have not been challenged and whose authenticity has not been questioned. The Court also accepts, pursuant to Article 43 of the Rules of Procedure, the evidence submitted by the parties with regard to supervening events occurring after the application had been filed.

[FN26] Cf. Cantos case, supra note 3, para. 41; Las Palmeras case. Reparations, supra note 3, para. 28; and El Caracazo case. Reparations, supra note 3, para. 57.

Assessment of the Testimonial and Expert Evidence

85. With regard to the statements made by two of the alleged victims in the instant case (supra para. 50), the Court admits them to the extent that they are consistent with the purpose of the questioning proposed by the Commission. In this respect, the Court considers that, because they are alleged victims and have a direct interest in this case, their statements may not be assessed in an isolated manner, but rather as part of the body of evidence of the proceedings. Regarding both merits and reparations, the statements of the alleged victims are useful insofar as they can provide better information on the consequences of the possible violations [FN27].

[FN27] Cf. Cantos case, supra note 3, para. 42; El Caracazo case. Reparations, supra note 3, para. 59; and Trujillo Oroza case. Reparations, supra note 4, para. 52.

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86. Regarding the reports submitted by the expert witnesses (supra paras. 50 and 56), which were not challenged or questioned, the Court admits them and accepts their probative value. The Court has also taken into consideration the State's comments of November 7, 2002 (supra para. 60), and the expert report of Máximo Jesús Atauje Montes.

VI. PROVEN FACTS

87. Having examined the documents, the statements of the witnesses, the reports of the expert witnesses, and the statements of the Commission, the representatives of the alleged victims and their next of kin, and the State during this proceeding, the Court considers that the following facts have been proven:

88. GENERAL FACTS

88(a) On February 26, 1974, Decree Law No. 20530 entitled "Pension and Compensation Regime for Civil Service to the State not covered by Decree Law 19990" was promulgated [FN28].

[FN28] Cf. Decree Law No. 20530 "Pension and Compensation Regime for Civil Service to the State not covered by Decree Law 19990" of February 26, 1974 (file of appendices to the application, appendix 19, folios 78 to 85).

88(b) The alleged victims worked for the SBS and retired after having served for more than 20 years in the Public Administration [FN29]. The five pensioners began working in the Public Administration between 1940 and 1964, and stopped working for the SBS between 1975 and 1990 [FN30].

[FN29] Cf. administrative decision SBS No. 003-87 of January 6, 1987, with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 10, folio 66); administrative decision SBS No. 376-83-EFC/97-10 of August 2, 1983, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 12, folio 68); administrative decision SBS No. 330-95 of May 4, 1995, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 51, folios 194 and 195); administrative decision SBS No. 228-84 of August 16, 1984, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 14, folios 70 and 71); administrative decision SBS No. 412-90 of July 4, 1990, with regard to Reymert Bartra Vásquez (file of appendices to the application, appendix 16, folio 73); and administrative decision SBS No. 398-75-EF/97-10 of October 21, 1975, with regard to Maximiliano Gamarra Ferreyra (file of appendices to the application, appendix 18, folios 76 and 77).

[FN30] Cf. supra note 29.

88(c) According to the organic law of the SBS, enacted in 1981, this entity "is a public institution with public law legal status, and functional, administrative and financial autonomy." SBS personnel were included in a public sector labor regime until, in this 1981 organic law, it was established that its personnel "[would be] included in the labor regime corresponding to the private sector, with the exception of those employees covered by the regime of Law No. 11377 and the pensions established by Decree Law 20530, who [could] opt to continue under the said regime" [FN31].

[FN31] Cf. Legislative Decree No. 197 "Organic Law of the Superintendency of Banks and Insurance" of June 12, 1981, published in July 1981 in the Official Gazette, El Peruano, articles 1 and 35 (file of appendices to the application, appendix 9, folios 60 to 65).

88(d) The alleged victims opted to continue under the regime of Decree Law No. 20530 [FN32]. According to the said decree law and its related and complementary norms, the State recognized the alleged victims' right to a retirement pension, progressively equalized with the salary "of the active public servants in the respective categories", who occupied the same position or a similar function to that occupied by the pensioners when they ceased to work for the SBS [FN33].

[FN32] Cf. testimony provided by Carlos Torres Benvenuto to the Court on September 3, 2002; testimony provided by Guillermo Álvarez Hernández to the Court on September 3, 2002; administrative decision SBS No. 003-87 of January 6, 1987, with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 10, folio 66); administrative decision SBS No. 330-95 of May 4, 1995, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 51, folios 194 and 195); administrative decision SBS No. 228-84 of August 16, 1984, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 14, folios 70 and 71); administrative decision SBS No. 412-90 of July 4, 1990, with regard to Reymert Bartra Vásquez (file of appendices to the application, appendix 16, folio 73); and administrative decision SBS No. 398-75-EF/97-10 of October 21, 1975, with regard to Maximiliano Gamarra Ferreyra (file of appendices to the application, appendix 18, folios 76 and 77).

[FN33] Cf. Act No. 23495 "Progressive equalization of the pensions of retirees and those who cease to work for the Public Administration who are not subject to the social insurance regime or to other special regimes" of November 19, 1982 (file of appendices to the application, appendix 21, folios 133 and 134); and Decree Law No. 20530 "Pension and Compensation Regime for Civil Service to the State not covered by Decree Law 19990" of February 26, 1974 (file of appendices to the application, appendix 19, folios 78 to 85).

88(e) The pensions of the alleged victims were equalized successively and periodically, "each time there was an increase in the salary scale of the active employees and officials of the Superintendency of Banks and Insurance," [FN34] from the time that each of the five pensioners retired until, in April 1992, the SBS suspended payment of the pension of Reymert Bartra Vásquez and, in September the same year, reduced the amount of the pensions of Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández and Maximiliano Gamarra Ferreyra, by approximately 78% without any prior notice or explanation [FN35].

[FN34] Cf. administrative decision SBS No. 283-95 of April 7, 1995, with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 50, folios 192 and 193);

administrative decision SBS No. 330-95 of May 4, 1995, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 51, folios 194 and 195); administrative decision SBS No. 331-95 of May 4, 1995, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 52, folios 196 to 198); administrative decision SBS No. 332-95 of May 4, 1995, with regard to Maximiliano Gamarra Ferreyra (file of appendices to the application, appendix 53 folios 199 to 201); and administrative decision SBS No. 254-2002 of March 12, 2002, with regard to Reymert Bartra Vásquez (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, submitted by the representatives of the alleged victims and their next of kin, folios 991 to 994).

[FN35] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; communication of the Director of Labor Relations of the SBS of February 20, 1992, notifying Carlos Torres Benvenuto of administrative decision SBS No. 050-92 (file of appendices to the application, appendix 23, folios 138 and 139); SBS payroll for August 1992 with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 24, folio 140); SBS payroll for September 1992, with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 32, folio 154); SBS payroll for October 1992, with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 32, folio 155); communication of the Director General of Human Resources of the SBS of July 10, 1990, notifying Javier Mujica Ruiz-Huidobro of administrative decision SBS No. 480-90 (file of appendices to the application, appendix 25, folios 143 and 144); communication of the Director General of Human Resources of the SBS of August 16, 1990, notifying Javier Mujica Ruiz-Huidobro of administrative decision SBS No. 583-90 (file of appendices to the application, appendix 25, folio 144); communication of the Director General of Human Resources of the SBS of September 14, 1990, notifying Javier Mujica Ruiz-Huidobro of administrative decision SBS No. 637-90 (file of appendices to the application, appendix 25, folio 145); administrative decision SBS No. 115-91 of March 14, 1991, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 26, folios 146 and 147); SBS payrolls of March and April 1992, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 25, folios 141 and 142); SBS payroll of June 1992, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 27, folio 148); application for amparo of October 6, 1992, filed by Javier Mujica Ruiz-Huidobro before the lower civil court judge (file on merits and possible reparations, tome II, appendix 8, of the brief answering the application, folios 343 to 358); communication of the Director of Labor Relations of February 20, 1992, notifying Guillermo Álvarez Hernández of administrative decision SBS No. 050-92 (file of appendices to the application, appendix 28, folios 149 and 150); SBS payroll of June 1992, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 29, folio 151); SBS payroll of June 1992, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 29, folio 151); SBS payroll of July 1992, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 30, folio 152); SBS payroll of September 1992, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 33, folio 156); application for amparo of October 6, 1992, filed by Guillermo Álvarez Hernández before the lower civil court judge (file on merits and possible reparations, tome II, appendix 8, of the brief answering the application, folios 362 to 371); SBS payroll of February 1992, with regard to Reymert Bartra Vásquez (file of appendices to the application, appendix 31, folio 153); application for amparo of 30 of June 1992 filed by Reymert

Bartra Vásquez on July 1, 1992, before the Twenty-sixth Civil Court (file of appendices to the application, appendix 42, folios 173 to 175); MEF payroll of February 1993, with regard to Reymert Bartra Vásquez (file of appendices to the application, appendix 34, folio 157); and application for amparo of October 6, 1992, filed by Maximiliano Gamarra Ferreyra before the lower civil court judge (file on merits and possible reparations, tome II, appendix 8, of the brief answering the application, folios 372 to 381).

88(f) On October 14, 1992, Decree Law No. 25792 [FN36] was promulgated; it "Authorizes the Superintendency of Banks and Insurance (SBS) to establish an Incentives Program for the voluntary retirement of its employees," and article 5 established that "the collection of the contributions and the payment of pensions, remunerations or similar that the Superintendency of Banks and Insurance should pay to its pensioners, retirees and those who have left its employment who are covered by the regime of Decree Law No. 20530 [was] transferred to the budget envelope of the Ministry of Economy and Finance." It also stipulated that "[t]he said pensions, remunerations or similar [would] be referred to those that the Ministry pays its employees and officials, in accordance with Legislative Decree No. 276, including for their equalization" and it added that "[i]n no case will they be equalized or referred to the remunerations paid by the Superintendency of Banks and Insurance to personnel subject to the private sector regime."

[FN36] Cf. Decree Law No. 25792 of October 14, 1992, which "Authorizes the Superintendency of Banks and Insurance (SBS) to establish an Incentives Program for the voluntary retirement of its employees" (file of appendices to the application, appendix 35, folio 159).

88(g) As of November 1992, and while Decree Law No. 25792 was in force, the MEF continued to pay the alleged victims a pension calculated as established in the said law [FN37].

[FN37] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; MEF payroll of February 1993, with regard to Reymert Bartra Vásquez (file of appendices to the application, appendix 34, folio 157); judgment of the Constitutional Court of Peru delivered on August 3, 2000, concerning the compliance proceeding filed by Carlos Torres Benvenuto (file of appendices to the application, appendix 54, folios 202 to 205); administrative decision SBS No. 250-2002 of March 12, 2002, with regard to Carlos Torres Benvenuto (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 975 to 978); administrative decision SBS No. 251-2002 of March 12, 2002, with regard to Maximiliano Gamarra Ferreyra (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 979 to 982); administrative decision SBS No. 252-2002 of March 12, 2002, with regard to Guillermo Álvarez Hernández (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their

next of kin, folios 983 to 986); administrative decision SBS No. 253-2002 of March 12, 2002, with regard to Javier Mujica Ruiz-Huidobro (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 987 to 990); and administrative decision SBS No. 254-2002 of March 12, 2002, with regard to Reymert Bartra Vásquez (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 991 to 994).

88(h) Each of the alleged victims filed an application for amparo against the SBS and, during 1994, these applications were all declared admissible by the Constitutional and Social Law Chamber of the Supreme Court of Justice of Peru in final judgments [FN38]. The judgments were published in the Official Gazette El Peruano [FN39]. At the stage of execution of judgment, the corresponding civil courts in Lima issued decisions ordering the SBS and the MEF to comply with the provisions of the final judgments declaring that the applications for amparo filed by the alleged victims had been substantiated [FN40].

[FN38] Cf. judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on May 2, 1994, regarding the application for amparo filed by Carlos Torres Benvenuto against the SBS (file of appendices to the application, appendix 36, folio 160); judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on September 1, 1994, regarding the application for amparo filed by Javier Mujica Ruiz-Huidobro against the SBS (file of appendices to the application, appendix 38, folio 165); judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on September 19, 1994, published in the Official Gazette El Peruano on July 25, 1995, regarding the application for amparo filed by Guillermo Álvarez Hernández (file of appendices to the application, appendix 41, folio 172), judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on June 28, 1994, published in the Official Gazette El Peruano on September 14, 1994, regarding the application for amparo filed by Reymert Bartra Vásquez (file of appendices to the application, appendix 46, folios 183 and 184); and judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on October 10, 1994, published in the Official Gazette El Peruano on December 2, 1994, regarding the application for amparo filed by Maximiliano Gamarra Ferreyra (file of appendices to the application, appendix 48, folios 187 and 188).

[FN39] Cf. judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on September 19, 1994, published in the Official Gazette El Peruano on July 25, 1995, regarding the application for amparo filed by Guillermo Álvarez Hernández (file of appendices to the application, appendix 41, folio 172); judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on June 28, 1994, published in the Official Gazette El Peruano on September 14, 1994, regarding the application for amparo filed by Reymert Bartra Vásquez (file of appendices to the application, appendix 46, folios 183 and 184); and judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on October 10, 1994, published in the Official Gazette El Peruano on December 2, 1994, regarding the application for amparo filed by Maximiliano Gamarra Ferreyra (file of appendices to the application, appendix 48, folios 187 and 188).

[FN40] Cf. official letter No. 914-94-DNJCL/JNLA of January 16, 1995, from the regular judge of the Nineteenth Civil Court of Lima addressed to the Superintendent of Banks and Insurance, and requesting the latter to comply with that Court's order of November 3, 1994 (file of appendices to the application, appendix 37, folios 161 to 164); official letter of December 19, 1994, of the regular judge of the Nineteenth Civil Court of Lima addressed to the Head of the Superintendency of Banks and Insurance, transmitting him that Court's order of November 22, 1994 (file of appendices to the application, appendix 49, folio 190); administrative decision SBS No. 330-95 of May 4, 1995, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 51, folios 194 and 195); and administrative decision SBS No. 331-95 of May 4, 1995, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 52, folios 196 to 198).

88(i) The SBS only complied by reintegrating to the alleged victims the difference between the pension received and the equalized pension that they had been receiving: for April to October 1992, in the case of Reymert Bartra Vásquez, and for September and October 1992, in the case of the other four alleged victims [FN41].

[FN41] Cf. application brief submitted by the Inter-American Commission (file on merits and possible reparations, tome I, folio 21, para. 60); and brief on requests, arguments and evidence presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome I, folio 176).

88(j) Several of the alleged victims filed criminal complaints against those they considered responsible for non-compliance with the judgments [FN42].

[FN42] Cf. decision of the Superior Criminal Prosecutor of the Office of the Public Prosecutor delivered on December 2, 1996, with regard to complaint No. 34-96 (file on merits and possible reparations, tome I, appendix 3 of the brief on requests, arguments and evidence, folio 228); decision of the Attorney General delivered on June 27, 1997, with regard to file No. 001-97-D-SBS (file on merits and possible reparations, tome I, appendix 4 of the brief on requests, arguments and evidence, folios 229 to 234); decision of the Judge del Thirtieth Criminal Court of Lima delivered on February 2, 1996 (file on merits and possible reparations, tome I, appendix 5 of the brief on requests, arguments and evidence, folios 235 to 237); complaint of July 4, 1995, filed by Javier Mujica Ruiz-Huidobro before the Comptroller General (file on merits and possible reparations, tome I, appendix 6 of the brief on requests, arguments and evidence, folios 238 to 242); and testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002.

88(k) In 1995, the SBS issued five decisions in order to comply with the provisions of the final judgments that decided the said applications for amparo. In these decisions, the SBS ordered the pensions of the alleged victims to be equalized on the basis of the remunerations that the active

employees of the same or an equivalent category received when the salaries were readjusted, and also that the corresponding repayments should be made according to the calculations set out in the said decisions [FN43]. Moreover, article 2 of these decisions established that they should be transmitted to the MEF "for the relevant purposes." The said decisions were not implemented [FN44].

[FN43] Cf. administrative decision SBS No. 283-95 of April 7, 1995, with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 50, folios 192 and 193); administrative decision SBS No. 330-95 of May 4, 1995, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 51, folios 194 and 195); administrative decision SBS No. 331-95 of May 4, 1995, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 52, folios 196 to 198); administrative decision SBS No. 332-95 of May 4, 1995, with regard to Maximiliano Gamarra Ferreyra (file of appendices to the application, appendix 53, folios 199 to 201); and administrative decision SBS No. 254-2002 of March 12, 2002, with regard to Reymert Bartra Vásquez (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 991 to 994).
[FN44] Cf. administrative decision SBS No. 250-2002 of March 12, 2002, with regard to Carlos Torres Benvenuto (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 975 to 978); administrative decision SBS No. 251-2002 of March 12, 2002, with regard to Maximiliano Gamarra Ferreyra (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 979 to 982); administrative decision SBS No. 252-2002 of March 12, 2002, with regard to Guillermo Álvarez Hernández (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 983 to 986); administrative decision SBS No. 253-2002 of March 12, 2002, with regard to Javier Mujica Ruiz-Huidobro (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 987 to 990); and administrative decision SBS No. 254-2002 of March 12, 2002, with regard to Reymert Bartra Vásquez (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 991 to 994).

88(l) Three of the alleged victims filed compliance proceedings against the Superintendent of Banks and Insurance. When ruling on these actions in 1998 and 2000, the Constitutional Court of Peru decided that the SBS must comply with the provisions of its 1995 administrative decisions. The said judgments of the Constitutional Court were published in the Official Gazette El Peruano [FN45].

[FN45] Cf. judgment of the Constitutional Court of Peru delivered on August 3, 2000, regarding the compliance proceeding filed by Carlos Torres Benvenuto (file of appendices to the

application, appendix 54, folios 202 to 205); judgment of the Constitutional Court of Peru delivered on December 21, 2000, published in the Official Gazette El Peruano on April 25, 2001, regarding the compliance proceeding filed by Guillermo Álvarez Hernández against the Superintendent of Banks and Insurance (file of appendices to the application, appendix 58, folios 214 and 215); and judgment of the Constitutional Court of Peru delivered on July 9, 1998, published in the Official Gazette El Peruano on October 16, 1998, regarding the compliance proceeding filed by Javier Mujica Petit (file of appendices to the application, appendix 55, folios 206 to 208 and file on merits and possible reparations, tome II, appendix 9 of the answer to the application, folio 412).

88(m) On January 21, 2002, the Congress of the Republic of Peru promulgated Act No. 27650, by which it annulled article 5 of Decree Law No. 25792 and the second transitory provision of Legislative Decree No. 680. This act was published in the Official Gazette El Peruano on January 23, 2002 [FN46].

[FN46] Cf. Act No. 27650 of January 21, 2002, published in the Official Gazette El Peruano on January 23, 2002 (file on merits and possible reparations, tome II, appendix 1 of the answer to the application, folio 314).

88(n) On March 12, 2002, the SBS issued five decision in which, inter alia, it decided to comply with the SBS decisions issued in 1995, "deducting from the sum to be paid to [the five pensioners] the amounts that the Ministry of Economy and Finance had paid [them], in application of article 5 of Decree Law No. 25792, from November 1, 1992, to January 23, 2002." In the third article of these 2002 decisions, the SBS "[r]eserved the right [...], in accordance with the judgment of the Inter-American Court of Human Rights […], to deduct the sum that may have been paid in excess when complying with [the 1995 decisions]; in which case, the provisions of article 53 of Decree Law No. 20530, which expressly authorizes encumbering pensions to pay debts, will be taken into consideration" [FN47].

[FN47] Cf. administrative decision SBS No. 250-2002 of March 12, 2002, with regard to Carlos Torres Benvenuto (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 975 to 978); administrative decision SBS No. 251-2002 of March 12, 2002, with regard to Maximiliano Gamarra Ferreyra (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 979 to 982); administrative decision SBS No. 252-2002 of March 12, 2002, with regard to Guillermo Álvarez Hernández (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 983 to 986); administrative decision SBS No. 253-2002 of March 12, 2002, with regard to Javier Mujica Ruiz-Huidobro (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 987 to 990);

and administrative decision SBS No. 254-2002 of March 12, 2002, with regard to Reymert Bartra Vásquez (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 991 to 994).

88(o) On March 18, 2002, the SBS paid the five pensioners the amounts determined in the said decisions, corresponding to reimbursement of the amounts of the equalized pensions that they had not received from November 1992 until February 2002; this did not include the payment of interest [FN48]. In March 2002, the equalized pensions were reestablished and, as of April 2002, Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Reymert Bartra Vásquez and Maximiliano Gamarra Ferreyra's widow have regularly received the equalized payment of their pensions [FN49]

[FN48] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; and communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome IV, folio 898).
[FN49] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; and communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome IV, folio 899).

88(p) The alleged victims and their next of kin suffered pecuniary and non-pecuniary damage, owing to the reduction in their pensions and the failure to comply with the judgments in their favor; the quality of life of the alleged victims was diminished [FN50].

[FN50] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; and expert report of Máximo Jesús Atauje Montes submitted to the Court on September 3, 2002.

88(q) The five pensioners incurred expenses in the proceedings at the domestic level, and at the international level before the Commission and the Court [FN51]. The representatives of the alleged victims and their next of kin, CEJIL and CEDAL, also incurred various expenses in the inter-American jurisdiction [FN52].

[FN51] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; written expert report presented by Máximo Jesús Atauje Montes (file on merits and possible reparations, tome V, folio 1143); copy of the "collection document" of November 9, 2001, for a plane ticket for Javier Mujica (file on merits and possible reparations, tome V, appendix to the written expert

report presented by Máximo Jesús Atauje Montes, folio 1246); copy of Javier Mujica's plane ticket of February 21, 2000 (file on merits and possible reparations, tome V, appendix to the written expert report presented by Máximo Jesús Atauje Montes, folio 1249); and receipt issued by the Comfort Inn Gunston Corner to Javier Mujica for March 4 to 8, 2000 (file on merits and possible reparations, tome V, appendix to the written expert report presented by Máximo Jesús Atauje Montes, folio 1250).

[FN52] Cf. written expert report presented by Máximo Jesús Atauje Montes (file on merits and possible reparations, tome V, folios 1143 to 1146); copy of the "collection document" of November 9, 2001, for a plane ticket for Javier Mujica (file on merits and possible reparations, tome V, appendix of the written expert report presented by Máximo Jesús Atauje Montes, folio 1246); copy of Javier Mujica's plane ticket of February 21, 2000 (file on merits and possible reparations, tome V, appendix of the written expert report presented by Máximo Jesús Atauje Montes, folio 1249); receipt issued by the Comfort Inn Gunston Corner to Javier Mujica for March 4 to 8, 2000 (file on merits and possible reparations, tome V, appendix of the written expert report presented by Máximo Jesús Atauje Montes, folio 1250); receipt from "Panorama Viajes/Turismo S.A." for accommodation expenses for María C. Galvis for April 21 and 22 and from April 24 to 27, 2002 (file on merits and possible reparations, tome V, appendix of the written expert report presented by Máximo Jesús Atauje Montes, folio 1251); and copy of the plane ticket for María Clara Galvis of August 8, 2002 (file on merits and possible reparations, tome V, appendix of the written expert report presented by Máximo Jesús Atauje Montes, folio 1252).

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89. SPECIFIC FACTS REGARDING EACH PENSIONER

Carlos Torres Benvenuto

89(a) Mr. Torres Benvenuto began to work at the SBS in 1950 and on December 29, 1986, he ceased working for this institution [FN53]. The last position he occupied in the SBS was that of Director General of Communications [FN54]. At the time of his retirement, he was credited with 36 years, 11 months and 13 days service in the Public Administration [FN55]. He is subject to the pension regime established in Decree Law No. 20530 [FN56].

[FN53] Cf. administrative decision SBS No. 003-87 of January 6, 1987, with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 10, folio 66); and testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002.

[FN54] Cf. administrative decision SBS No. 003-87 of January 6, 1987, with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 10, folio 66).

[FN55] Cf. supra note 54.

[FN56] Cf. judgment of the Constitutional Court of Peru delivered on August 3, 2000, regarding the compliance proceeding filed by Carlos Torres Benvenuto (file of appendices to the application, appendix 54, folios 202 to 205).

89(b) By an SBS administrative decision of February 13, 1992, Mr. Torres Benvenuto's retirement pension was adjusted to a total of S.2,086.00 (two thousand and eighty-six soles), an amount that he received every month until August 1992 [FN57]. As of September 1992, his pension was reduced by approximately 75% to the sum of S.504.00 (five hundred and four soles), without any prior notice or procedure [FN58].

[FN57] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; and communication of the Director of Labor Relations of the SBS of February 20, 1992, notifying Carlos Torres Benvenuto of the administrative decision SBS No. 050-92 (file of appendices to the application, appendix 23, folios 138 and 139).
[FN58] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; SBS August payroll with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 24, folio 140); SBS September 1992 payroll, with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 32, folio 154); and SBS October 1992 payroll, with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 32, folio 155).

89(c) On October 6, 1992, Mr. Torres Benvenuto filed an application for amparo against the SBS [FN59]. On January 7, 1993, the Eleventh Civil Court of Lima declared that the application for amparo was unsubstantiated [FN60]. On September 22, 1993, the First Civil Chamber of the Superior Court of Lima revoked the preceding decision and declared that the action was admissible [FN61]. On May 2, 1994, the Constitutional and Social Law Chamber of the Supreme Court of Justice "declare[d] that the application for amparo filed by Carlos Torres Benvenuto against the Superintendency of Banks and Insurance was admissible; consequently, [it ordered] the Superintendency of Banks and Insurance to comply by paying the plaintiff the pension he had been receiving by law" [FN62]. At the stage of execution of judgment, the Nineteenth Civil Court of Lima issued a decision on November 3, 1994, in which it ordered that "the Superintendency of Banks and Insurance issue the administrative decision or decisions necessary to restore the plaintiff's right to receive remunerations and repayments in accordance with the said Supreme Judgment and that the Ministry of Economy and Finance, through its General Administration Office, comply by making the required payments effective" [FN63].

[FN59] Cf. application for amparo of October 6, 1992, filed by Carlos Torres Benvenuto before the lower civil court judge (file on merits and possible reparations, tome II, appendix 8 of the brief answering the application, folios 327 to 342).
[FN60] Cf. decision of the Eleventh Civil Court of Lima delivered on January 7, 1993, regarding the application for amparo filed by Carlos Torres Benvenuto against the SBS (file on merits and possible reparations, tome II, appendix 9 of the brief answering the application, folios 389 to 391).
[FN61] Cf. decision of the First Civil Chamber of the Superior Court of Lima delivered on 22 of September 1993, regarding the application for amparo filed by Carlos Torres Benvenuto against the SBS (file on merits and possible reparations, tome II, appendix 9 of the brief answering the application, folios 387 and 388).

[FN62] Cf. judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on May 2, 1994, regarding the application for amparo filed by Carlos Torres Benvenuto against the SBS (file of appendices to the application, appendix 36, folio 160).
[FN63] Cf. official letter No. 914-94-DNJCL/JNLA of January 16, 1995, from the regular judge of the Nineteenth Civil Court of Lima addressed to the Superintendent of Banks and Insurance, requesting him to comply with that Court's decision of November 3, 1994 (file of appendices to the application, appendix 37, folios 161 to 164).

89(d) On April 7, 1995, by administrative decision No. 283-95, the SBS decided "[i]n compliance with the provisions of the Supreme Judgment of May 2, 1994, and, during the procedure of execution of judgment, with the ruling of the judge of the Nineteenth Civil Court of Lima in a decision of November 3, 1994, to equalize the amount of the pension corresponding to Carlos Torres Benvenuto with the salaries received by active officials of this Superintendency of the same or an equivalent category when they were given salary adjustments; and also to make the corresponding repayments, as indicated in the attached appendix […], which forms an integral part of the […] decision" [FN64].

[FN64] Cf. administrative decision SBS No. 283-95 of April 7, 1995, with regard to Carlos Torres Benvenuto (file of appendices to the application, appendix 50, folios 192 and 193).

89(e) Mr. Torres Benvenuto filed a compliance proceeding against the Superintendent of Banks and Insurance and the Deputy Superintendent of General Administration of the SBS [FN65]. On August 10, 1999, the Transitory Corporative Public Law Court of Lima declared this compliance proceeding admissible [FN66]. On February 29, 2000, the Transitory Corporative Public Law Chamber of the Superior Court of Justice of Lima revoked the previous decision and declared the application for the compliance proceeding inadmissible [FN67]. Finally, on August 3, 2000, the Constitutional Court of Peru declared the compliance proceeding admissible "in the part that establishes that the Superintendent of Banks and Insurance should comply with the provisions of Decision SBS No. 283-95 of April 7, 1995; and inadmissible in the part referring to the payment of the reimbursements and the earned interest" [FN68].

[FN65] Cf. infra note 68.
[FN66] Cf. infra note 68.
[FN67] Cf. infra note 68.
[FN68] Cf. judgment of the Constitutional Court of Peru of August 3, 2000, regarding the compliance proceeding filed by Carlos Torres Benvenuto (file of appendices to the application, appendix 54, folios 202 to 205).

89(f) On March 12, 2002, the SBS issued administrative decision No. 250-2002, in which, inter alia, it decided "[t]o comply with Decision No. 283-95, of April 7, 1995, deducting from the sum to be paid to Carlos Torres Benvenuto, the amounts that the Ministry of Economy and Finance

has paid him, in application of article 5 of Decree Law No. 25792, from November 1, 1992, to January 23, 2002." In the third article of this 2002 decision, the SBS "[reserved] the right […], in accordance with the judgment of the Inter-American Court of Human Rights[…], to deduct the sum that may have been paid in excess when complying with Decision SBS No. 283-95, of April 7, 1995; in which case, the provisions of article 53 of Decree Law No. 20530, which expressly authorizes encumbering pensions to pay debts, will be taken into consideration" [FN69].

[FN69] Cf. administrative decision SBS No. 250-2002 of March 12, 2002, with regard to Carlos Torres Benvenuto (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 975 to 978).

89(g) On March 18, 2002, the SBS paid Mr. Torres Benvenuto the amount determined in administrative decision No. 250-2002, corresponding to repayment of the amounts of the equalized pensions that he failed to receive from November 1992 until February 2002; this did not include interest payments [FN70]. In March 2002, the equalized pension was reestablished and, as of April 2002, Mr. Torres Benvenuto has received the equalized payment of his pension; currently, he receives a monthly pension of approximately S.22,552.80 (twenty-two thousand five hundred and fifty-two soles and eighty cents) [FN71].

[FN70] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; administrative decision SBS No. 250-2002 of March 12, 2002, with regard to Carlos Torres Benvenuto (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 975 to 978); and communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome IV, folio 898).

[FN71] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome IV, folio 899); and administrative decision SBS No. 250-2002 of March 12, 2002, with regard to Carlos Torres Benvenuto (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 975 to 978).

Javier Mujica Ruiz-Huidobro

89(h) Mr. Mujica Ruiz-Huidobro began to work at the SBS in 1940 and on August 1, 1983, he ceased working in this institution [FN72]. The last position he occupied in the SBS was that of General Superintendent of Banking Area Credits [FN73]. When he retired, he was credited with 43 years and 15 days service in the Public Administration [FN74]. He is subject to the pension regime established in Decree Law No. 20530 [FN75].

[FN72] Cf. brief of July 15, 1940, transmitting to Javier Mujica decision SBS No. 325 of July 15, 1940 (file of appendices to the application, appendix 11, folio 67); and administrative decision SBS No. 376-83-EFC/97-10 of August 2, 1983, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 12, folio 68).
[FN73] Cf. administrative decision SBS No. 376-83-EFC/97-10 of August 2, 1983, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 12, folio 68).
[FN74] Cf. administrative decision SBS No. 330-95 of May 4, 1995, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 51, folios 194 and 195).
[FN75] Cf. administrative decision SBS No. 253-2002 of March 12, 2002, with regard to Javier Mujica Ruiz-Huidobro (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 987 to 990).

89(i) The amount of the retirement pension he was paid in June 1992 was S.2,258.67 (two thousand two hundred and fifty-eight soles and sixty-seven cents) [FN76]. As of September 1992, the pension was reduced by approximately 77% to the sum of S.504.00 (five hundred and four soles), without any prior notice or procedure [FN77].

[FN76] Cf. SBS June 1992 payroll, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 27, folio 148).
[FN77] Cf. infra note 78.

89(j) On October 6, 1992, Mr. Mujica Ruiz-Huidobro filed an application for amparo against the SBS [FN78]. On January 7, 1993, this application for amparo was declared inadmissible [FN79]. On November 12, 1993, the First Civil Chamber of the Superior Court of Justice of Lima revoked the previous judgment and declared the application admissible [FN80]. On September 1, 1994, the Constitutional and Social Law Chamber of the Supreme Court of Justice "declare[d] admissible the application for amparo filed […] by Javier Mujica Ruiz-Huidobro against the Superintendency of Banks and Insurance and, consequently, order[ed] that the defendant pay the pension to the plaintiff in accordance with Decree Law No. 20530" [FN81]. During the proceeding on execution of judgment, the Nineteenth Civil Court of Lima issued a decision on January 3, 1995, in which "it order[ed] the Superintendency of Banks and Insurance and the Ministry of Economy and Finance, to comply with the provisions of the Supreme Judgment of September 1, 1994, and pay the pensioner, Javier Mujica Ruiz-Huidobro, the monthly pension he was receiving and also refund him the corresponding amounts that he had not received" [FN82].

[FN78] Cf. application for amparo of October 6, 1992, filed by Javier Mujica Ruiz-Huidobro before the lower civil court judge (file on merits and possible reparations, tome II, appendix 8 of the brief answering the application, folios 343 to 358).

[FN79] Cf. judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on September 1, 1994, regarding the application for amparo filed by Javier Mujica Ruiz-Huidobro against the SBS (file of appendices to the application, appendix 38, folio 165); application brief submitted by the Inter-American Commission (file on merits and possible reparations, tome I, folio 19); and brief on requests, arguments and evidence presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome I, folio 173).
[FN80] Cf. supra note 79.
[FN81] Cf. judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on September 1, 1994, regarding the application for amparo filed by Javier Mujica Ruiz-Huidobro against the SBS (file of appendices to the application, appendix 38, folio 165).
[FN82] Cf. infra note 83.

89(k) On May 4, 1995, by administrative decision No 330-95, the SBS decided "[in compliance with the provisions of the Supreme Judgment of September 1, 1994, and, during the proceeding on execution of judgment with the ruling of the judge of the Tenth Civil Court in Decision No. 1 of January 3, 1995, to equalize the amount of the pension corresponding to Javier Mujica Ruiz-Huidobro with the salaries received by active officials of this Superintendency of the same or an equivalent category at the time when salary adjustments were made; and also to make the corresponding reimbursements, as indicated in the attached appendix [...], which forms an integral part of the [...] Decision" [FN83].

[FN83] Cf. administrative decision SBS No. 330-95 of May 4, 1995, with regard to Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 51, folios 194 and 195).

89(l) In representation of Javier Mujica Ruiz-Huidobro, Javier Mujica Petit filed a compliance proceeding against the Superintendent of Banks and Insurance of the SBS [FN84]. On May 13, 1997, the Second Public Law Court of Lima declared the compliance proceeding admissible [FN85]. This decision was appealed and on October 13, 1997, the Transitory Corporative Public Law Chamber of the Superior Court of Justice of Lima "revoked the appealed [decision] and reformulating it, declared it inadmissible" [FN86]. Finally, on July 9, 1998, the Constitutional Court of Peru revoked the decision of the said Corporative Chamber and declared the compliance proceeding admissible; consequently it decided "that the Superintendent of Banks and Insurance must comply with the provisions of Decision SBS No. 330-95 of May 4, 1995" [FN87].

[FN84] Cf. infra note 87.
[FN85] Cf. decision No. 10 of the Second Public Law Court of Lima delivered on May 13, 1997, regarding the compliance proceeding filed by Javier Mujica Petit representing Javier Mujica Ruiz-Huidobro (file on merits and possible reparations, tome II, appendix 9 of the brief answering the application, folios 464 to 467).
[FN86] Cf. infra note 87.

[FN87] Cf. judgment of the Constitutional Court of Peru delivered on July 9, 1998, published in the Official Gazette El Peruano on October 16, 1998, regarding the compliance proceeding filed by Javier Mujica Petit representing Javier Mujica Ruiz-Huidobro (file of appendices to the application, appendix 55, folios 206 to 208 and file on merits and possible reparations, tome II, appendix 9 of the answer to the application, folio 412).

89(m) On March 12, 2002, the SBS issued administrative decision No. 253-2002, in which, inter alia, it ordered "[t]hat Decision SBS No. 330-95, of May 4, 1995, should be complied with, deducting from the sum to be paid to Javier Mujica Ruiz Huidobro the amounts that the Ministry of Economy and Finance has paid to him, in application of article 5 of Decree Law No. 25792, from November 1, 1992, to January 23, 2002". In the third article of this 2002 decision, the SBS "[reserved] the right […], in accordance with the judgment of the Inter-American Court of Human Rights[…], to deduct the sum that may have been paid in excess when complying with Decision SBS No. 330-95, of May 4, 1995; in which case, the provisions of article 53 of Decree Law No. 20530, which expressly authorizes encumbering pensions to pay debts, will be taken into consideration" [FN88].

[FN88] Cf. administrative decision SBS No. 253-2002 of March 12, 2002, with regard to Javier Mujica Ruiz-Huidobro (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 987 to 990).

89(n) On March 18, 2002, the SBS paid Mr. Mujica Ruiz-Huidobro the amount determined in administrative decision No. 253-2002, corresponding to repayment of the amounts of the equalized pensions that he failed to receive from November 1992 until February 2002; this did not include interest payments [FN89]. In March 2002, the equalized pension was reestablished and, as of April 2002, Mr. Mujica Ruiz-Huidobro has regularly received the equalized payment of his pension; currently, he receives a monthly pension of approximately S.23,391.20 (twenty-three thousand three hundred and ninety-one soles and twenty cents) [FN90].

[FN89] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; and communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome IV, folio 898).

[FN90] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome IV, folio 899); and administrative decision SBS No. 253-2002 of March 12, 2002, with regard to Javier Mujica Ruiz-Huidobro (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 987 to 990).

Guillermo Álvarez Hernández

89(o) Mr. Álvarez Hernández began to work in the Public Administration in 1948 and ceased working at the SBS on August 1, 1984 [FN91]. The last position he occupied in this institution was that of Administrative Adviser to Senior Management [FN92]. When he retired he was credited with 36 years and 4 months service in the Public Administration [FN93]. He is subject to the pension regime established in Decree Law No. 20530 [FN94].

[FN91] Cf. administrative decision SBS No. 228-84 of August 16, 1984, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 14, folios 70 and 71).
[FN92] Cf. supra note 91.
[FN93] Cf. supra note 91.
[FN94] Cf. testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; and administrative decision SBS No. 252-2002 of March 12, 2002, with regard to Guillermo Álvarez Hernández (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 983 to 986).

89(p) By SBS administrative decision of February 13, 1992, the retirement pension of Mr. Álvarez Hernández was adjusted to the sum of S.2,047.26 (two thousand and forty-seven soles and twenty-six cents) [FN95]. On June 18, 1992, the SBS paid him a pension of S.2,047.26 (two thousand and forty-seven soles and twenty-six cents) [FN96]. As of September 1992, the pension was reduced by approximately 75%, to the sum of S.504.00 (five hundred and four soles), without any prior notice or procedure [FN97].

[FN95] Cf. communication of the Director of Labor Relations of February 20, 1992, notifying Guillermo Álvarez Hernández of administrative decision SBS No. 050-92 (file of appendices to the application, appendix 28, folios 149 and 150).
[FN96] Cf. SBS June 1992 payroll, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 29, folio 151).
[FN97] Cf. testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; SBS September 1992 payroll, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 33, folio 156); and application for amparo of October 6, 1992, filed by Guillermo Álvarez Hernández before the lower civil court judge (file on merits and possible reparations, tome II, appendix 8 of the brief answering the application, folios 362 to 371).

89(q) On October 6, 1992, Mr. Álvarez Hernández filed an application for amparo against the SBS [FN98]. On January 6, 1993, the Eleventh Civil Court of Lima declared this application for amparo inadmissible [FN99]. On November 12, 1993, the First Civil Chamber of the Superior

Court of Lima revoked the preceding decision and declared the application admissible [FN100].An appeal for annulment was filed against the previous judgment and, on September 19, 1994, the Constitutional and Social Law Chamber of the Supreme Court of Justice decided that the said judgment should not be annulled, and "declare[d] that the application for amparo filed by Guillermo Álvarez Hernández against the Superintendency of Banks and Insurance was admissible; consequently, [it ordered] that the defendant entity pay the plaintiff the entire amount of the pension established in administrative decision SBS No. 22884" [FN101]. At the stage of execution of judgment, the Nineteenth Civil Court of Lima issued a decision on December 19, 1994, in which "it order[ed] the Superintendency of Banks and Insurance and the Ministry of Economy and Finance to comply with the provisions of the Supreme Judgment of September 19, 1994, and to pay the pensioner, Guillermo Álvarez Hernández, the monthly pension that he was receiving, and also to make the corresponding repayment of the amounts he had failed to receive" [FN102].

[FN98] Cf. application for amparo of October 6, 1992, filed by Guillermo Álvarez Hernández before the lower civil court judge (file on merits and possible reparations, tome II, appendix 8 of the brief answering the application, folios 362 to 371).
[FN99] Cf. decision of the Eleventh Civil Court of Lima delivered on January 6, 1993, regarding the application for amparo filed by Guillermo Álvarez Hernández (file of appendices to the application, appendix 39, folios 166 to 168).
[FN100] Cf. decision of the First Civil Chamber of the Superior Court of Lima delivered on November 12, 1993, regarding the application for amparo filed by Guillermo Álvarez Hernández (file of appendices to the application, appendix 40, folios 169 and 170).
[FN101] Cf. judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on September 19, 1994, published in the Official Gazette El Peruano on July 25, 1995, regarding the application for amparo filed by Guillermo Álvarez Hernández (file of appendices to the application, appendix 41, folio 172).
[FN102] Cf. infra note 103.

89(r) On May 4, 1995, by administrative decision No. 331-95, the SBS decided "[i]n compliance with the provisions of the Supreme Judgment of September 19, 1994, and with the ruling of the judge of the Nineteenth Civil Court of Lima in Decision No. 1 of December 19, 1994, at the stage of execution of judgment, to equalize the amount of the pension corresponding to Guillermo Álvarez Hernández with the remuneration received by active officials of this Superintendency of the same or an equivalent category at the time when the salary adjustments were made; and also to make the corresponding repayments, as indicated in the attached appendix [...], which forms an integral part of the [...] Decision" [FN103].

[FN103] Cf. administrative decision SBS No. 331-95 of May 4, 1995, with regard to Guillermo Álvarez Hernández (file of appendices to the application, appendix 52, folios 196 to 198).

89(s) Mr. Álvarez Hernández filed a compliance proceeding against the Superintendent of Banks and Insurance [FN104]. On December 22, 1999, the First Transitory Corporative Public Law Court of Lima declared that the compliance proceeding was admissible [FN105]. This judgment was appealed on September 8, 2000, the Transitory Corporative Public Law Chamber of the Superior Court of Justice of Lima revoked the appealed judgment and declared the application inadmissible [FN106]. On December 21, 2000, the Constitutional Court of Peru revoked the decision issued by this Corporative Chamber and "declare[d] that the compliance proceeding was admissible; consequently, it ruled that the Superintendent of Banks and Insurance must comply with the provisions of decision SBS No. 331-95 of May 4, 1995, deducting the payments that it can confirm that it has made" [FN107]. The Public Attorney of the SBS objected to the ruling of the Constitutional Court. Lastly, on December 27, 2001, the Second Public Law Court of the Superior Court of Justice of Lima declared that the said objection was inadmissible and established that "finding that the case is at the stage of execution of judgment, the constitutional ruling must obligatorily be complied with by the designated entity, which must administratively equalize the amount of the pension corresponding to the plaintiff with the salary of the employees of the Superintendency of Banks and Insurance of the same or an equivalent category, when their salaries are adjusted, and also make the corresponding repayments" [FN108].

[FN104] Cf. judgment of the Constitutional Court of Peru delivered on December 21, 2000, published in the Official Gazette El Peruano on April 25, 2001, regarding the compliance proceeding filed by Guillermo Álvarez Hernández (file of appendices to the application, appendix 58, folios 214 and 215).

[FN105] Cf. decision No. 27 of the First Transitory Corporative Public Law Court of Lima delivered on December 22, 1999, regarding the compliance proceeding filed by Guillermo Álvarez Hernández (file of appendices to the application, appendix 56, folios 209 to 211).

[FN106] Cf. decision of the First Transitory Corporative Public Law Chamber of the Superior Court of Justice of Lima delivered on September 8, 2000, regarding the compliance proceeding filed by Guillermo Álvarez Hernández (file of appendices to the application, appendix 57, folios 212 and 213).

[FN107] Cf. judgment of the Constitutional Court of Peru delivered on December 21, 2000, published in the Official Gazette El Peruano on April 25, 2001, regarding the compliance proceeding filed by Guillermo Álvarez Hernández (file of appendices to the application, appendix 58, folios 214 and 215).

[FN108] Cf. decision No. 14 of the Second Public Law Court of the Superior Court of Justice of Lima delivered on December 27, 2001, regarding the compliance proceeding filed by Guillermo Álvarez Hernández (file on merits and possible reparations, tome II, appendix 9 of the brief answering the application, folios 422 and 423).

89(t) On March 12, 2002 the SBS issued administrative decision No. 252-2002, in which, inter alia, it ordered "[t]hat decision SBS No. 331-95 of May 4, 1995, should be complied with, deducting from the sum to be paid to Guillermo Álvarez Hernández, the amounts that the Ministry of Economy and Finance has paid to him in application of article 5 of Decree Law No. 25792, from November 1, 1992, to January 23, 2002." In the third article of this 2002 decision,

the SBS "[reserved] the right […], in accordance with the judgment of the Inter-American Court of Human Rights[…], to deduct the sum that may have been paid in excess when complying with Decision SBS No. 331-95, of May 4, 1995; in which case, the provisions of article 53 of Decree Law No. 20530, which expressly authorizes encumbering pensions to pay debts, will be taken into consideration" [FN109].

[FN109] Cf. administrative decision SBS No. 252-2002 of March 12, 2002, with regard to Guillermo Álvarez Hernández (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 983 to 986).

89(u) On March 18, 2002, the SBS paid Mr. Álvarez Hernández the amount determined in administrative decision No. 252-2002, corresponding to repayment of the amounts of the equalized pension he had failed to receive from November 1992 to February 2002; this did not include interest payments [FN110]. In March 2002, the equalized pension was reestablished and, as of April 2002, Mr. Álvarez Hernández has received the equalized payment of his pension; currently, he receives a monthly pension of approximately S.22,547.34 (twenty-two thousand five hundred and forty-seven soles and thirty-four cents) [FN111].

[FN110] Cf. testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; administrative decision SBS No. 252-2002 of March 12, 2002, with regard to Guillermo Álvarez Hernández (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 983 to 986); and communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome IV, folio 898).

[FN111] Cf. testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome IV, folio 899); and administrative decision SBS No. 252-2002 of March 12, 2002, with regard to Guillermo Álvarez Hernández (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 983 to 986).

Maximiliano Gamarra Ferreyra

89(v) Mr. Gamarra Ferreyra began to work in the Public Administration in 1954 and ceased to work at the SBS on September 18, 1975 [FN112]. The last position he occupied in this institution was that of Superintendent of Banks and Insurance [FN113]. At the time of his retirement, he was credited with 20 years, 10 months and 20 days service in the Public Administration [FN114]. Mr. Gamarra Ferreyra retired under the pension regime established in Decree Law No.

20530 and his widow is subject to the widow's pension regime established in this decree law [FN115].

[FN112] Cf. administrative decision SBS No. 398-75-EF/97-10 of October 21, 1975, with regard to Maximiliano Gamarra Ferreyra (file of appendices to the application, appendix 18, folios 76 and 77).
[FN113] Cf. supra note 112.
[FN114] Cf. supra note 112.
[FN115] Cf. administrative decision SBS No. 251-2002 of March 12, 2002, with regard to Maximiliano Gamarra Ferreyra (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 979 to 982); and Decree Law No. 20530 "Pension and Compensation Regime for Civil Service to the State not covered by Decree Law 19990" of February 26, 1974 (file of appendices to the application, appendix 19, folios 78 to 85).

89(w) In August 1992, the SBS paid him a retirement pension of S.2,680.33 (two thousand six hundred and eighty soles and thirty-three cents) [FN116]. As of September 1992, the pension was reduced by approximately 81% to the sum of S.504.00 (five hundred and four soles), without any prior notice or procedure [FN117].

[FN116] Cf. decision No. 3023 of the First Civil Chamber of the Superior Court of Justice of Lima delivered on December 30, 1993, regarding the application for amparo filed by Maximiliano Gamarra Ferreyra (file of appendices to the application, appendix 47, folios 185 and 186).
[FN117] Cf. supra note 116.

89(x) On October 6, 1992, Mr. Gamarra Ferreyra filed an application for amparo against the SBS [FN118]. On January 6, 1993, the Civil Court of Lima declared that the said application for amparo was inadmissible [FN119]. On December 30, 1993, the First Civil Chamber of the Superior Court of Justice of Lima revoked the preceding decision and declared that the application for amparo was admissible [FN120]. On October 10, 1994, the Constitutional and Social Law Chamber of the Supreme Court of Justice declared that the judgment delivered by the First Civil Chamber of the Superior Court of Justice of Lima declaring the application for amparo admissible should not be annulled, and "consequently, order[ed] the Superintendency of Banks and Insurance to comply by paying the plaintiff the amount of his retirement pension that he had been receiving up until August 1992" [FN121]. On December 19, 1994, at the stage of execution of judgment, the Nineteenth Civil Court of Lima transmitted to the SBS the decision adopted by this court, in which it indicated that "the authorities […] are obliged to accept and comply with judicial decisions, without qualifying their content or grounds" and ordered that "[it send] official letters to the Superintendency of Banks and Insurance and also to the Ministry of Economy and Finance requiring them to proceed to comply with the provisions of the Supreme Judgment of October 10, 1994, and pay the plaintiff the monthly pension that he had been

receiving and also the corresponding repayments of the amounts he had failed to receive and to which he was entitled" [FN122].

[FN118] Cf. application for amparo of October 6, 1992, filed by Maximiliano Gamarra Ferreyra before the lower civil court judge (file on merits and possible reparations, tome II, appendix 8 of the answer to the application, folios 372 to 381).
[FN119] Cf. infra note 120.
[FN120] Cf. decision of the First Civil Chamber of the Superior Court of Lima delivered on December 30, 1993, regarding the application for amparo filed by Maximiliano Gamarra Ferreyra (file of appendices to the application, appendix 47, folios 185 and 186).
[FN121] Cf. judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on October 10, 1994, published in the Official Gazette El Peruano on December 2, 1994, regarding the application for amparo filed by Maximiliano Gamarra Ferreyra (file of appendices to the application, appendix 48, folios 187 and 188).
[FN122] Cf. official letter of December 19, 1994 of the Titular (¿) Judge of the Nineteenth Civil Court of Lima addressed to the Head of the Superintendency of Banks and Insurance, transmitting to him the decision of November 22, 1994, issued by this court (file of appendices to the application, appendix 49, folio 190).

89(y) On May 4, 1995 by administrative decision No. 332-95, the SBS decided "[i]n compliance with the provisions of the Supreme Judgment of October 10, 1994, and as ordered by the judge of the Nineteenth Civil Court of Lima, in decision No. 1 of November 22, 1994, at the execution of judgment stage, to equalize the pension amount corresponding to Maximiliano Gamarra Ferreyra with the remuneration received by employees of this Superintendency of the same or an equivalent category when the salary adjustments were made; and also to make the corresponding repayments, as indicated in the attached appendix [...], which forms an integral part of the [...] Decision [FN123].

[FN123] Cf. administrative decision SBS No. 332-95 of May 4, 1995, with regard to Maximiliano Gamarra Ferreyra (file of appendices to the application, appendix 53, folios 199 to 201).

89(z) Maximiliano Gamarra Ferreyra died on August 6, 1997 [FN124]. His widow is Sara Elena Castro Remy [FN125] and his daughters are Patricia Elena and Sara Esther Gamarra Castro [FN126].

[FN124] Cf. death certificate issued by the Peruvian National Identification and Civil Status Registry, for Maximiliano Gamarra Ferreyra (file of appendices to the application, appendix 59, folio 216).

[FN125] Cf. marriage certificate No. 591 of September 1, 1962, for the marriage between Maximiliano Gamarra Ferreyra and Sara Elena Castro Remy (file of appendices to the application, appendix 60, folio 217).
[FN126] Cf. birth certificate No. 1752 of March 1, 1967, issued by the Provincial Council of Lima, Births Section of the Civil Registry, for Patricia Elena Gamarra Castro (file of appendices to the application, appendix 61, folio 218); and birth certificate No. 3927 of June 26, 1963, issued by the Provincial Council of Lima, Births Section of the Civil Registry, for Sara Esther Gamarra Castro (file of appendices to the application, appendix 62, folio 219).

89(aa) On March 12, 2002, the SBS issued administrative decision No. 251-2002, in which, inter alia, it ordered "[t]hat Decision SBS No. 332-95, of May 4, 1995, should be complied with, deducting from the amount to be paid to Maximiliano Gamarra Ferreyra, the amounts that the Ministry of Economy and Finance has paid, in application of article 5 of Decree Law No. 25792, from November 1, 1992, to January 23, 2002". In the third article of this 2002 decision, la SBS "[reserved] the right […], in accordance with the judgment of the Inter-American Court of Human Rights[…], to deduct the sum that may have been paid in excess when complying with Decision SBS No. 332-95, of May 4, 1995; in which case, the provisions of article 53 of Decree Law No. 20530, which expressly authorizes encumbering pensions to pay debts, will be taken into consideration" [FN127].

[FN127] Cf. administrative decision SBS No. 251-2002 of March 12, 2002, with regard to Maximiliano Gamarra Ferreyra (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 979 to 982).

89(bb) On March 18, 2002, the SBS paid Mr. Gamarra Ferreyra's widow the amount determined in administrative decision No. 251-2002, corresponding to the repayment of the equalized retirement pension amounts that Mr. Gamarra Ferreyra had failed to receive from November 1992 to October 1997, and to the amounts of the widow's pension that Sara Elena Castro Remy had failed to received from November 1997 to February 2002; this did not include the payment of interest [FN128]. In March 2002, the equalized pension was reestablished and, as of April 2002, Mr. Gamarra Ferreyra's widow has regularly received the equalized payment of the pension; currently, she receives a monthly widow's pension of approximately S.25,762.50 (twenty-five thousand seven hundred and sixty-two soles and fifty cents) [FN129].

[FN128] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome IV, folio 898); and administrative decision SBS No. 251-2002 of March 12, 2002, with regard to Maximiliano Gamarra Ferreyra (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22,

2002, presented by the representatives of the alleged victims and their next of kin, folios 979 to 982).
[FN129] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome IV, folio 899); and administrative decision SBS No. 251-2002 of March 12, 2002, with regard to Maximiliano Gamarra Ferreyra (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 979 to 982).

Reymert Bartra Vásquez

89(cc) Mr. Bartra Vásquez began to work in the Public Administration in 1964 and on June 13, 1990, he ceased working at the SBS [FN130]. The last position he occupied in this institution was Technical Adviser to the Deputy Superintendency of Specialized Entities [FN131]. At the time of his retirement, he was credited with 25 years, 10 months and 26 days service in the Public Administration [FN132].He is subject to the pension regime established in Decree Law No. 20530 [FN133].

[FN130] Cf. administrative decision SBS No. 412-90 of July 4, 1990, with regard to Reymert Bartra Vásquez (file of appendices to the application, appendix 16, folio 73).
[FN131] Cf. supra note 130.
[FN132] Cf. supra note 130.
[FN133] Cf. administrative decision SBS No. 254-2002 of March 12, 2002, with regard to Reymert Bartra Vásquez (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 991 to 994).

89(dd) The amount of the retirement pension he was paid on February 21, 1992, was S.2,700.74 (two thousand seven hundred soles and seventy-four cents) [FN134]. From April to October 1992, the pension payment was suspended, without any prior notice or procedure and, as of November that year, the pension was reduced by approximately 81% to the sum of S.504.00 (five hundred and four soles) [FN135].

[FN134] Cf. SBS payroll of February 1992, with regard to Reymert Bartra Vásquez (file of appendices to the application, appendix 31, folio 153).
[FN135] Cf. application for amparo of June 30, 1992, filed by Reymert Bartra Vásquez on July 1, 1992, before the Twenty-sixth Civil Court (file of appendices to the application, appendix 42, folios 173 to 175); decision of the lower Civil Court of Lima delivered on January 7, 1993, regarding the application for amparo filed by Reymert Bartra Vásquez (file of appendices to the application, appendix 44, folios 178 to 180); MEF payroll of February 1993, with regard to

Reymert Bartra Vásquez (file of appendices to the application, appendix 34, folio 157); and administrative decision SBS No. 254-2002 of March 12, 2002, with regard to Reymert Bartra Vásquez (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 991 to 994).

89(ee) On July 1, 1992, Mr. Bartra Vásquez filed an application for amparo against the SBS [FN136]. On August 7, 1992, the Twenty-sixth Civil Court of Lima ordered as a precautionary measure that the SBS should pay the retirement pension to which the plaintiff was entitled [FN137]. This decision was appealed and, on September 14, 1992, the Second Civil Chamber of the Superior Court of Justice of Lima confirmed the said precautionary measure [FN138]. The SBS paid Mr. Bartra Vásquez the pension corresponding to the months when payments had been suspended, but reducing the amount to S.504.00 (five hundred and four soles) [FN139]. On January 7, 1993, the lower Civil Court of Lima declared that the application for amparo was admissible and ordered the SBS "to comply by restoring to the plaintiff, Bartra Vásquez, the retirement pension to which he was legally entitled" [FN140]. This judgment delivered by the lower Civil Court of Lima was appealed and, on October 29, 1993, the Second Civil Chamber of the Superior Court of Justice of Lima confirmed the decision and declared the application for amparo admissible [FN141]. On June 28, 1994, the Constitutional and Social Law Chamber of the Supreme Court of Justice declared that the judgment of the Second Civil Chamber of the Superior Court of Lima could not be annulled and declared the application for amparo admissible; consequently, it ordered the SBS "to comply by restoring to the plaintiff the retirement pension to which he [was] legally entitled" [FN142].

[FN136] Cf. application for amparo of June 30, 1992, filed by Reymert Bartra Vásquez on July 1, 1992, before the Twenty-sixth Civil Court (file of appendices to the application, appendix 42, folios 173 to 175).

[FN137] Cf. application brief submitted by the Inter-American Commission (file on merits and possible reparations, tome I, folio 20); and brief on requests, arguments and evidence presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome I, folios 170 and 174).

[FN138] Cf. supra note 137.

[FN139] Cf. supra note 137.

[FN140] Cf. decision of the lower Civil Court of Lima delivered on January 7, 1993, regarding the application for amparo filed by Reymert Bartra Vásquez (file of appendices to the application, appendix 44, folios 178 to 180).

[FN141] Cf. decision of the Second Civil Chamber of the Superior Court of Lima delivered on October 29, 1993, regarding the application for amparo filed by Reymert Bartra Vásquez (file of appendices to the application, appendix 45, folios 181 and 182).

[FN142] Cf. judgment of the Constitutional and Social Law Chamber of the Supreme Court of Justice delivered on June 28, 1994, published in the Official Gazette El Peruano on September 14, 1994, regarding the application for amparo filed by Reymert Bartra Vásquez (file of appendices to the application, appendix 46, folios 183 and 184).

89(ff) On June 14, 1995, by administrative decision No. 391-95, the SBS decided to equalize the amount of the pension of Mr. Bartra Vásquez, "taking into consideration, in this regard, the salaries that are paid to the employees of the Superintendency, and ordering that the beneficiary be paid the corresponding repayments, as detailed in the appendix that […] forms an integral part of this administrative decision" [FN143].

[FN143] Cf. infra note 144.

89(gg) On March 12, 2002, the SBS issued administrative decision No. 254-2002, in which, inter alia, it ordered "[t]hat Decision SBS No. 391-95, of June 14, 1995, should be complied with, deducting from the sum to be paid to Reymert Bartra Vásquez, the amounts that the Ministry of Economy and Finance has paid to him in application of article 5 of Decree Law No. 25792, from November 1, 1992, to January 23, 2002". In the third article of this 2002 decision, la SBS "[reserved] the right […], in accordance with the judgment of the Inter-American Court of Human Rights[…], to deduct the sum that may have been paid in excess when complying with Decision SBS No. 391-95, of June 14, 1995; in which case, the provisions of article 53 of Decree Law No. 20530, which expressly authorizes encumbering pensions to pay debts, will be taken into consideration" [FN144].

[FN144] Cf. administrative decision SBS No. 254-2002 of March 12, 2002, with regard to Reymert Bartra Vásquez (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 991 to 994).

89(hh) On March 18, 2002, the SBS paid Mr. Bartra Vásquez the amount determined in administrative decision No. 254-2002, corresponding to repayment of the equalized pension amounts that he had failed to receive from November 1992 to February 2002; this did not include the payment of interest [FN145]. In March 2002, the equalized pension was reestablished and, as of April 2002, Mr. Bartra Vásquez has regularly received the equalized payment of his pension; currently, he receives a pension of approximately S.13,281.24 (thirteen thousand two hundred and eighty-one soles and twenty-four cents) [FN146].

[FN145] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome IV, folio 898); and administrative decision SBS No. 254-2002 of March 12, 2002, with regard to Reymert Bartra Vásquez (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 991 to 994).

[FN146] Cf. testimony provided to the Court by Carlos Torres Benvenuto on September 3, 2002; testimony provided to the Court by Guillermo Álvarez Hernández on September 3, 2002; communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin (file on merits and possible reparations, tome IV, folio 899); and administrative decision SBS No. 254-2002 of March 12, 2002, with regard to Reymert Bartra Vásquez (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 991 to 994).

VII. VIOLATION OF ARTICLE 21 (RIGHT TO PROPERTY)

The Commission's arguments

90. Regarding Article 21 of the Convention, the Commission alleges that:

a) The State violated this provision by reducing by law, to the detriment of the alleged victims, the amount of the equalized pensions they had received since their retirement. In the instant case, the right to receive a retirement pension, calculated in accordance with Decree Law No. 20530 and its related norms, is an asset that formed part of the patrimony of the alleged victims and, consequently, they enjoyed all the guarantees established in Article 21 of the Convention;
b) When the alleged victims ceased to work for the SBS they opted for the retirement regime established in Decree Law No. 20530, and this institution recognized their right to receive a retirement pension progressively equalized with the salary of the SBS employee who occupied the same position or a similar function to the ones they occupied at the date of their retirement. This acquired right could only be modified by the State, to the detriment of the five pensioners, as regards the parameters established in Article 21 of the Convention. According to this provision, a reduction would violate the right to property if it was substantial, as it is in this case in which the reduction represented approximately 80% of the amount of the pensions; and
c) In order to interpret the scope of the substance of the right to property established in Article 21 of the Convention, it is relevant to take into consideration the provisions of Article 29(b) thereof. The First Transitory Final Provision of the 1993 Constitution of Peru acknowledges that the pensions of public employees are an acquired right, and the Constitutional Court established that the right to an equalized pension established in Decree Law No. 20530 constituted an acquired right.

Arguments of the representatives of the alleged victims and their next of kin

91. With regard to Article 21 of the Convention, the representatives of the alleged victims and their next of kin indicated that:

a) In accordance with the regime of Decree Law No. 20530, the pensions of the alleged victims were equalized each time the pay scale of their active counterparts in the SBS was modified until, in September 1992, the alleged victims were illegally and unconstitutionally deprived of the economic resources represented by their complete equalized pensions. The reduction in the pensions was carried out, first as a "de facto retention" and then was allegedly

"legalized" by the retroactive application of "pension caps" established in November 1992 by Decree Law No. 25792, which signified a substantial erosion of the patrimony of the five pensioners and had "confiscatory connotations";

b) The reduction of the pensions was not based on a State decision substantiated by reasons of public utility or social interest and "even in the rejected assumption that this had been the case, the respective State decision was not transmitted as established by law and the rules of due legal process." In addition, there is no evidence that this capping was based on "any criterion of reasonableness"; in other words, that it responded to a legitimate purpose, "inasmuch as it represented the interests of society and did not alter the substance of the rights which had been temporarily harmed." The right to property was affected beyond the scope provided for in the Convention;

c) The State undertook to administer appropriately the Pension Fund managed by the SBS – to which the five pensioners made contributions– and to guarantee the future payment of their pensions under the pension regime regulated by Decree Law No. 20530. When they ceased to work for the SBS and opted for an equalized pension, the alleged victims became creditors of the State, which –through the SBS– became a debtor to them and was therefore obliged to pay them monthly a pension equalized "with the salary of their active counterparts, who occupied the same or a similar function to the one occupied by the pensioners when they were working." The "unilateral reduction" of the pensions of the alleged victims "constituted an illegal and undue expropriation of an asset to which they were creditors and which was legally their property";

d) The First Transitory Final Provision of the 1993 Constitution of Peru establishes that legally recognized pension rights are acquired rights that cannot be eroded by the establishment of subsequent modifications to the pension regimes, and the Constitutional Court indicated that the right to an equalized pension regulated by Decree Law No. 20530 constituted an acquired right. Based on the criterion established in Article 29(b) of the Convention, the nature of an acquired right of the pensions of employees subject to the pension regime of Decree Law No. 20530 forms part of the substance of the right to property safeguarded by Article 21 of the Convention; and

e) "Until 1990, and in accordance with the provisions of the different norms that reopened the pension regime regulated by DL 20530, and also with the rulings of the corresponding administrative courts, [the] accumulation [of services rendered to the public administration under public and private sector labor regimes] was invariably and regularly practiced by the public administration, including the Superintendency of Banks and Insurance itself".

The arguments of the State

92. With regard to Article 21 of the Convention, the State indicated that, in the application, the Court was requested to declare that Peru was responsible for the violation of this article because, to the detriment of the five pensioners, it had reduced the amount of the equalized pensions "by law (apparently Decree Law 25792)." In this respect, Peru stated that the said Decree Law No. 25792 was annulled by Act No. 27650, published on January 23, 2002, and added the following arguments:

a) The annulment of this law "did not introduce major changes in the situation of the pensioners[,] except that their pensions would be paid by the Superintendency of Banks and Insurance; however, it did not alter the amount received, because the said annulment does not

grant them any right that differs from the one that corresponds to them[,] which is to receive a renewable pension referred to the system of Decree Law 20530 and not to an employee subject to the private sector labor regime";

b) The application is not correct when it affirms that Decree Law No. 25792 was a legal argument of the State to disregard the acquired right of the five pensioners to collect a pension equalized with the salary of the employee occupying the same position or a similar function to that occupied by the pensioners when they ceased to work for the SBS. The said law "is subsequent to the reduction made by the Superintendency of Banks and Insurance, which was regularized by the payment of reimbursements";

c) The pensions granted to the alleged victims "were those corresponding to them as pensioners under the regime of Decree Law 20530". Moreover, Decree Law No. 25792 did not impose caps on pensions "because the caps existed before the said legal norm." The second part of article 5 of the said norm "did not contain any capping effect that was not included in various laws" and in the Constitution; "it did not affect the five pensioners because it only ratified that, for the effects of equalization, their pensions were referred to the personnel of the public sector employees' regime." When the State has established caps, it has done so by means of clear, precise legal provisions, in which it has indicated the maximum pension that could be granted; for example, in the 1991 Budget Act, extended to 1992;

d) There was no legal or constitutional impediment to prevent the payment of the pensions being transferred to the MEF through the provisions of Decree Law No. 25792, "because the State was empowered to indicate which entity should pay the pensions of those who ceased to work and this [was done] taking into account that the Superintendency of Banks and Insurance had a private sector labor regime and its employees and officials were not covered by the pension regime of Law 20530[,] as the pensioners were, because they had worked under this regime and contributed to the corresponding pension fund." Likewise, it is not true, as the Commission has affirmed in the application, that Decree Law No. 25792 was promulgated in reaction to the applications for amparo because, before these actions were filed, other norms, similar to Decree Law No. 25792, had been drafted, in order to correct the distortions that had arisen in the Peruvian pension system;

e) "From one perspective, the fact that there has been a reduction in the pensions of the five pensioners [could] be considered a situation contrary to pension logic. However, it should be emphasized that such acts occurred by applying legal norms that, at one time, were even considered constitutional – although, subsequently, this opinion may have changed";

f) "The mere violation of a legal norm should not necessarily be qualified as a human rights violation"; "to qualify as a violation of human rights, an act must have been committed intentionally and with evident animus nocendi. These requirements were not present in this case, because the existence of caps, on both salaries and pensions, was considered valid according to the Constitution." Added to this, "an evident state of necessity should be taken into account to explain certain situations that could have led to taking one of the measures subject to court proceedings (imposing caps on pensions or salaries)[,] such as a budget crisis which was impossible to manage in any other way[; …] all legislation has protection mechanisms for dealing with critical situations such as force majeure, act of God, harm, and the excessive burden signified by implementation [which] allow compliance with obligations to be modified in exceptional situations";

g) "The right to property is not in discussion in a case such as this, and it should be borne in mind that such a right may be subordinated to the law in the interest of society." The reduction in

the amount of the pension "was due to the provisions of the 1991 Budget Act, extended to 1992, which the alleged victims have not mentioned." When that act was promulgated, the Constitutional Guarantees Court was consulted, and it declared that the caps were constitutionally valid. At that time, the 1979 Constitution was in force, according to which, pensions "are periodically adjusted, taking into consideration the cost of living and the possibility of the national economy, in accordance with the law";

h) "Domestic remedies have not been duly exhausted", because none of the five pensioners, or any other State authority has questioned the effects, constitutionality or application of Decree Law No. 25792, "a legal norm with which the State is accused of failing to comply";

i) Since no complaint has been filed against the act of paying pensions carried out by the MEF, in application of Decree Law No. 25792, "those acts are final. The best evidence of this is that the corresponding pension was assumed by this Ministry until the legal provision had been annulled, when responsibility for payment was transferred once again to the Superintendency of Banks and Insurance." The five pensioners are attempting "to project the effects of judgments that have been complied with onto a new situation that occurred subsequently, owing to the application of a subsequent norm";

j) The five pensioners were employed under the public labor regime and none of them worked under the private sector labor regime. By authority of law and provisions of the Constitution, services rendered under the two regimes cannot be accumulated. The five pensioners are claiming "that they should be recognized a right that does not correspond to them", which is the regulation or updating of their pensions, taking as a reference the salary of the acting official of the SBS, who belongs to a different labor and pension regime; and

k) The State has paid the five pensioners the pension repayments demanded and has decided "to continue to make the said payment in the amount established, which is not the amount that is legally owing, provided this is not reverted by a national judge." "[T]he applications for amparo filed by the pensioners in the domestic courts have only decided that matters should be restored to their status prior to the alleged violation, but there has been no ruling on the merits of the right claimed."

Considerations of the Court

93. Article 21 of the Convention establishes that:

1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

94. The Court observes that, in the instant case, there is no dispute between the parties about whether the alleged victims have the right to a pension. They all agree that Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Maximiliano Gamarra Ferreyra and Reymert Bartra Vásquez, when they ceased to work at the SBS, obtained the right to the retirement pension established in Decree Law No. 20530 [FN147]. The dispute between the parties relates to whether the parameters used by the State to reduce or recalculate the

amounts of the pensions of the alleged victims as of 1992 represented a violation of their right to property.

[FN147] The said Decree Law No. 20530, entitled “Pension and Compensation Regime for Civil Service to the State not covered by Decree Law 19990”, stipulates that:
Art. 4. Employees acquire the right to a pension when they have completed fifteen years of real and paid service, for men, and twelve and a half, for women.

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95. In order to settle the dispute between the parties, the Court will examine two points in particular: a) whether the right to a pension can be considered an acquired right and what this means; and b) what parameters should be taken into consideration to quantify the right to a pension, and whether it is possible to cap a pension.

96. a) First point. Regarding whether the right to a pension is an acquired right or not, this dispute has already been settled by the Constitution of Peru and the Peruvian Constitutional Court.

97. In this respect, the First Transitory Final Provision of the 1993 Constitution of Peru establishes that:

The new obligatory social regimes established for the pensions of public sector employees do not affect legally acquired rights, particularly the right corresponding to the regimes of Decree Laws 19990 and 20530 and their modifying provisions [FN148].

[FN148] The Constitution of Peru of December 29, 1993 (file of appendices to the application, appendix 64, folios 248 to 289).

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98. When referring to the preceding norm of the Constitution, the Constitutional Court of Peru indicated that:

The correct interpretation of that provision can only be that it embodies, at the constitutional level, the acquired rights to a pension by the pensioners subject to the regimes of Decree Laws 19990 and 20530; acquired rights being understood to be “those that have entered into our ownership, that are part of it, and of which the entity from which we have received them cannot deprive us” [FN149].

[FN149] Judgment of the Constitutional Court of Peru delivered on April 23, 1997, concerning file N° 008-96-I/TC (file of appendices to the application, appendix 65, folios 290 to 322).

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99. Furthermore, in a judgment delivered on April 23, 1997, the Constitutional Court indicated that once the requirements for granting a pension set forth in Decree Law No. 20530 and its complementary provisions have been fulfilled, the employee:

[…] incorporates into his patrimony, by virtue of the express authority of law, a right that is not subject to recognition by the Administration, that is not something that the law grants in some way, that, as has been recalled, arises from compliance with the requirements established by law. Thus, those who were subject to the regime of Decree Law 20530 and who, until the entry into force of Legislative Decree 817 had already complied with the requirements indicated in the norm, that is, they had worked for twenty years or more, have the right to an equalized pension, in accordance with the provisions of Decree Law 20530 and its modifying provisions.

100. In the same way, the Peruvian Constitutional Court indicated in this judgment that:

Given that the principal effect of incorporation into the regime of Decree Law No. 20530 is: 1) to be a pensioner under this decree law; 2) to be able to acquire the right to a pension after fifteen years service, for men, and twelve and a half years, for women; such pensions being regulated as established in article 5 of the said decree law; and 3) to have the right to an equalized pension, as established in the said decree law. All the foregoing constitute therefore acquired rights as established in the First Transitory Final Provision of the Constitution that is in force.

101. It should be recalled that Article 29(b) of the American Convention establishes that no provision of the Convention may be interpreted as restricting "the enjoyment or exercise of any right or freedom recognized by virtue of the law of any State Party… ."

102. In this context, Article 21 of the Convention protects the right of the five pensioners to receive an equalized retirement pension in accordance with Decree Law No. 20530, in the sense that it is an acquired right, by virtue of the provisions of the Peruvian Constitution; in other words, a right that has been incorporated into the patrimony of the persons.

103. In light of the provisions of the Constitution of Peru, the rulings of the Peruvian Constitutional Court, Article 29(b) of the Convention – which prohibits a restrictive interpretation of rights – and a progressively developing interpretation of international instruments that protect human rights, this Court considers that, from the time that Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Maximiliano Gamarra Ferreyra and Reymert Bartra Vásquez paid their contributions to the pension fund regulated by Decree Law No. 20530, ceased to work for the SBS, and opted for the retirement regime set forth in this decree law, they acquired the right to their pensions being regulated by the terms and conditions established in this decree law and its related norms. In other words, the pensioners acquired a right to property related to the patrimonial effects of the right to a pension, in accordance with Decree Law No. 20530 and as established in Article 21 of the American Convention [FN150].

[FN150] The Court has defined "property" (Ivcher Bronstein case. Judgment of February 6, 2001. Series C No. 74, para. 122) as "those material objects that may be appropriated, and also

any right that may form part of a person's patrimony; this concept includes all movable and immovable property, corporal and incorporeal elements, and any other intangible object of any value". Also, cf. Eur. Court H.R., Case of Gaygusuz v. Austria, Judgment of 16 September 1996, Merits and just satisfaction, paras. 39, 41.----------

104. b)Second Point. In accordance with the foregoing, it has been established that the alleged victims have an acquired right to the payment of a pension and, more precisely, to a pension, the amount of which is equalized with the salary received by the persons who are performing the same or similar tasks to those that the beneficiary of the pension exercised at the time he retired from the position. Therefore, the dispute involves another point. The persons who perform the same or similar tasks to those that the five pensioners exercised may be subject to two different regimes, the public sector regime and the private sector regime, and their salaries vary, according to whether they are subject to one or the other, because the salary under the latter regime is considerably higher than the salary under the former. Consequently, the provision according to which the five pensioners will receive a pension equivalent to the salary of the current personnel involves an ambiguity that must be clarified in order to define the content and scope of the acquired right to the pension.

105. In this respect, it is pertinent to mention Act No. 23495 entitled "Progressive equalization of the pensions of retirees and those who cease working for the Public Administration and who are not subject to the Social Insurance Regime or other Special Regimes." Article 1 of this act establishes that:

The pensions of those who stop working after more than 20 years' service and of those who retire from the Public Administration, who are not subject to the Social Insurance Regime or other special regimes, will be progressively equalized with the salaries of active public servants in the respective categories...

106. The Commission and the representatives of the alleged victims and their next of kin consider that the calculation of the amount of the pension to which the five pensioners have a right should be made on the basis of the salary of the active SBS official occupying the same or an equivalent position to the one the pensioner occupied at the time of his retirement. The State affirms that the calculation should be made by equalizing with the salary of an active employee in the same category and labor regime (public sector) as that of the alleged victims when they took their retirement. The State maintains that equalizing the pension on the basis of the salary received by employees subject to the private sector labor regime is not consistent with the provisions of Decree Law No. 20530.

107. To examine this point, the Court considers it advisable to distinguish two different stages or periods:

1. From retirement to March and August 1992; and
2. From the reduction in the pensions until March 2002.

a) First Stage

108. It has been proved that the State's interpretation of Decree Law No. 20530 (through SBS administrative decisions) to calculate the pensions, from the retirement of the alleged victims up until August 1992, with the exception of Mr. Reymert Bartra, in whose case it was from retirement until March 1992, signified equalizing on the basis of the salary received by the person who occupied the same position as they did in the SBS at the time of their retirement, without taking into account that, as of June 1981, SBS employees were governed by the private sector labor regime. That is why the five pensioners received an equalized pension in those terms, as follows: Carlos Torres Benvenuto from January 1987 until August 1992; Javier Mujica Ruiz-Huidobro from August 1983 until August 1992; Guillermo Álvarez Hernández from August 1984 until August 1992; Maximiliano Gamarra Ferreyra from October 1975 until August 1992, and Reymert Bartra Vásquez from July 1990 until March 1992.

b) Second Stage

109. It has also been proved that as of April 1992 (in the case of Mr. Bartra Vásquez) and September 1992 (in the case of the other alleged victims), the amount of the pensions of the five pensioners was reduced by approximately 78%. This reduction was arbitrary, because, when the alleged victims went to withdraw their pension, they received a much lower sum than they had been receiving, without any legal proceeding or any decision having been issued that authorized this reduction. In view of this situation, the alleged victims filed the corresponding legal recourses (supra paras. 88(h) and 88(l)).

110. In October 1992, prior to the delivery of the judgments that ruled on the applications for protective measures, Decree Law No. 25792 was promulgated. It "[a]uthorizes the Superintendency of Banks and Insurance (SBS) to establish a program of incentives for the voluntary resignation of its employees." Article 5 of this decree law stipulates:

> The collection of the contributions and the payment of the pensions, remunerations or similar that the Superintendency of Banks and Insurance is responsible for paying to its pensioners, retirees and those who have ceased to work for it and who are covered by the regime of Decree Law No. 20530 shall be transferred to the budgetary envelope of the Ministry of Economy and Finance.
> The said pensions, remunerations or similar will have as a reference, including for their equalization, those that the said Ministry pays to its employees and officials in accordance with Legislative Decree No. 276. In no case, will the remunerations paid by the Superintendency of Banks and Insurance be equalized or referred to employees subject to the private sector regime.

111. As of November 1992, in light of Article 5 of this decree law and the interpretations of Decree Law No. 20530, the five pensioners continued to be paid a pension that was approximately 78% lower than the one they had received in March and August 1992.

112. In other words, since April and September 1992, and after the promulgation of Decree Law No. 25792, the State modified the parameters for determining the amount of the equalized pension, considerably reducing the amount of the monthly pensions the alleged victims had been receiving.

113. As a result of the applications for protective measures filed by the five pensioners (supra paras. 88(h) and 88(l), 89(c), 89(e), 89(j), 89(l), 89(q), 89(s), 89(x) and 89(ee)), five judgments on amparo were delivered in 1994 and three judgment on compliance were delivered between 1998 and 2000, ordering that they should continue to be paid the pension they had been receiving before the said reductions were made.

114. The SBS paid only the amounts owed up until October 1992 and, to this end, it based the calculations on the salary received by its active officials. However, this was the only equalized pension payment that the pensioners received after the judicial rulings had been delivered until, in March 2002, the situation changed; this will be examined below (infra para. 119). Consequently, for several years, the State failed to fully implement the said judgments.

115. The Court observes that, although the State authorities could have established the equalized pension in accordance with the salary received by an official subject to the public sector regime of a similar level or category to that of the alleged victims when the SBS employees changed to the private sector regime (1981), they did not do so. Moreover, it was the State itself that, as of the time the alleged victims opted for the pension regime of Decree Law No. 20530, recognized, by administrative decisions, that they had a right to a pension amount equalized with the salary of an active SBS official. In addition, but even more important, when ruling on the applications for protective measures filed by the five pensioners, the domestic courts ordered that the monthly pensions should continue to be paid as they had been paid; in other words, equalizing them with the salary received by active SBS officials, who belonged to the private sector regime. This constitutes a right, to the benefit of the pensioners, emanating from the judgments on protective measures, which, when it was disregarded by the State, affected their patrimony, violating Article 21 of the Convention.

116. Although the right to an equalized pension is an acquired right, in accordance with Article 21 of the Convention, States may restrict the enjoyment of the right to property for reasons of public utility or social interest. In the case of the patrimonial effects of pensions (the pension amount), States may reduce these only by the appropriate legal procedure and for the said reasons. Moreover, Article 5 of the Additional Protocol to the American Convention in the area of Economic, Social and Cultural Rights (hereinafter "Protocol of San Salvador") allows States to establish restrictions and limitations on the enjoyment and exercise of economic, social and cultural rights "by means of laws promulgated in order to preserve the general welfare in a democratic society only to the extent that they are not incompatible with the purpose and reason underlying those rights."In any case, if the restriction or limitation affects the right to property, this should also be established in accordance with the parameters established in Article 21 of the American Convention.

117. Furthermore, instead of acting arbitrarily, if the State wished to give another interpretation to Decree Law No. 20530 and its related norms, in relation to the five pensioners, it should have: a) executed an administrative procedure with full respect for the appropriate guarantees; and b) in any event, given precedence to the decisions of the courts of justice over the administrative decisions.

118. In the instant case, neither of these two conditions was fulfilled. Without exhausting the adequate proceeding, the Administration changed its interpretation of the norms that regulated the pension of the five alleged victims and, subsequently, disregarded the judicial decisions referred to above.

119. A significant element in this case was the promulgation of Act No. 27650, published on January 23, 2002, in the Official Gazette El Peruano, which annulled article 5 of Decree Law No. 25792. Subsequently, the SBS issued five decisions that decided that the alleged victims should be paid the pension that corresponded to them in accordance with Decree Law No. 20530, deducting from the calculation the amounts of the pensions received between November 1, 1992, and January 23, 2002. The payment made to the five pensioners in March 2002, three months after the application had been submitted to the Court, was made on the basis of the salary of active SBS employees. Moreover, the said decisions reserved the right of the SBS to deduct the amount that might have been paid in excess to the five pensioners, in accordance with the judgment of the Inter-American Court. In light of this judgment, this reservation in the SBS decisions has no effect whatsoever.

120. The State's payment of the equalized pensions that corresponded to the alleged victims from the time they were reduced implies that the State has acknowledged and complied with the claims made by the Inter-American Commission and the representatives of the alleged victims and their next of kin in this respect.

121. Based on the foregoing, the Court finds that, by arbitrarily changing the amount of the pensions that the alleged victims had been receiving and by failing to comply with the judicial rulings arising from their applications for protective measures (infra Chapter VIII), the State violated the right to property embodied in Article 21 of the Convention to the detriment of Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Maximiliano Gamarra Ferreyra and Reymert Bartra Vásquez, because the rights recognized in the said judgments were violated.

VIII. VIOLATION OF ARTICLE 25 (JUDICIAL PROTECTION)

The arguments of the Commission

122. With regard to Article 25 of the Convention, the Commission alleges that:

a) When the SBS reduced de facto the pensions that the alleged victims had been receiving, the latter, together with their legal advisers, examined the different recourses offered by Peruvian legislation and decided that the appropriate way to defend their rights was to file applications for amparo against the SBS, the State organ that had violated their rights. In its judgments of May 2, June 28, September 1 and 19, and October 10, 1994, the Supreme Court of Justice of Peru ordered that the five pensioners should be paid a pension equalized with the salary of the active occupant of the same position or a similar function to that of the alleged victims when they ceased working for the SBS. "This corroborated that the applications for amparo filed by the victims were indeed the appropriate recourses under the Peruvian legal system to protect the rights of the victims that had been violated." The alleged victims did not have to exhaust any

domestic remedy against Decree Law No. 25792, promulgated after they had filed the applications for amparo. The Supreme Court of Justice ruled on the remedies of amparo almost two years after Decree Law No. 25792 had entered into force and, fully aware of the existence of a new pension regime, considered that, in the case of the alleged victims, the SBS should pay the equalized pensions;

b) The SBS disregarded the rulings of the Supreme Court of Justice of Peru and only paid the difference in the amount of the pensions partially. Furthermore, as of November 1992, the MEF paid the alleged victims a pension that was substantially less than the one that corresponded to them. Also, the SBS did not abide by the administrative decisions that it issued in 1995, in which it decided to comply with the said rulings of the Supreme Court of Justice of Peru;

c) Given the non-compliance with the rulings of the Supreme Court of Justice of Peru, some of the alleged victims filed compliance proceedings and, in the corresponding rulings, delivered on July 9, 1998, August 3, 2000, and December 21, 2000, the Constitutional Court ordered the SBS to comply with the provisions of the rulings of the Supreme Court of Justice;

d) The alleged victims also filed criminal proceedings, although these did not lead to compliance with the rulings of the Supreme Court of Justice and the Constitutional Court;

e) The State violated the right to effective judicial protection by not complying with the provisions of these final judgments of the Supreme Court of Justice of Peru and the Constitutional Court of Peru. Compliance with judgments cannot be subject to the discretion of the party that loses the lawsuit, much less when the party that loses the lawsuit is an organ of the State;

f) Even though, in April 2002, the State complied with the 1994 judgments in favor of the alleged victims, it did so conditional on the judgment of the Inter-American Court and reserved the right to recover part of the payment made to the pensioners should the Inter-American Court decide that what is owed to them is less than the State has paid them. Due to this situation, the alleged victims are in a "state of total legal uncertainty in view of the State's declared intention not to comply definitively with the judgments delivered by its highest courts";

g) The State "is not fully complying with the judgments delivered against it by its highest courts. The difference is that instead of disregarding these judgments, it has made a conditional payment to the victims and, as indicated in the oral hearing in the instant case, it now wants the Court to decide that the Supreme Court of Justice and the Constitutional Court were wrong when they delivered judgments against the State, and thereby recover what it has paid to the victims in accordance with the provisions of the said judgments";

h) To ensure that the alleged victims have legal certainty with regard to compliance with the judgments delivered in their favor in the domestic sphere, the Inter-American Court must decide that Peru must comply, unconditionally, with the final judgments of the Peruvian Supreme Court of Justice and Constitutional Court;

i) Since the res judicata nature of the judgments in favor of the alleged victims delivered by the domestic courts is not in discussion, "and the Commission has not alleged that judicial guarantees were violated in the proceedings during which these judgments were delivered," the principal purpose of the instant case is for the Court to decide on the State's international responsibility for non-compliance with the firm and executable judgments in favor of the alleged victims delivered by the highest Peruvian courts: the Supreme Court of Justice of Peru and the Peruvian Constitutional Court; and

j) With regard to the allegations of the representatives of the alleged victims and their next of kin concerning the ineffectiveness of the criminal recourses that some of the pensioners filed to try and obtain compliance with the judgments of the Supreme Court of Justice, which violated the right to effective judicial protection embodied in Articles 8(1) and 25 of the Convention, it considers that "even though the said allegations were made by the petitioners in their original petition to the ICHR, the Commission did not determine the existence of such alleged violations either in its report on merits or in its application to the Court. However, they constitute additional legal criteria concerning the same facts that, based on the available evidence, were established by the Commission in its report on merits and in the application [. … T]he Commission considers that such arguments […] may be examined by the Court by virtue of the principle of iura novit curia".

The arguments of the representatives of the alleged victims and their next of kin

123. With regard to Article 25 of the Convention, the representatives of the alleged victims and their next of kin indicated that:

a) After March and September 1992, when the SBS reduced the pensions the alleged victims had been receiving, they filed applications for amparo against the SBS. This reduction represented "a de facto measure, outside the regular procedure during which the aggrieved party could have exercised his right to defense." The Constitutional and Social Chamber of the Supreme Court of Justice rejected the arguments of the SBS and ordered it to restore the pension rights of the Decree Law No. 20530 regime, which, unconstitutionally, had been withdrawn from the alleged victims. The SBS reintegrated the nominal difference the five pensioners had failed to receive during September and October 1992 and refused to be responsible for the subsequent amounts, on the basis that, with the promulgation of Decree Law No. 25792, their obligation to be responsible for the payment of such pensions had been removed and that the MEF was responsible for paying them. The MEF alleged that the obligation to pay the pensions corresponded to the SBS, because the Supreme Court had so ordered and that, even if it had been the obligation of the MEF, the SBS had not transferred the necessary resources and contributions so that it could make such payments as ordered by Decree Law No. 25792;
b) The five pensioners filed a criminal complaint against the State agents responsible for non-compliance with the judgments delivered by the Supreme Court of Justice, so that they would be investigated and punished for non-compliance. However, "the criminal recourses were ineffective to remedy the right of the pensioners to have the judgments in their favor complied with; therefore the right to effective judicial protection embodied in Articles 8(1) and 25 of the Convention was violated";
c) Subsequently, "the procedural measure of the compliance proceeding was definitively and unsuccessfully exhausted with the resulting judgment of the Constitutional Court, which was equally useless to restore to the pensioners the enjoyment of the human rights of which they had been deprived." Moreover, on June 17, 1997, the Peruvian Ombudsman issued a decision requiring the SBS and the MEF to comply with the judgments of the Supreme Court and the Constitutional Court;
d) The reservation stipulated by the SBS in the five decisions issued on March 12, 2002, according to which it would have the power to reclaim certain sums from the pensioners, should the Inter-American Court order the payment of lower amounts than those that had been paid, has

caused uncertainty for the alleged victims, because they do not have peace of mind to dispose of the amounts that they were paid;

e) For eight years, the State failed to comply with the final judgments delivered by the Supreme Court of Justice in 1994 and the Constitutional Court between 1998 and 2000, ordering the SBS to restore to the five pensioners their right to enjoy a progressively equalized pension, in accordance with the pension regime governed by Decree Law No. 20530; in other words, adjusting it according to the salary of the active SBS official who occupied the same or a similar function to that of the pensioner until he retired;

f) The State's arguments have attempted to justify non-compliance with the judgments by indicating their divergence with the judicial decisions, because, according to the State, they recognize rights unduly and contain erroneous and contradictory interpretations;

g) In this case, non-compliance with the judgments is very serious, because "it represents a defiance of justice by the Peruvian Executive, which, based on its discrepancies and disagreements with the adopted decisions, has disregarded and continues disregarding final judgments of the highest courts of Peru." The judges' decisions should be called into question through institutional procedures and not by de facto methods, such as disobedience and rebellion by the Executive itself; and

h) It is irrelevant whether the violation of the right to effective judicial protection was due to the act or omission of a superintendency or a ministry. The State cannot impose on its citizens the burden of addressing themselves to the appropriate State entity to comply with the judgments and knowing the functions of the different entities, much less when the State itself recognizes that its entities are not fully aware of what other entities are doing.

The arguments of the State

124. Regarding Article 25 of the Convention, the State argues that:

a) It considers that the application is inadmissible because it is not possible to qualify "as a violation of human rights, unfinished procedural actions resulting from measures taken by the pensioners in the national jurisdiction before they filed the application."When recurring to the Inter-American Commission, the five pensioners "were involved in domestic proceedings; therefore, there was no refusal to comply with judicial decisions." "[A]ny questioning of the admissibility of the application, owing to non-exhaustion of the procedure indicated in the domestic jurisdiction of Peru, should be decided on together with the judgment and based on the body of evidence contributed by the parties";

b) The applications for amparo "were filed against the SBS as a consequence of the rectification of an legal error in the payment of the pension." The decisions of the SBS, recognizing the retirement pensions, indicate that retirement was related to a category and a sub-category; however "at some time, there was an error of interpretation, and the pension began to be referred to what an employee of the private sector labor regime received [… and w]hen this error was detected, the respective corrective measure was applied";

c) The 1994 judgments of the Supreme Court of Justice, arising from the applications for amparo filed in 1992 against the SBS owing to the reduction in the pensions, were duly complied with by this institution, which paid the pensions up until the date on which it ceased to be responsible for them by law. No reference was made to Decree Law No. 25792, because it was subsequent to the facts on which the claims that motivated the judgments were based and, when

the said judgments were delivered, the responsibility for paying the pensions had been transferred to the MEF by the provisions of Decree Law No. 25792. It was not possible to extend the obligations that corresponded to the SBS up until the entry into force of the said decree law to the MEF "without them having been expressly attributed to it in a judicial proceeding." When Decree Law No. 25792 was promulgated – following the date of the applications for amparo and before the judgments had been delivered – "the plaintiffs did not question the provisions of this norm or request that the Ministry of Economy and Finance should be incorporated into the preceding proceedings." "Therefore, it cannot be affirmed that there has been a refusal to comply with these rulings (because the [SBS] has already complied with them) and no action has been filed as a consequence of Act 25792." There has not been a failure to comply with the judgments since the judgments "were complied with insofar as legally possible, because no action was filed against the Ministry of Economy and Finance as it should have been";

d) "[E]ven though it is true that both the Superintendency of Banks and Insurance and the Ministry of Economy and Finance form part of the State structure, each has its own autonomous judicial representation, and this situation makes it necessary to take legal action against them expressly when they are attributed any conduct that is not in accordance with the law." "It would be unacceptable to affirm that, because a claim had been filed against the […] Superintendency, the whole of the State of Peru was aware of the claims";

e) The five pensioners "filed applications for amparo against the Superintendency of Banks and Insurance, the effect of which is to restore matters to their status prior to the alleged violation of rights. At that time, it was considered that what was ordered had been complied with, as there was no ruling that ordered the payment of any specific amount";

f) The judgments corresponding to Carlos Torres Benvenuto, Reymert Bartra Vásquez and Maximiliano Gamarra Ferreyra did not determine the amount of the pensions that corresponded to them, so that there was "a difference of interpretation about the amount of the pension, an issue that can only be examined in the domestic jurisdiction and [in] the context of a judicial proceeding in which evidentiary mechanisms can be used, and not in an application for protective measures." If the plaintiff considered that the pension he was paid was not the correct amount, he should have filed the respective judicial proceedings so that the exact amount of the pension could be determined;

g) The three judgments of the Constitutional Court were delivered after the petition against Peru had been submitted to the Inter-American Commission, and were not filed against the MEF."By filing these applications against a body that was inappropriate according to law [...] it made their execution impossible; the latter was facilitated by the recent annulment of Act 25792 [in 2002], immediately after which the [SBS] complied with the ruling, even though the plaintiffs did not have this right." In the three compliance proceedings, the SBS was expressly cited and the MEF was not cited, "which was juridically impossible since it had not been a party to the first proceeding";

h) As a result of a legal error committed by the SBS – by issuing a decision, which exceeded its competence – based on compliance proceedings and the injunction to the officials of this institution, the pensions were paid, taking as a reference the salary of SBS employees who were under the private sector regime. However, the SBS has reserved "the right to act in accordance with the law" because the five pensioners or their heirs have received extremely high amounts for the concept of repayments, which did not correspond to them, since, in order to adjust their pension, an inappropriate salary reference was used;

i) "As a result of the judicial rulings arising from applications for protective measures that have been executed[, …] the claimants are receiving a pension that does not correspond to them, considerably higher than other pensioners in the country, merely as a result of having resorted to an inappropriate procedure, in which there has been no ruling on merits with regard to the admissibility of the pension claimed, but only that it should continue, because it had been modified by law";
j) As to the existence of procedures permitting the enforcement of fundamental rights, there are six types of protective measure, which are regulated in the Constitution. Such recourses were only used effectively in February 2002. Moreover, Peru "has guaranteed compliance with the decisions, creating mechanisms to make them effective, and it has not been demonstrated, as required according to the principles of the burden of proof, that it has in any way interfered with the execution of the said rulings"; k) Since no judicial proceeding was filed against the MEF or other State body, owing to the application of Decree Law No. 25792, "it is evident that the fundamental presumption for filing a proceeding before the Court does not exist, because domestic remedies have not been exhausted[, …] which implied having cited the Ministry of Economy and Finance, through the respective Public Attorney responsible for the defense of the State, regarding the actions of this Ministry." In view of the lack of a complaint, this Ministry has "acted, based on the conviction that its processing of the pensions of the pensioners was correct";
l) The judicial decisions issued as a result of the applications for protective measures have special execution mechanisms, such as coercion of the responsible official and the latter's possible civil liability for non-compliance. "The correct use of this procedural mechanism would have ensured compliance with the decision – as it subsequently did. Therefore, the State of Peru cannot be accused of not complying with judicial decisions if all the existing execution mechanisms regulated by domestic legislation had not been exhausted'; and
m) "The pensioners filed several actions, including criminal proceedings, which were dismissed, which only shows that they were not filed appropriately."

Considerations of the Court

125. Article 25 of the Convention establishes that:

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.
2. The States Parties undertake:
   a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;
   b. to develop the possibilities of judicial remedy; and
   c. to ensure that the competent authorities shall enforce such remedies when granted

126. The Court has said that:

[…] it is not enough that such recourses exist formally; they must be effective; that is, they must give results or responses to the violations of rights established in the Convention. This Court has

also held that remedies that, due to the general situation of the country or even the particular circumstances of any given case, prove illusory cannot be considered effective. This may happen when, for example, they prove to be useless in practice because the jurisdictional body does not have the independence necessary to arrive at an impartial decision or because they lack the means to execute their decisions; or any other situation in which justice is being denied, such as cases in which there has been an unwarranted delay in rendering judgment [FN151].
and that:
the safeguard of the individual in the face of the arbitrary exercise of the powers of the State is the primary purpose of the international protection of human rights [FN152].

[FN151] Cf. Las Palmeras case. Judgment of December 6, 2001. Series C No. 90, para. 58; Case of the Mayagna (Sumo) Awas Tingni Community, supra note 2, paras. 111-113; and the Constitutional Court case. Judgment of January 31, 2001. Series C No. 71, paras. 89, 90 and 93.
[FN152] Cf. the Constitutional Court case, supra note 151, para. 89; Godínez Cruz case. Judgment of January 20, 1989(Series C No. 5, para. 174; and Velásquez Rodríguez case. Judgment of July 29, 1988(Series C No. 4, para. 165.

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127. The alleged violation of Article 25 of the Convention will be examined at three different stages: a) the payment of the pensions from April to October 1992 (for Mr. Bartra Vásquez) and September and October 1992 (for the other four pensioners); b) from November 1992 to February 2002; and c) from March 2002 to date.

a) First stage

128. In the instant case it has been established (supra paras. 88(h), 89(c), 89(j), 89(q), 89(x), and 89(ee)) that the five pensioners filed various proceedings before the different judicial authorities of Peru, to seek payment of the pensions, which they considered were due to them by law. As a result of these claims, various judgments were delivered ordering the SBS to pay the total pension that the alleged victims had been receiving by law.

129. For example, the judgments employed phrases such as “that the Superintendency of Banks and Insurance comply by paying the plaintiff the pension that he had been receiving by law” [FN153] or “that the respondent pay the pension to the plaintiff in accordance with Decree Law 20530” [FN154] or “that the [Superintendency of Banks and Insurance] pay the plaintiff the entire amount of his pension established by Decision …” [FN155].

[FN153] Judgment of the Constitutional and Social Chamber of the Supreme Court of Justice delivered on May 2, 1994, regarding the application for amparo filed by Carlos Torres Benvenuto against the SBS (file of appendices to the application, appendix 36, folio 160).
[FN154] Judgment of the Constitutional and Social Chamber of the Supreme Court of Justice delivered on September 1, 1994, regarding the application for amparo filed by Javier Mujica Ruiz-Huidobro against the SBS (file of appendices to the application, appendix 38, folio 165).

[FN155] Judgment of the Constitutional and Social Chamber of the Supreme Court of Justice delivered on September 19, 1994, published in the Official Gazette El Peruano on July 25, 1995, regarding the application for amparo filed by Guillermo Álvarez Hernández (file of appendices to the application, appendix 41, folio 172).
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130. Subsequent to their delivery, the judgments were not complied with, no arrangement was made to pay the amounts corresponding to the proportion of the pensions owed. The SBS attributed the responsibility to the MEF and vice versa.

131. However, the SBS did comply with the judgments in favor of the five pensioners when it paid them the difference in the amount of the pensions that corresponded to them as follows: to Messrs. Torres Benvenuto, Mujica Ruiz-Huidobro, Álvarez Hernández and Gamarra Ferreyra, only for September and October 1992, while Mr. Bartra Vásquez was paid the difference for April to October 1992. These payments were made by judicial deposits in favor of the five pensioners.

132. In light of the foregoing, the Court considers that the first stage does not merit any consideration because, during this period, the amounts that the pensioners should receive as an equalized pension were paid, in accordance with the rulings of the domestic courts.

b) Second stage

133. The second stage merits special attention, since it was as of November 1992 that the SBS attributed the responsibility for payment to the MEF and vice versa. Furthermore, the State affirms that, owing to the application of article 5 of Decree Law No. 25792, which made the MEF responsible for the "collection of the contributions and the payment of the pensions, remunerations or similar that it would have corresponded to the Superintendency of Banks and Insurance to pay to its pensioners, retirees and those who have ceased to work for it, who are covered by the regime of Decree Law No. 20530", the five pensioners should have filed a complaint not only against the SBS but also the MEF and that, consequently, the judgments were complied with, because the respondent party, that is the SBS, complied with them to the extent of its responsibility.

134. In view of the foregoing, it is important to indicate that, at the stage of execution of the judgment on amparo and in a decision of November 3, 1994, the Nineteenth Civil Court of Lima, ordered, with regard to Carlos Torres Benvenuto, that the SBS should "issue the necessary administrative decision or decisions to restore the right of the plaintiff to receive remunerations and repayments in accordance with the Supreme Judgment [...] and that the [MEF], through its General Administration Office [should] comply by making the required payments effective." In this decision, the court also indicated that there had been a lack of good faith, because "both entities, which are simultaneously and reciprocally obligated have mutually attributed to each other the responsibility for complying with the ruling" without contributing "any solution to compliance with the said ruling."

135. With regard to the State's position that the MEF should have been cited, the Court dismisses this argument and indicates that, when, in 1995, the SBS issued the corresponding decisions that decided to equalize the reduced pensions of the alleged victims, in the second article of these decisions it stipulated: "Transmit this decision and appendix to the Ministry of Economy and Finance for the pertinent purposes." Furthermore, the judicial rulings were published in the Official Gazette El Peruano, so that the MEF could not allege that it was unaware of the judgments to justify its failure to comply with them.

136. It is important to indicate that:

[…] the inexistence of an effective recourse against the violation of the rights recognized by the Convention constitutes a transgression of the Convention by the State Party in which such a situation occurs. In that respect, it should be emphasized that, for such a recourse to exist, it is not enough that it is established in the Constitution or in the law or that it should be formally admissible, but it must be truly appropriate to establish whether there has been a violation of human rights and to provide everything necessary to remedy it. Those recourses that are illusory, owing to the general conditions in the country or to the particular circumstances of a specific case, shall not be considered effective.Recourses are illusory when it is shown that they are ineffective in practice, when the Judiciary lacks the necessary independence to take an impartial decision, or in the absence of ways of executing the respective decisions that are delivered. They are illusory when justice is denied, when there is an unjustified delay in the decision and when the alleged victim is impeded from having access to a judicial recourse [FN156].

[FN156] Cf. Case of the Mayagna (Sumo) Awas Tingni Community, supra note 2, para. 113; Ivcher Bronstein case, supra note 150, paras. 136 and 137; and Judicial Guarantees in States of Emergency (arts. 27(2), 25 and 8 American Convention on Human Rights). Advisery Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 24.

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137. Moreover, in the report entitled "Non-compliance with judgments by the State Administration", prepared in October 1998, the Peruvian Ombudsman indicated that:

[…] if compliance with judgments is left to the discretion of the Administration, the very notion of the rule of law is violated and conditions are created for a regime of arbitrariness and uncertainty, contrary to constitutional principles such as the separation of powers and the autonomy of the Judiciary. Also, the right to equality of all the parties to a proceeding is particularly harmed, by subordinating the execution of the judgment to the will of one of them; paradoxically the party which has lost.

138. In view of the foregoing, the Court considers that, during this stage, there was evident non-compliance with the judgments of the Constitutional and Social Law Chamber of the Supreme Court of Justice of May 2, June 28, September 1 and 19, and October 10, 1994, in favor of the five pensioners. Given that there had already been judgments resulting from the applications for protective measures, which protect the status quo, the State cannot fail to comply

with such decisions, at the risk of incurring in violations of the right to property and to judicial protection, without detriment to the provisions of paragraphs 116 and 177 of this judgment.

c) Third stage

139. In this stage, it is worth emphasizing that the State complied with the judgments of the domestic judicial authorities. On March 18, 2002, the SBS executed its administrative decisions No. 250-2002, No. 251-2002, No. 252-2002, No. 253-2002 and No. 254-2002, issued on March 12, 2002, in which it decided to comply with the judgments; in other words, it decided to pay the pensions to which the alleged victims had a right in accordance with the law, deducting from the sum to be paid, the amounts that the MEF had paid to the pensioners, in application of article 5 of Decree Law No. 25792, from November 1, 1992, to January 23, 2002. It was also established that "it reserve[d] the right of the SBS to deduct, in accordance with the judgment of the Inter-American Court of Human Rights, […] the amount that may have been paid in excess when complying [with the decisions ...], in which case, the provisions of [article] 53 of Decree Law 20530 will expressly be taken into account, which authorizes encumbering pensions to pay debts" [FN157].

[FN157] Cf. administrative decision SBS No. 250-2002 of March 12, 2002, with regard to Carlos Torres Benvenuto (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 975 to 978); administrative decision SBS No. 251-2002 of March 12, 2002, with regard to Maximiliano Gamarra Ferreyra (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 979 to 982); administrative decision SBS No. 252-2002 of March 12, 2002, with regard to Guillermo Álvarez Hernández (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 983 to 986); administrative decision SBS No. 253-2002 of March 12, 2002, with regard to Javier Mujica Ruiz-Huidobro (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 987 to 990); and administrative decision SBS No. 254-2002 of March 12, 2002, with regard to Reymert Bartra Vásquez (file on merits and possible reparations, tome IV, appendix 6 of the communication of July 22, 2002, presented by the representatives of the alleged victims and their next of kin, folios 991 to 994).

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140. Consequently, this stage does not need further examination by the Court, because during this stage the judgments delivered in favor of the five pensioners were complied with.

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141. In view of the foregoing, this Court considers that the State violated Article 25 of the American Convention to the detriment of Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Maximiliano Gamarra Ferreyra and Reymert Bartra

Vásquez, by not executing the judgments of the Constitutional and Social Law Chamber of the Supreme Court of Justice of Peru until almost eight years after they had been delivered.

IX. ARTICLE 26 (PROGRESSIVE DEVELOPMENT OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Commission's arguments

142. With regard to Article 26 of the Convention, the Commission alleges that:

a) The State violated this article when it drafted Decree Law No. 25792, which "constituted an unjustified setback with regard to the level of development of the right to social security that the victims had achieved in accordance with Decree Law No. 20530 and its related norms," so that it imposed a cap that was substantially lower cap than the amount of the equalized pension the alleged victims were receiving. As of the entry into force of Decree Law No. 25792, the five pensioners began to receive approximately one-fifth of the retirement pension they had been receiving;
b) The obligation established in Article 26 of the Convention implies that the States may not adopt regressive measures in relation to the level of development achieved; although, in exceptional circumstances and by analogous application of Article 5 of the Protocol of San Salvador, laws that impose restrictions and limitations on economic, social and cultural rights may be justified, provided that they have been "promulgated in order to preserve the general welfare in a democratic society and only to the extent that they are not incompatible with the purpose and reason underlying those rights"; and
c) The State did not allege or prove that the setback entailed by Decree Law No. 25792 was effected "in order to preserve the general welfare in a democratic society," "nor did it allege or prove any other circumstance in this respect."

Arguments of the representatives of the alleged victims and their next of kin

143. With regard to Article 26 of the Convention, the representatives of the alleged victims and their next of kin indicated that:

a) According to the provisions of this article, the State has the obligation to progressively achieve the full realization of the right to social security. This obligation implies the "correlative prohibition of regression with regard to recognition of the right to social security, except in circumstances that are absolutely necessary, reasonable and justified for the common good." The adoption of regressive policies, aimed at reducing the degree of enjoyment of economic, social and cultural rights, violates the principle of progressive development;
b) The scope of this article should be determined bearing in mind the evolving interpretation of international instruments and in accordance with the pro homine principle established in Article 29(b) of the Convention;
c) The essential content of the right to social security is to ensure to all persons a protection against the consequences of ageing or of any other contingency beyond their control that implies a deprivation of the essential means of support to lead a dignified and decorous life. Peru violated the right to social security when it deprived the five pensioners of the means of support

that, in the form of an equalized pension, corresponded to them in the context of the pension regime to which they were assigned and that – until March 1992 in one case, and until September that year with regard to the other four – had permitted them to provide the most immediate vital necessities for themselves and their families;

d) The reduction in the amounts of the pensions of the alleged victims "is a regressive measure that was not justified by the State in the context of the full exercise of economic, social and cultural rights." This measure has violated the principle of progressive development established in Article 26 of the Convention, which "cannot be undermined, under the pretext of a lack of economic resources, and much less in the case of vulnerable groups of the population, such as retirees and pensioners";

e) Overall, it is evident that the measures adopted by the State have implied a grave violation of the human right to social security, because "these measures – even though they may not have had that explicit intention – had the concrete effect of creating a situation that deprived them of their means of support, which – as pensioners and elderly adults – was essential to enable them to lead a dignified and decorous life"; and

f) They request the Court to determine the contents of the article on progressive development of economic, social and cultural rights and also to establish parameters and criteria that instruct the States on how to comply with their juridical obligations, as well as criteria to determine how regressive measures violate their obligations under the Convention. Moreover, it would be "very useful" if the Court would establish guidelines that allow the State to adopt an integrated social security policy.

The arguments of the State

144. With regard to Article 26 of the Convention, the State alleges that:

a) It has not violated the progressive development of the retirement pension of the alleged victims, because the pension they are receiving, as a result of the judicial proceedings they filed, "is considerably higher than the one to which they would be legally entitled, if their pensions had been regulated by the regime that corresponded to them;" in other words, in function of the salary of the employees of the public sector labor regime and not to those of the private sector regime; and

b) This article contains a generic declaration that cannot be interpreted so extensively as to claim that it sustains that, under the Peruvian social security and pension regime, payment of pensions is absolute and cannot be limited by law.

Considerations of the Court

145. Article 26 of the Convention states that:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

146. The Inter-American Commission and the representatives of the alleged victims and their next of kin alleged that Article 26 of the American Convention had been violated because, by reducing the amount of the pensions of the alleged victims, the State failed to comply with its obligation to progressively develop their economic, social and cultural rights and, in particular, did not ensure the progressive development of their right to a pension.

147. Economic, social and cultural rights have both an individual and a collective dimension. This Court considers that their progressive development, about which the United Nations Committee on Economic, Social and Cultural Rights has already ruled [FN158], should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation.

[FN158] U.N. Doc. E/1991/23, United Nations Committee on Economic, Social and Cultural Rights, General Comment No. 3: The nature of States Parties obligations (paragraph 1 of article 2 of the Covenant), adopted at the Fifth Session, 1990, point 9.

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148. It is evident that this is what is occurring in the instant case; therefore, the Court considers that it is in order to reject the request to rule on the progressive development of economic, social and cultural rights in Peru, in the context of this case.

X. ARTICLE 8 (RIGHT TO A FAIR TRIAL)

Arguments of the representatives of the alleged victims and their next of kin

149. In the brief on requests, arguments and evidence the representatives of the alleged victims and their next of kin alleged that the State had violated Article 8(1) of the Convention; this was not included in the application filed by the Inter-American Commission. In that respect, they alleged:

a) In view of the violation of their rights, the five pensioners filed applications for amparo before the sitting civil judges, who were the only ones competent to hear this type of action, according to the provisions of the Habeas Corpus and Amparo Act. These judges heard the complaints that had been filed and delivered the respective judgments. However, on April 23, 1994, Legislative Decree No. 817, “The State social security regime Act,” was promulgated. It established that, as of that date, all legal proceedings concerning the pension regime of State’s civil servants governed by Decree Law No. 20530 – including those already underway – would be decided exclusively by the Transitory Corporative Public Law Courts;

b) The promulgation of Legislative Decree No. 817 deprived the judges who had been hearing the proceedings on execution of the judgments delivered by the Supreme Court of Justice of Peru in relation to the harm suffered by the five pensioners of competence, and these cases were transferred to the two Transitory Corporative Public Law Courts in Lima. Both courts were “presided by interim judges [...and] the Inter-American Commission on Human Rights itself had

at one time indicated that they were officials who had been called into question owing to their anti-juridical decisions";

c) The State could not assign cases on the pension regime of State civil servants to be heard by interim judges. "By changing the jurisdiction to this type of judge, who could be controlled by the Executive (and, therefore, lacking the independence demanded by Article 8(1) of the Convention), it sought to ensure decisions which would discourage filing applications for amparo that would be decided favorably for the pensioners, as had occurred in some cases. The interim public law judges [...] changed jurisprudence and affirmed that compliance proceedings were not the appropriate mechanism for obtaining payment of sums of money, because the decisions taken in that type of proceeding had declarative rather than condemnatory effects, and execution had to be implemented by another mechanism." These decisions of the interim judges disregarded the nature of compliance proceedings as simple and prompt recourses to protect the individual in the face of violations of fundamental rights and, thereby, prejudiced the five pensioners;

d) With the said actions, Peru violated the right of the five pensioners to have judges with general jurisdiction – civil judges – decide on their rights impartially and independently, without the interference of the Executive. "[I]n order to consider that a court respects the guarantee of the regular, independent and impartial judge, that court should not only have been established previously by a law, but also should have been established so that its competence to hear the case submitted to it is derived from the said case being one of those that, in general and in abstract, the law establishes should be judged by that court";

e) The five pensioners filed a criminal complaint against the State agents responsible for non-compliance with the judgments delivered by the Supreme Court of Justice, seeking to have them investigated and punished for non-compliance. However, "the criminal recourses were ineffective to repair the right of the pensioners to have the judgments in their favor complied with, which violated the right to effective judicial protection embodied in Articles 8(1) and 25 of the Convention";

f) The communication of September 22, 2000, submitted by Javier Mujica during the procedure before the Commission, stated, in the part relating to the violation of the right to a fair trial, that the said change in jurisdiction "constituted a flagrant violation of the principle of the judge with general jurisdiction and also represented a covert means of assigning the case to courts that were known to favor the position of the SBS." On September 26 that year, the Commission forwarded the pertinent parts of this communication to the State so that the latter had the opportunity of exercising its right to defense in view of the alleged violation;

g) The applicants are allowed to extend the factual framework presented by the Commission in the application and to include other events described during the procedure before the Commission but not included in the application;

h) According to the Court's new Rules of Procedure, the true parties to the contentious proceeding are the individual plaintiffs and the State and, only procedurally, the Commission. Moreover, the victims have the right to participate autonomously in the international proceeding, so that, in their application, they may include facts that were not included in the Commission's application, "provided the State is given the opportunity to challenge them; and this can take place before the Court." If the alleged victims were denied this possibility, the principle of procedural equality would be violated; and

i) There is no provision in the Convention establishing that only the Commission or the State may determine the factual basis for the proceeding before the Court. Once the Commission

has filed the application, the alleged victims and the State may present autonomously any de facto and de jure matters that they deem necessary to provide the Court with a better understanding in order to deliver judgment.

The arguments of the Commission

150. Regarding the alleged violation of Article 8(1) of the Convention, the Commission indicated that:

a) It confirms that the purpose of the instant case is for the Court to decide whether Peru is responsible for the violation of Article 21, 25 and 26 of the Convention, in relation to the general obligations established in Articles 1(1) and 2 thereof, owing to the facts described in the application filed by the Commission. The specific plea in the application was prepared on the basis of the facts established in the report on merits drawn up by the Commission in accordance with Article 50 of the Convention. The proceeding before the Court should be circumscribed to the limits of the report on merits and the application filed before the Court;
b) The petitioners did not allege the violation of Article 8 of the Convention, because Peru had transferred the assignation of jurisdiction to hear the proceedings concerning the pension regime of State civil servants regulated by Decree Law No. 20530 to the transitory corporative public law courts, in either the petition of February 1, 1998, or its expansion of May 25 that year. Consequently, this allegation was not part of the procedure before the Inter-American Commission; therefore, the State did not submit arguments in that respect, and the Commission did not rule on the matter;
c) The principle that, when submitting a case to the Court, the Commission or the State Parties should determine the juridical content of the proceeding – that is, the facts to be proved by the parties and examined by the Court, and also the rights that the Court must decide whether they have been violated – derives from Article 61 of the Convention. "The substance of the proceeding before the Court and the limits within which the Court must decide are established by the Commission or possibly the State";
d) The legal and factual presumption that allows the State to exercise effectively its right to defense is that the application filed before the Court should contain substantially the same legal and factual conclusions as the report drawn up by the Commission, in accordance with Article 50 of the Convention. "Should it be accepted that the Court's jurisdiction can extend beyond the facts that were the object of the procedure before the ICHR and the articles that the Commission found had been violated in its Article 50 report and in its application, legal certainty, procedural equity and congruence would be jeopardized";
e) The Court's practice has consisted in indicating that the Commission's report or its application constitute the limits to the claims of the case. These limits to the Court's latitude for decision "have not been modified by the recent regulatory reforms [which grant] autonomous representation to the petitioners." The Court's Rules of Procedure clearly state that the proceeding is initiated by the filing of the application by the Commission, which should contain, inter alia, the claims, a statement of the facts, the legal arguments and the pertinent conclusions. This signifies that the application filed by the Commission establishes the limits to the substance of the proceeding;
f) The Court's Rules of Procedure establish that, in the answer to the application, the State must state whether it accepts the facts and claims or whether it contradicts them, and that the

Court may consider accepted those facts that have not been expressly denied and the claims that have not been expressly contested. "The foregoing is another element which indicates that it is the Commission's application and the State's answer that determine the substance of the contentious proceeding before the Court";

g) Based on the foregoing conclusions, it considers that the facts that were not alleged in the original petition before the Commission should not form part of the substance of the proceeding before the Court, except if, having been alleged and subsequently proved, the State has had the opportunity to defend itself and, also, that the Commission expressly accepts that those facts are relevant to the proceeding;

h) Without detriment to the foregoing, the Commission acknowledges that, by virtue of the iura novit curia principle, the Court has the power and even the right to apply the pertinent legal provisions in a case, even when the parties do not invoke them expressly;

i) With regard to the allegation of the representatives of the alleged victims and their next of kin that the criminal remedies that some of the alleged victims filed in order to try and enforce the judgments of the Supreme Court of Justice were ineffective, which violated the right to effective judicial protection embodied in Articles 8(1) and 25 of the Convention, it considers that "although the said allegations were made by the petitioners in their original petition before the ICHR, the Commission did not determine the existence of these alleged violations either in its report on merits or in its application before the Court. However, they represent additional legal assessments of the same facts which, based on the available evidence, were established by the Commission in its report on merits and in the application[. … T]he Commission considers that such arguments […] may be heard by the Court under the iura novit curia principle."

The arguments of the State

151. With regard to Article 8(1) of the Convention, the State alleges that:

a) The right of the five pensioners to have recourse to a competent judge has not been violated by the fact that, owing to the substance of the action, the jurisdiction was changed from civil judges to public law judges, "because the State is authorized to determine jurisdiction in order to ensure a better distribution of the procedural load; this should signify that the opposition procedure existed in both cases and also that both organs are part of the Judiciary and have the same normative hierarchy." Furthermore, it has not been shown that the change caused a situation of defenselessness or prejudice for the alleged victims. This argument was not put forward by the five pensioners in the domestic jurisdiction, nor did it form part of the substance of the application filed by the Commission; it is "an argument submitted after the Peruvian State's answer to the application and, therefore, cannot be discussed in this case"; and

b) "The pensioners filed various actions, including criminal proceedings, which were rejected, which only shows that they were not filed appropriately."

The considerations of the Court

152. Owing to the difference of opinion that has arisen between the Commission and the representatives of the alleged victims and their next of kin and since this is the first case to be processed in its entirety under the Rules of Procedure that entered into force on June 1, 2001, the

Court considers it advisable to clarify the matter relating to the possibility of alleging facts or rights that are not included in the application.

153. With regard to the facts that are the substance of this proceeding, this Court considers that it is not admissible to allege new facts, distinct from those presented in the application, without detriment to setting forth those that may explain, clarify or reject the facts that have been mentioned in the application, or be consistent with the claims of the plaintiff.

154. The case of supervening facts is different. These are presented after any of the following briefs has been submitted: application; requests, arguments and evidence, and answer to the application. In this hypothesis, the information can be forwarded to the Court at any stage of the proceeding before judgment has been delivered.

155. Regarding the incorporation of rights other than those included in the application filed by the Commission, the Court considers that the petitioners may invoke such rights. They are the holders of all the rights embodied in the American Convention and, if this were not admissible, it would be an undue restriction of their condition of subjects of international human rights law. It is understood that the foregoing, with regard to other rights, refers to facts that are already contained in the application.

156. The Court is empowered to examine the violation of articles of the Convention that are not included in the briefs of application; requests, arguments and evidence, and answer to the application, based on the iura novit curia principle, solidly supported in international jurisprudence and "which international jurisprudence has used repeatedly [understanding it] in the sense that the judge has the power and even the obligation to apply the pertinent legal provisions in a case, even when the parties do not invoke them expressly" [FN159].

[FN159] Cf. Cantos case, supra note 3, para. 58; Hilaire, Constantine and Benjamin et al. case, supra note 4, para. 107; Durand and Ugarte case. Judgment of August 16, 2000. Series C No. 68, para. 76; Eur. Court H.R., Guerra and others v. Italy, Judgment of 19 February 1998, Reports 1998-I, p.13, para. 44; Eur. Court H.R., Philis v. Greece, Judgment of 27 August 1991, Series A No. 209, p. 19, para. 56; Eur. Court H.R., Powell and Rayner v. The United Kingdom, Judgment of 21 February 1990, Series A No. 172, p. 13, para. 29; and the Court of Justice of the European Communities, Judgment of November 19 1998, in Case C-252/96 P, p.7, para. 23, where it is established that "[t]he iura novit curia principle authorizes the civil judge to apply the legal norms he deems appropriate, and also to modify the legal arguments on which the claims of the parties are based, without altering, however, the cause of action or modifying the nature of the problem posed."

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157. Lastly, the Court considers that it is not necessary to deliver a ruling on the alleged violation of Article 8 of the Convention, because the file contain insufficient evidence in this respect.

XI. NON-COMPLIANCE WITH ARTICLES 1(1) AND 2 (OBLIGATION TO RESPECT RIGHTS AND DOMESTIC LEGAL EFFECTS)

The arguments of the Commission

158. Regarding Articles 1(1) and 2 of the Convention, the Commission alleges that:

a) The violations of Articles 21, 25 and 26 of the Convention committed by Peru to the detriment of the five pensioners, imply that the State did not comply with the general obligation to respect the rights and freedoms and to ensure their free and full exercise; and
b) When it promulgated and applied article 5 of Decree Law No. 25792, the State violated the rights embodied in Articles 21 and 26 of the Convention. The State did not take adequate measures in domestic law to make effective the rights embodied in the Convention, thus violating the general obligation stipulated in Article 2 thereof.

The arguments of the representatives of the alleged victims and their next of kin

159. Regarding Articles 1(1) and 2 of the Convention, the representatives of the alleged victims and their next of kin allege that:

a) As a consequence of the violation of the rights embodied in Articles 8(1), 21, 25 and 26 of the Convention, the State also violated the obligation to respect the rights and freedoms recognized in the Convention and the obligation to ensure their free and full exercise to all persons subject to its jurisdiction; and
b) With the adoption of article 5 of Decree Law No. 25792 and while it was in force, Peru disregarded the obligation to adapt its domestic legislation to the Convention, pursuant to the provisions of Article 2 thereof.

The arguments of the State

160. The State did not refer expressly to the alleged non-compliance with Articles 1(1) and 2 of the American Convention.

The considerations of the Court

161. Article 1(1) of the Convention establishes that:

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

162. While, Article 2 of the Conventions stipulates 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.

163. The Court has established that:

Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights that can be attributed, under the rules of international law, to the act or omission of any public authority constitutes an act imputable to the State and which entails its responsibility as established in the Convention.
According to Article 1(1), any exercise of public power that violates the rights recognized by the Convention is illegal. Whenever a State organ or official, or a public entity violates one of those rights, this constitutes a failure in the duty to respect the rights and freedoms set forth in the Convention.
This conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority. Under international law, a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law [FN160].

[FN160] Cf. Case of the Mayagna (Sumo) Awas Tingni Community, supra note 2, para. 154; Baena Ricardo et al. case. Judgment of February 2, 2001. Series C No. 72, para. 178; and Caballero Delgado and Santana case. Judgment of December 8, 1995. Series C No. 22, para. 56.

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164. With regard to Article 2 of the Convention, the Court has said that:

In international law, customary law establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence. The American Convention establishes the general obligation of each State Party to adapt its domestic law to the provisions of this Convention, in order to guarantee the rights it embodies. This general obligation of the State Party implies that the measures of domestic law must be effective (the principle of effet utile). This means that the State must adopt all measures so that the provisions of the Convention are effectively fulfilled in its domestic legal system, as Article 2 of the Convention requires. Such measures are only effective when the State adjusts its actions to the Convention's rules on protection [FN161].

[FN161] Cf. "The Last Temptation of Christ" case (Olmedo Bustos et al.), Judgment of February 5, 2001. Series C No. 73, para. 87; Baena Ricardo et al. case, supra note 160, para. 179; Durand and Ugarte case, supra note 159, para. 136; and cf. also "a self-evident principle" (principe allant

de soi); Exchange of Greek and Turkish Populations, Advisory Opinion, 1925, P.C.I.J., Series B, No. 10, p. 20.
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165. The Court has also 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 the said guarantees [FN162].

[FN162] Cf. Baena Ricardo et al, case, supra note 160, para. 180; Cantoral Benavides case. Judgment of August 18, 2000. Series C No. 69, para. 178; and Castillo Petruzzi et al. case. Judgment of May 30, 1999. Series C No. 52, para. 207.
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166. As already indicated in this judgment, the Court observes that, the State violated the human rights embodied in Articles 21 and 25 of the Convention, to the detriment of Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Maximiliano Gamarra Ferreyra and Reymert Bartra Vásquez; it therefore failed to comply with the general obligation established in Article 1(1) to respect the rights and freedoms embodied in the Convention and to ensure their free and full exercise.

167. The Court observes that, by abstaining for an extended period of time from adopting the series of measures necessary to fully comply with the judgments of its judicial organs and, consequently, making effective the rights embodied in the American Convention (Articles 21 and 25), the State failed to comply with the obligation stipulated in Article 2 thereof.

168. In view of the foregoing, the Court concludes that the State failed to comply with the general obligations of Articles 1(1) and 2 of the American Convention.

XII. APPLICATION OF ARTICLE 63(1)

The arguments of the Commission

169. The Commission stated that it corresponded to the representatives of the alleged victims and their next of kin to present “their specific claims” regarding reparations and costs. In this respect, it requested the Court:

a) To order that the alleged victims and their next of kin should be ensured the enjoyment of their rights that had been violated by compliance with the judgments delivered by the Supreme Court of Justice of Peru on May 2, June 28, September 1 and 19, and October 10, 1994, and by the Constitutional Court of Peru on July 9, 1998, August 3, 2000, and December 21, 2000. In this respect, it indicated that “[c]ompliance with these judgments implies that the State of Peru should pay Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez

Hernández, Reymert Bartra Vásquez and the next of kin of Maximiliano Gamarra Ferreyra the difference that it has not paid them in the amount of their pensions as of November 1992, plus the respective interest, and that it should also pay them their pensions for an equalized amount in the future";

b) To order the State to compensate Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Reymert Bartra Vásquez and the next of kin of Maximiliano Gamarra Ferreyra "for all other damage that […] they duly substantiate, which is a consequence of the alleged violations of the human rights of the victims, including the non-pecuniary damage for the suffering arising from the reduction in the amount of their pensions and from the State's failure to comply with the judgments of the Supreme Court of Justice of Peru and the Constitutional Court."With regard to the those entitled to the measures of reparation, the Commission indicated that the affected parties are Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Reymert Bartra Vásquez and Maximiliano Gamarra Ferreyra, and, since the latter has died "payment of his pension as well as the compensation that the Court may decide should be paid to his sole universal heirs: his wife, Sara Elena Castro Remy, and his daughters, Sara Esther Gamarra Castro and Patricia Elena Gamarra Castro";

c) Regarding the other forms of reparation, to order the State to annul and terminate, retroactively, the effects of article 5 of Decree Law No. 25792 of October 23, 1992, in view of its incompatibility with the American Convention. Also, it requested the Court to order Peru to conduct a complete, impartial and effective investigation into the facts in order to establish responsibilities for the failure to comply with the above-mentioned judgments delivered by the Supreme Court of Justice and by the Constitutional Court, "and, using criminal, administrative or any other relevant procedure, apply to those responsible the pertinent punishments that are appropriate to the gravity of the said violations"; and

d) To order the State to pay the costs arising from processing the judicial proceedings in the domestic sphere, and also those incurred at the international level by processing the case before the Commission and the Court.

The arguments of the representatives of the alleged victims and their next of kin

170. The representatives of the alleged victims and their next of kin alleged the following considerations with regard to reparations, costs and expenses:

a) With regard to the beneficiaries of the reparations, they indicated that "the five pensioners and their next of kin suffered the consequences of not having received the amounts that corresponded to them for the equalized pension to which they were entitled for almost ten years."In addition to the five pensioners, the representatives of the alleged victims and their next of kin indicated the names of the next of kin who they consider are also beneficiaries of the reparations;

b) The State should reestablish the right of the five pensioners to the equalized pension under the same terms and conditions as those under which it was established at the time of their retirement, by issuing SBS administrative decisions, to be published in the Official Gazette El Peruano and in another newspaper with wide national circulation;

c) As a second measure to reestablish the situation prior to the violation, they indicated that the State should pay the differences between the pension amounts received by the five pensioners

and the amounts that they should have received each month if their pensions had not been arbitrarily reduced, together with the corresponding interest on the arrears. They added that these calculations should be made on the basis of "the amounts received since November 1992, as salary, by persons occupying the positions or performing similar functions to those performed by the victims at the time of their retirement," and they requested the Court to designate Máximo Jesús Atauje Montes to make these calculations;

d) As for the reparation of the pecuniary damage, in the brief on requests, arguments and evidence, they requested the Court that, in order to establish the exact amount of the compensation for damages, "it should take into account the accounting expertise that is available to the Court, at the appropriate time." Subsequently, in their brief with final arguments, they clarified that the purpose of the expert report presented in the public hearing was "to explain the magnitude of the patrimonial damage that had been caused," and that they did not intend the Court to order the State to reimburse the amounts indicated in this report, but that it should take them as a reference in order to establish compensation for pecuniary damage;

e) As regards the compensation for non-pecuniary damage, it requested the Court that "in accordance with the testimonies of Carlos Torres and Guillermo Álvarez, it should determine, in fairness, the amount of the reparation for the suffering endured by the five pensioners and their next ofS kin." In this respect, they indicated that the alleged victims have endured suffering, anxiety and concerns arising from the lack of financial means to satisfy their needs and those of their families, "as a result of the reduction of their pensions, almost ten years ago, and the subsequent denial of justice for eight years during which they untiringly invested, energy and efforts in order to achieve compliance with the judgments in their favor";

f) The five pensioners expressed their willingness to donate "any amount" ordered by the Court in their favor to the National Human Rights Coordinator so that it can be used to protect the victims of violations of the right to social security and non-compliance with judgments by the State;

g) With regard to measures of satisfaction and guarantees of non-repetition, they requested the Court to order the State to acknowledge publicly its international responsibility "for the reduction in the amounts of the equalized pension to which the five pensioners are entitled, for failure to pay, during these years, the difference between the amount owed and the amounts actually received, and also for denial of justice," and that it should make a public apology for the occurrence of these facts. It also requested that the State should publish the acknowledgement of responsibility and the apology in two newspapers with wide national circulation;

h) As a measure of satisfaction and guarantee of non-repetition, they indicated that the State should conduct an impartial and effective investigation, in order to punish the SBS and MEF officials responsible for the prolonged failure to comply with the judgments. They added that the proceedings filed by the alleged victims are paralyzed;

i) As a guarantee of non-repetition, they requested that the Court "should order the State of Peru to establish a Study Group, formed of well-know academics and international experts in that field from […] ILO, and the Committee on Economic, Social and Cultural Rights." The Study Group should draw up a report with recommendations on the legislative initiatives or modifications necessary to fully adapt Peru's legislation on social security to its international obligations;

j) They requested the Court to order the State to establish a "National Pensioners Day". "[T]his measure would give Peruvian society, at least once a year, the opportunity to reflect on

the importance and transcendence for society of the right to a pension of those who, with effort and dedication, have helped to develop Peru"; and

k) With regard to the repayment of costs and expenses, it requested the Court to order the State to repay the expenses incurred by the five pensioners at the domestic level and before the Commission and the Court, and to refund the expenses assumed by the representatives of the alleged victims and their next of kin in the procedures before the Commission and the Court. As to the amount of the expenses and costs assumed by CEJIL, they indicated that they referred to the report presented by the expert witness, Máximo Jesús Atauje Montes. Lastly, CEDAL stated that the amount established by the Court for this concept will be donated to the National Human Rights Coordinator.

171. In the brief with final arguments, the representatives of the alleged victims and their next of kin informed that the State had complied with some measures of reparation. In this regard, they indicated that:

a) Article 5 of Decree Law No. 25792 was annulled by Act No. 27650 of January 21, 2002;

b) The State had reestablished the right of the five pensioners to an equalized pension by administrative decisions issued by the SBS on March 12, 2002, which ordered compliance with the 1995 decisions establishing that the judgments of the internal judicial authorities should be executed; and

c) The State had paid the five pensioners the amounts of the pensions that they had failed to receive since November 1992. However, they indicated that it did not pay them interest on the said amounts and that the SBS conditioned these payments to the judgment of the Inter-American Court. In addition, they underscored that, even though the amounts received in March 2002 are "high and impressive amounts," "it should not be forgotten that these figures correspond to sums accumulated over ten years" and that "they are explained due to the exponential increase in the salaries of those who occupy the SBS positions that serve as a reference for the adjustment of the pensions."

The arguments of the State

172. With regard to reparations, costs and expenses, the State indicates the following:

a) It is "strange" that the alleged victims "seek to obtain compensation, not only for themselves, but also for their adult dependents," who are financially independent;

b) "With regard to the compensation claimed," it indicated that "it was inadmissible because, as has been indicated, the State was not responsible for the plaintiffs' situation";

c) The State does not have to acknowledge publicly any responsibility for the facts claimed or apologize, "because, as has repeatedly been indicated, it has no responsibility for the facts in which it was not involved";

d) As regards the investigation for the "failure to execute" the judicial decisions, "the Peruvian State has not been the subject of any judicial complaint";

e) It considers "inadmissible" the requests relating to the adjustment of domestic social security legislation to the international obligations of Peru "because this is a matter of parliamentary competence," and the establishment of a Day of the Pensioner "because it bears no relation to this complaint"; and

f) With regard to the repayment of costs and expenses, it indicated that "this request is not admissible because the Peruvian State has no responsibility for the facts on which the application was based."

The considerations of the Court

173. In accordance with the contents of the preceding chapters, the Court has found that, owing to the facts of this case, Articles 21 and 25 of the American Convention have been violated, in relation to Articles 1(1) and 2 thereof to the detriment of Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Maximiliano Gamarra Ferreyra and Reymert Bartra Vásquez. This Court, in its constant jurisprudence has established that it is a principle of international law that any violation of an international obligation that has caused a damage involves the obligation to repair it adequately [FN163]. To this end, the Court has based itself on Article 63(1) of the American Convention, according to which:

[I]f 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.

[FN163] Cf. Cantos case, supra note 3, para. 66; El Caracazo case. Reparations, supra note 3, para. 76; and Trujillo Oroza case. Reparations, supra note 4, para. 60.
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174. As the Court has indicated, Article 63(1) of the American Convention contains a common law norm that constitutes one of the fundamental principles of contemporary international law on State responsibility. According to this, when an illegal fact which can be imputed to the State occurs, the State's responsibility for the violation of the international norm in question arises immediately, with the consequent obligation to repair and to make the consequences of the said violation cease [FN164].

[FN164] Cf. Cantos case, supra note 3, para. 67; El Caracazo case. Reparations, supra note 3, para. 76; and Hilaire, Constantine and Benjamin et al. case, supra note 4, para. 202.
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175. The Court observes that, subsequent to the filing of the application, the State of Peru has taken a series of measures to comply with the claims of the Commission and the representatives of the victims and their next of kin. These include:

a) Reestablishment of the enjoyment of the right to a pension equalized with the salary of the SBS official occupying the same or a similar position to the one occupied by each of the pensioners at the time of their retirement;

b) Compliance with the judgments delivered by the Constitutional and Social Law Chamber of the Supreme Court of Justice and by the Constitutional Court, by payment of the part of the monthly pensions that was not paid to the victims from November 1992 to February 2002; and
c) Annulment of article 5 of Decree Law No. 25792.

176. The Court considers that this attitude of the State of Peru makes a positive contribution towards settling this dispute.

177. As to the claim that the effects of article 5 of Decree Law No. 25792 should be annulled and made to cease "retroactively," the Court considers that this claim no longer forms part of the dispute in the instant case, because the said decree has already been annulled and, also, the amounts of the pension that the victims had not received has been refunded, in the terms in which they had been receiving it prior to the arbitrary reductions.

178. With regard to the possible patrimonial consequences of the violation of the right to property, this Court considers that they should be established by the competent national organs, as provided for in the domestic legislation.

179. The claim that an impartial and effective investigation should be conducted into the prolonged failure to comply with the judicial rulings is admissible, so that the Court orders the State to conduct the corresponding investigations and apply the pertinent punishments to those responsible for disregarding the judicial rulings.

180. With regard to the other claims [FN165], the Court considers that this judgment constitutes per se a form of reparation for the five pensioners [FN166].Nevertheless, the Court considers that the facts that occurred in this case caused suffering to the pensioners, because their quality of life was diminished when their pensions were substantially reduced in an arbitrary manner, and the judicial rulings in their favor were not executed. Therefore, the Court considers that the non-pecuniary damage caused should also be repaired by providing fair compensation [FN167]. Consequently, the Court considers that, within one year, the State should pay to each of the five pensioners for reparation of non-pecuniary damage the sum of US$3,000.00 (three thousand United States dollars). The amount corresponding to Maximiliano Gamarra Ferreyra should be paid to his widow, Sara Elena Castro Remy.

[FN165] The other claims of the Commission and the representatives of the victims and their next of kin are: payment of the interest corresponding to the amounts of the pensions which were not received as of November 1992; compensation for pecuniary damage; public acknowledgement of international responsibility and a public apology, and the publication of both in two newspapers with extensive national circulation; the setting up of a "Study Group" on the adjustment of domestic social security legislation to Peru's international obligations, and the establishment of a "National Pensioners Day."
[FN166] Cf. Trujillo Oroza case. Reparations, supra note 4, para. 83; "The Last Temptation of Christ" case (Olmedo Bustos et al.), supra note 161, para. 99; and the Constitutional Court case, supra note 151, para. 122.

[FN167] Cf. El Caracazo case. Reparations, supra note 3, para. 94; Bámaca Velásquez case. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of February 22, 2002. Series C No. 91, para. 60; and Trujillo Oroza case. Reparations, supra note 4, para. 83.

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181. As for the reimbursement of costs and expenses, this Court must prudently assess their scope, which includes the expenses arising from the actions filed by the five pensioners before the authorities of the internal jurisdiction, and also those incurred during the proceedings before the inter-American system. The assessment may be based on the principle of fairness [FN168].

[FN168] Cf. Hilaire, Constantine and Benjamin et al. case, supra note 4, para. 218; Cesti Hurtado case. Reparations (Art. 63(1) American Convention on Human Rights). Judgment of May 31, 2001. Series C No. 78, para. 72; and the "Street Children" case (Villagrán Morales et al.). Reparations (Art. 63(1) American Convention on Human Rights). Judgment of May 26, 2001. Series C No. 77, para. 109.
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182. To this end, the Court considers that it is fair to order the payment of a total of US$13,000.00 (thirteen thousand United States dollars) for expenses and a total of US$3,500.00 (three thousand five hundred United States dollars) for the costs incurred by the five pensioners and their representatives in the domestic proceedings and in the international proceeding before the inter-American protection system. To comply with this, the State must make the respective payment within six months of notification of this judgment. The payment corresponding to expenses must be distributed as follows: a) the sum of US$3,000.00 (three thousand United States dollars) each to Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro and Guillermo Álvarez Hernández, and b) the sum of US$2,000.00 (two thousand United States dollars) to Reymert Bartra Vásquez and the sum of US$2,000.00 (two thousand United States dollars) to Sara Elena Castro Remy, Maximiliano Gamarra Ferreyra's widow. With regard to the payment of costs, this must be distributed as follows: a) the sum of US$3,000.00 (three thousand United States dollars) to CEDAL, and b) the sum of US$500.00 (five hundred United States dollars) to CEJIL.

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183. The State may fulfill its obligations by payment in United States dollars or an equivalent amount in Peruvian currency, using the exchange rate of both currencies in force on the New York, United States, market the day before payment for the respective calculation.

184. The payments of compensation for non-pecuniary damage and for costs and expenses established in this judgment may not be subject to any current or future tax or charge. The State must comply with the measures of reparation ordered within one year of notification of this judgment. Also, should the State fall into arrears, it must pay interest on the amount owed corresponding to bank interest on payments in arrears in Peru.

185. With regard to the phrase in the SBS decisions that indicated "the right of the SBS to deduct, in accordance with the judgment of the Inter-American Court of Human Rights, the amount that may have been paid in excess," this Court considers that this reservation in the SBS decisions has no effect (supra para. 119).

186. In accordance with its constant practice, the Court reserves the right to monitor full compliance with this judgment. The case will be closed when the State has fully applied its provisions. Within one year from notification of this judgment, the State must provide the Court with a report on the measures taken to comply with the said judgment.

XIII. OPERATIVE PARAGRAPHS

187. Therefore

THE COURT,

unanimously,

1. Declares that the State violated the right to property embodied in Article 21 of the American Convention on Human Rights, as stated in paragraphs 93 to 121 of this judgment, to the detriment of Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Maximiliano Gamarra Ferreyra and Reymert Bartra Vásquez.
2. Declares that the State violated the right to judicial protection embodied in Article 25 of the American Convention on Human Rights, as stated in paragraphs 125 to 141 of this judgment, to the detriment of Carlos Torres Benvenuto, Javier Mujica Ruiz-Huidobro, Guillermo Álvarez Hernández, Maximiliano Gamarra Ferreyra and Reymert Bartra Vásquez.
3. Declares that the State failed to comply with the general obligations of Articles 1(1) and 2 of the American Convention on Human Rights, in relation to the violations of the substantive rights indicated in the preceding operative paragraphs, as stated in paragraphs 161 to 168 of this judgment.
4. Declares that this judgment constitutes per se a form of reparation for the victims, as stated in paragraph 180 of this judgment.
5. Decides that the possible patrimonial consequences of the violation of the right to property should be established under domestic legislation, by the competent national organs.
6. Decides that the State must conduct the corresponding investigations and apply the pertinent punishments to those responsible for failing to abide by the judicial decisions delivered by the Peruvian courts during the applications for protective measures filed by the victims.
7. Decides that, as indicated in paragraph 190 of this judgment, in fairness, the State must pay the four victims and Maximiliano Gamarra Ferreyra's widow the amount of US$3,000.00 (three thousand United States dollars) for non-pecuniary damage. The State must comply with the provisions of this operative paragraph within one year at the latest of notification of this judgment.
8. Decides that the State must pay the amount of US$13,000.00 (thirteen thousand United States dollars) for expenses and a total of US$3,500.00 (three thousand five hundred United States dollars) for costs, as stated in paragraph 182 of this judgment.

9. Declares that the payments of compensation for non-pecuniary damage and for costs and expenses established in this judgment may not be subject to any current or future tax or charge.
10. Declares that the State must comply with this judgment within one year of receiving notification thereof.
11. Declares that, should the State fall in arrears with the payments, it must pay interest on the amount owed corresponding to bank interest on payments in arrear in Peru.
12. Decides that it will monitor compliance with this judgment and will consider the case closed when the State has complied fully with its provisions. Within one year from notification of the judgment, the State must provide the Court with a report on the measures taken to comply with this judgment, as stated in paragraph 186 above.

Judge Cançado Trindade advised the Court of his Concurring Opinion, Judge García Ramírez also advised the Court of his Reasoned Concurring Opinion, and Judge de Roux Rengifo advised the Court of his Reasoned Opinion, all of which accompany this judgment.

Done in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica, on February 28, 2003.

Antônio A. Cançado Trindade
President

Hernán Salgado-Pesantes
Sergio García-Ramírez
Oliver Jackman
Alirio Abreu-Burelli
Carlos Vicente de Roux-Rengifo
Javier Mario de Belaunde-López de Romaña

Manuel E. Ventura-Robles
Secretary

So ordered,

Antônio A. Cançado Trindade
President

Manuel E. Ventura-Robles
Secretary

CONCURRING OPINION OF JUDGE A.A. CANÇADO TRINDADE

1. I vote in favour of the adoption of the present Judgment on merits and reparations in the case of the Five Pensioners versus Peru, in which the Inter-American Court of Human Rights, firstly, affirms the character of acquired right of the right to pension, subsumed in the right to private property under Article 21 of the American Convention on Human Rights, and linked to the perennial, ineluctable and irreducible social function of the State. And, subsequently, the

Court sustains that the prompt compliance with the judgments - which cannot remain at the mercy or discretion of the Administration - is an essential component of the right to judicial protection set forth in Article 25 of the American Convention.

2. From the present Judgment of the Court the wide scope of the right of access to justice, at national as well as international levels, can be inferred. That right is not reduced to the formal access, stricto sensu, to the judicial instance; the right of access to justice, which is implicit in several provisions of the American Convention (and of other human rights treaties) and which permeates the domestic law of the States Parties, means, lato sensu, the right to obtain justice. Endowed with a juridical content of its own, it appears as an autonomous right to the jurisdictional assistance, that is, to the very realization of justice.

3. As the circumstances of the present cas of the Five Pensioners versus Peru reveal, the obligations of judicial protection on the part of the State are not complied with by the sole issuing of judgments, but rather with the effective compliance with them (in accordance with the provision of Article 25(2)(c) of the American Convention). From the standpoint of the individuals, one can here visualize a true right to the Law ("derecho al Derecho"), that is, the right to a legal order - at national as well as international levels - which effectively protects the rights inherent to the human person [FN1] (among which the right to pension as an acquired right [FN2]).

[FN1] A.A. Cançado Trindade, Tratado de Direito Internacional dos Direitos Humanos, tomo III, Porto Alegre/Brasil, S.A. Fabris Ed., 2003, pp. 523-524.

[FN2] Which has been incorporated to the personal patrimony, as an assistance on the part of the public power for the years of work and social contributio rendered by the individual, and which cannot be affected by subsequent legislative alterations (or of other kinds), with consequences amounting to confiscation.

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4. My intention, in the present Concurring Opinion, is to underline the importance, for the operation, in particular, of the mechanism of protection of the American Convention, of the decision taken by the Court in the present Judgment in relation specifically to the distinct roles of the individual petitioners and of the Inter-American Commission on Human Rights in the procedure before the Court. The question has a direct incidence in the treatment of the right of access to justice, in its wide meaning to which I have just referred to, and in the framework of the application of the American Convention.

5. In fact, as pointed out in the present Judgment in the case of the Five Pensioners versus Peru, this is the first contentious case entirely handled under the new Regulations of the Court, adopted on 24 November 2000, and in force as from 01 June 2001 (par. 152). In adopting such historical Regulations, which conferred locus standi in judicio onto the petitioners in all the stages of the procedure before the Court, this latter had in mind the concomitant imperatives and needs of realization of justice, and of preservation of the juridico-procedural equality and security under the American Convention.

6. As to the distinct role of the individual petitioners and of the Inter-American Commission in the procedure before the Court, this latter took into consideration the approaches of both the thesis of procedural law, with emphasis on the exclusive faculty of the States Parties and of the Commission to submit a case to the Court (Article 61(1) of the American Convention), and the thesis of substantive law, with emphasis on the condition of the individuals of titulaires of the rights set forth in the Convention. From the ineluctable tension between the two thesis (which correspond to two trends of juridical thinking), there resulted the understanding that the new faculty of the petitioners to present in an autonomous way their arguments before the Court should pertain to the factual and juridical elements contained in the complaint presented by the Commission [FN3].

[FN3] Cf. Informe..., op. cit. infra n. (7), pp. 28-30.

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7. In the one year and a half of the new Regulations of the Court being in force, the petitioners have reiteratedly referred to rights, other that the ones contained in the complaint presented by the Commission, which they considered to have also been violated, not only in the present case of the Five Pensioners versus Peru, but also on other recent occasions [FN4], in contentious cases which in due course will be resolved by the Court in the respective Judgments. In the present case, the controversy arisen between the representatives of the alleged victims and their relatives, on theone hand, and the Inter-American Commission, on the other (pars. 149-150), has required from the Court a pronouncement on this specific point.

[FN4] Cases Mirna Mack Chang versus Guatemala, Maritza Urrutia versus Guatemala, Centro de Reeducación del Menor versus Paraguay, Ricardo Canese versus Paraguay, Juan Sánchez versus Honduras, and Gómez Paquiyauri versus Peru.

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8. The Commission opposed itself that the representatives of the alleged victims and their relatives could add, - in their brief of submissions, arguments and evidences, - new factual and juridical elements (additional rights) besides the ones already contained in the complaint interposed by the Commission before the Court. This controversy, in a way, leads the Court, in the present Judgment in the case of the Five Pensioners versus Peru, to clarify, and to place in adequate perspective, the fundamentally distinct roles of the petitioners and of the Commission in the procedure before the Tribunal.

9. The Court, called upon to pronounce itself on this matter, has had in mind the experience - of one and a half years so far - which begins to accumulate on the subject at issue, under its new Regulations, as well as, - once more, as always, - the concomitant imperatives of realization of justice, and of preservation of the juridico-procedural equality and security in the procedure under the Convention. As to the factual elements of the complaint presented by the Commission (the object of the process), the Court has accepted the argument of the Commission, - with the exception, naturally, of the supervening facts, - in the following terms (pars. 153-154):

"As to the facts object of the process, this Tribunal considers that it is not admissible to allege new facts, distinct from those raised in the complaint, without prejudice of referring to those which may explain, clarify or discard the onew that have been mentioned in the complaint, of rather, respond to the submissions of the complainant.
The case of the supervening facts is distinct. These latter are presented after any of the following written documents are submitted: complaint; submissions, arguments and evidences, and reply to the complaint. In such hypothesis, the information ought to be forwarded to the Tribunal in any stage of the process before the decision of the Judgment".

10. As to the juridical elements themselves of the complaint, the Court has decided in Judgment, in a distinct way, in the following terms (par. 155):

"As to the incorporation of other rights, distinct from the ones already contained in the complaint presented by the Commission, the Court considers that the petitioners may invoke those rights. They are the titulaires of all the rights set forth in the American Convention, and not to admit it would be an undue restriction to their condition of subjects of the International Law of Human Rights. It is understood that the aforesaid, concerning other rights, pertains to the facts already contained in the complaint".

11. The Court has, in this way, with all prudence, taken a step forward in this respect, in the direction claimed by the individual petitioners. It has done so withiout prejudice to the right of defence of the respondent State and without minimizing the relevant role of the Commission in the course of the contentious procedure. In fact, in any circumstances the right of defence of the State is preserved, as the State counts on a time-limit of two months to reply the complaint lodged by the Commission with the Court, as well as a prudencial time-limit to present its observations to the brief of submissions, arguments and evidences of the representatives of the alleged victims and their relatives. On some occasions the time-limit to submit the reply to the complaint and the observations to the brief of the representatives of the alleged victims and their relatives has been the same, it thus being possible to present in a same brief the two lines of arguments.

12. In the present case of the Five Pensioners versus Peru, the State had the opportunity, and in effect took the initiative, of presenting various briefs [FN5]. Accordingly, the principle of the contradictorio has been fully preserved. The important point, in this respect, is that the respondent State always has the occasion to exercise fully its right of defence. Moreover, in any case, as pointed out by the Court in the present Judgment, any right added by the petitioners to those already referred to in the complaint interposed by the Commission ought to pertain to the facts already contained in that complaint (par. 155).

[FN5] Thus, the respondent State presented, in the present case, the following briefs on the merits of the case: brief of 15.03.2002, of reply to the complaint; brief of 22.04.2002, of observations to the brief of submissions, arguments and evidences of the representatives of the alleged victims and their relatives; brief of 22.05.2002, whereby it referred to the information of the Comission pertaining to the compliance with the judgments issued by the Supreme Court of Justice and by the Constitutional Tribunal of Peru and the derrogation of Article 5 of the Decree-

Law n. 25792; brief of 02.09.2002, whereby it referred to the alleged non-exhaustion of remedies of domestic law referred to in the reply to the complaint; brief of 02.09.2002, whereby it expressed its considerations on the proposal of friendly settlement presented by the representatives of the alleged victims and their relatives before the Executive Secretariat of the National Commission of Human Rights of the Ministry of Justice of Peru and on the amicus curiae presented by the Office of the Ombudsman (Defensoría del Pueblo) during the handling of the case before the Commission; brief of 29.10.2002, whereby it submitted its final written arguments; brief of 29.10.2002, whereby it presented a document titled "Explicación de los Regímenes Laborales y Pensionarios que se Aplican en la República del Perú y Análisis Específico de la Situación de Cada Uno de los Pensionistas"; and brief of 07.11.2002, whereby it referred to the expertise presented before the Court by Mr. Máximo Jesús Atauje Montes. Besides those briefs, the Peruvian State presented other briefs limited to the handling of the case, as well as pertaining to the evidence.

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13. It is likewise preserved the role of the Commission, as guardian of the Convention, which assists the Court in the contentieux under the Convention as defender of the public interest. In the present case, the discrepancy between the Commission and the petitioners did not have major practical consequences, as the Court did not find in the briefs elements of evidence which would allow it to pronounce on an eventual additional violation of the Convention (par. 157). Furthermore, by virtue of a principle of procedural law, widely supported in international case-law, the Court has the inherent power to examine, sponte sua, any additional violation of the Convention, even if not alleged in the complaint submitted by the Commission (jura novit curia), - as indicated in the present Judgment (par. 156) and as expressly and rightly admitted by the Commission itself (par. 150(h)).

14. The principle jura novit curia (which has been studied in the ambit of the most distinct branches of Law, including international law) inspires the exercise of the judicial function, and gives expression to the understanding that the Law is above what is alleged by the parties, it being incumbent upon the judicial authority to identify it and apply it to the cas d'espèce, it being entirely free to that end. The judicial authority, thus, is not limited by what is alleged by the parties, nor is there margin for the non liquet. The judicial authority ought to say what the Law is (jurisdictio, jus dicere) and give application to it, and to that effect - in compliance with its duty - it is entirely free.

15. In fact, the consideration of the principle of procedural law jura novit curia comes to stress the differentiated treatment dispensed to the factual and juridical elements, which has guided the criterion adopted by the Inter-American Court, in the present Judgment, on the question at issue. By virtue of that principle jura novit curia, the judicial authority, although circumscribed in its decision to the facts and evidences submitted in the judicial process, has, distinctly, as to the law, the facultad and the duty to go further than the allegations by the parties. It thus finds itself entitled to qualify autonomously the factual situation at issue, and to search, in the applicable legal order, for the pertinent provisions, even if they have not been invoked by the parties; that is, it is entitled to search freely for the legal norms to apply.

16. In any way, it is of importance the step forward taken by the Court in the present Judgment, leaning, as to the position of the individual petitioners, in favour of the thesis of substantive law. The Courte correctly sustains that the consideration which ought to prevail is that of the individuals being subjects of all the rights protected by the Convention, as the true substantive complaining party, and as subjects of the International Law of Human Rights. The Court has moved consciously in the right direction, in the exercise of a faculty which is inherent to it, and taking both the American Convention and its interna corporis as living instruments, which require an evolutive interpretation (as indicated in its jurisprudence constante) [FN6], so as to fulfil the changing needs of protection of the human being.

[FN6] Cf., in this sense, the obiter dicta in: Inter-American Court of Human Rights (IACtHR), Advisory Opinion OC-10/89, on the Interpretation of the American Declaration on the Rights and Duties of Man in the Framework of Article 64 of the American Convention on Human Rights, of 14.07.1989, pars. 37-38; IACtHR, Advisory Opinion OC-16/99, on the Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, of 01.10.1999, pars. 114-115, and Concurring Opinion of Judge A.A. Cançado Trindade, pars. 9-11; IACtHR, case of the "Street Children" (Villagrán Morales and Others versus Guatemala), Judgment (on the merits) of 19.11.1999, pars. 193-194; IACtHR, case Cantoral Benavides versus Peru, Judgment (on the merits) of 18.08.2000, pars. 99 and 102-103; IACtHR, case Bámaca Velásquez versus Guatemala, Judgment (on the merits) of 25.11.2000, Individual Opinion of Judge A.A. Cançado Trindade, pars. 34-38; IACtHR, case of the Community Mayagna (Sumo) Awas Tingni versus Nicaragua, Judgment (on the merits and reparations) of 31.08.2001, pars. 148-149; IACtHR, case Bámaca Velásquez versus Guatemala, Judgment (on reparations) of 22.02.2002, Individual Opinion of Judge A.A. Cançado Trindade, par. 3.

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17. This is a significant step forward taken by the Court, since the adoption of its present Regulations. In conformity likewise with the mens legis of the current Regulations, in the sense of granting the greatest possible participation, in an autonomous way, to the alleged victims, and their legal representatives duly accredited, in the procedure before the Court, is the general Resolution on provisional measures of protection, issued by the Court on 29 August 2001. By means of that Resolution, the Court, in its wisdom, decided that "it will receive and will take cognizance of, in an autonomous way, the submissions, arguments and evidences of the beneficiaries of the provisional measures adopted by this latter in the cases in which the complaint has been submitted to it, without the Commission being dispensed, in the framework of its conventional obligations, from informing the Court, whenever it so requests" (resolutory point n. 1).

18. This being so, if the alleged victims and their legal representatives can present directly to the Court a request for provisional measures of protection in cases which are pending before the Tribunal, with even more force it can be sustained that they may, in the proceedings of contentious cases before the Court, refer to the alleged violation of rights additional to the ones already alleged in the complaint interposed by the Commission. Here, once again, the petitioners mark presence as titulaires of the rights set forth in the American Convention.

19. There will always subsist a difference of approach between the supporters of this thesis - among whom I stand [FN7] - and the followers of the thesis of procedural law. I think, however, that, as from the moment when one affirms, in an unequivocal way, the juridico-international subjectivity of the human person, one ought to assume the legal consequences ensuing therefrom. The petitioners themselves are those who, better than anyone else, can assess which rights have presumably been violated. To pretend to impose them a limit to this faculty would go against the right of access to justice under the American Convention.

[FN7] Cf. Inter-American Court of Human Rights, Informe: Bases para un Proyecto de Protocolo a la Convención Americana sobre Derechos Humanos, para Fortalecer Su Mecanismo de Protección (Rapporteur: A.A. Cançado Trindade), San José of Costa Rica, IACtHR, 2001, pp. 1-64, esp. pp. 59, 23, 33, 40-44, 50-55 and 64; A.A. Cançado Trindade, El Acceso Directo del Individuo a los Tribunales Internacionales de Derechos Humanos, Bilbao, University of Deusto, 2001, pp. 9-104.

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20. The criterion adopted in this respect by the Court in the present Judgment, which will serve as guide for its procedure from now onwards, contributes, thus, to the improvement of the due process of law at international level, under the American Convention. Not always the complaint originally presented by the petitioners before the Commission (Article 44 of the Convention) is necessarily the same as the complaint subsequently interposed by the Commission before the Court (Article 61(1) of the Convention). If it is required from the States, in conformity with the Convention (Article 25), the respect for the right of access to justice, with the preservation of the faculty of the individual complainants to substantiate their legal actions before national tribunals, how to pretend to deny them this same faculty in their arguments before an international tribunal like the Inter-American Court?

21. The criterion adopted by the Court in the present Judgment in the case of the Five Pensioners versus Peru correctly considers that one cannot hinder the right of the petitioners of access to justice at international level, which finds expression in their faculty to indicate the rights which they deem violated. The respect for the exercise of that right is required from the States Parties to the Convention, at the level of their respective domestic legal orders [FN8], and it would not make any sense if it were denied in the international procedure under the Convention itself. The new criterion of the Court clearly confirms the understanding whereby the process is not and end in itself, but rather a means of realization of Law, and, ultimately, of justice.

[FN8] The American Convention requires not only the access itself to justice at the level of domestic law (Article 25), but also the realization itself of material justice. To that end, the Convention determines the observance of the juridico-procedural guarantees (Article 8), these latter taken lato sensu, encompassing the whole of procedural requisites which ought to be observed so that all the individuals can adequately defend themselves from any act emanated from the State power which may affect their rights. Cf., in this sense (wide scope of the due process): IACtHR, case of the Constitutional Tribunal versus Peru, Judgment (on the merits) of

31.01.2001, par. 69; IACtHR, case Ivcher Bronstein versus Peru, Judgment (on the merits) of 06.02.2001, par. 102; IACtHR, case Baena Ricardo and Others versus Panama, Judgment (on the merits) of 02.02.2001, par. 125. In this last case, the Inter-American Court rightly warned that "in any subject matter, even in labour and administrative matters, the discretionality of the administration has boundaries that may not be surpassed, one such boundary being respect for human rights. (...) The administration (...) may not invoke public order to reduce discretionally the guarantees of its subjects" (ibid., par. 126).

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22. Though it is certain that only the States Parties and the Commission can submit a case to the Court (Article 61(1) of the Convention), it is also certain that, in providing for reparations, and referring to "the injured party" ("la parte lesionada / a parte prejudicada / la partie lésée" - Article 63(1)), the Convention refers to the victims, and not to the Commission. The artificiality of the formula of Article 61(1) of the Convention, - which, when adopted in 1969 gave expression to a dogma of the past, - does not resist to the overwhelming reality that the petitioners are the true complaining substantive party before the Court, as subjects of the International Law of Human Rights and, in my understanding, also of general International Law [FN9].

[FN9] A.A. Cançado Trindade, "A Personalidade e Capacidade Jurídicas do Indivíduo como Sujeito do Direito Internacional", in Jornadas de Derecho Internacional (Mexico City, December 2001), Washington D.C., Subsecretariat of Legal Affairs of the OAS, 2002, pp. 311-347.

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23. If, as already pointed out, before national tribunals the faculty of the individual complainants to sustantiate their own allegations of violations of their rights is secured, how to justify the denial or restriction of that faculty to the individual petitioners before the international tribunals of human rights? 34 years having lapsed since the adoption of the American Convention, at last the reality of the facts is leading to the overcoming of the unsustainable capitis diminutio of the individuals, titulaires of rights, in the procedure under the Convention (Article 61(1)), - without prejudice to the juridical security and of the preservation of the role, distinct from that of the petitioners, of the Commission. The assertion of the international juridical personality and capacity of the human being fulfils a true need of the contemporary international legal order.

24. In fact, the assertion of those juridical personality and capacity constitutes the truly revolutionary legacy of the evolution of the international legal doctrine in the second half of the XXth century. The time has come to overcome the classic limitations of the legitimatio ad causam in International Law, which have so much hindered its progressive development towards the construction of a new jus gentium. An important role is here being exercised by the impact of the proclamation of human rights in the international legal order, in the sense of humanizing this latter: those rights were proclaimed as inherent to every human being, irrespectively of any circumstances [FN10]. The individual is subject jure suo of International Law, and to the recognition of the rights which are inherent to him corresponds ineluctably the procedural capacity to vindicate them, at national as well as international levels.

[FN10] IACtHR, Advisory Opinion OC-17/02, on the Juridical Condition and Human Rights of the Child, of 28.08.2002, resolutory point n. 1, and Concurring Opinion of Judge A.A. Cançado Trindade, pars. 1-71.

Antônio Augusto Cançado Trindade
Judge

Manuel E. Ventura-Robles
Secretary

REASONED CONCURRING OPINION OF JUDGE SERGIO GARCÍA RAMÍREZ

I concur with my colleagues in the judgment delivered in the Five Pensioners v. Peru case, notwithstanding my wish to explain the reasons I took into consideration to issue my concurring opinion on several points analyzed in that decision.

1. Facts not specified in the application

The tendency that can be clearly observed in the successive Rules of Procedure of the Court – particularly those in force since 2000 – has led to the establishment of increasing procedural rights for the alleged victim. Thus, the importance and the action of the individual affected by the violation of the right are vindicated during the proceeding. I consider this to be the best option at present and the best route to follow for the future of the inter-American system, although the final destination remains a long way off.

Naturally, this recognition of procedural rights has a limit: the provisions of the American Convention and other treaties that the Court may apply. Within this framework, the Court has acted to regulate the actual participation in the proceeding of the alleged victim, who is, undoubtedly, the owner of the juridical rights that have been harmed and of the corresponding violated rights. This characteristic converts the victim into the subject of the disputed issue; that is, into a party in the material sense. To the contrary, the Commission is only a party in the formal sense, according to the well-known Carneluttian characterization: it is attributed the ownership of the procedural action in order to request a ruling of the international jurisdiction in a proceeding.

Currently, the Convention grants this faculty, which legitimizes direct access to the Court, to both the Commission and the States that have recognized the contentious jurisdiction of the Court, but has not conferred it – at this stage of the system's evolution – on the individuals affected by the violation of their rights. At times, it has been suggested that this legitimization could be recognized to individuals, as already occurs in the European system, de lege ferenda. Obviously, this recognition will depend on the spheres of competence of and advances in the inter-American system, which are being developed slowly but surely.

The procedural action is expressed in the juridical act of the application, which initiates the jurisdictional proceedings. This is of crucial importance for defining the substance of the proceeding. The application, which can only be submitted by the Inter-American Commission – or a State, as I mentioned earlier – describes the facts examined in the previous stage before the Inter-American Commission, and also delimits the substance of the proceeding that is beginning. The judgment must be evaluated and decided congruently and integrally on the basis of these facts. Thus, the State's defense countering the claims of the Commission – which are asserted during the procedural action – are concentrated on the facts set out in the application (without detriment to the exceptional possibility of supervening facts) by the entity that is legitimized to formulate it. In brief, it is only the Commission, acting as plaintiff, which sets forth the facts that constitute the factual basis of the proceeding and the judgment.

As a court that hears cases and makes rulings, the Inter-American Court has the authority to apply the law to the disputed facts and defines their juridical consequences with regard to the State's international responsibility. To this end, the Court hears the arguments made before it, but is not dependent on them. The Commission may and should, in compliance with its functional duty, set out its point of view on the juridical nature of the facts that have violated rights. However, if it does not do so, or if this does not persuade the Court, the Court may and should supplement this at its own discretion.

Furthermore, nothing prevents the alleged victim or his representatives from calling to the Court's attention the application of the law to the disputed facts in the proceeding, even when their opinion may differ from that of the Inter-American Commission. However – as I have already said – they may not introduce into the proceeding facts that differ from those contained in the application. Finally, the Court will decide what is appropriate, taking into consideration the facts presented and the Commission's legal arguments, submitted with the legitimization that the Convention recognizes to the plaintiff, as well as the points of view on those arguments offered by the alleged victim or his representatives in exercise of their procedural rights.

2. Violation of the right to property

The members of the Court have unanimously considered that, in this case, there was a violation of the right to property of the pensioners. However, it should be noted that the right claimed by the complainants was protected by decisions of the Peruvian Judiciary, which were implemented after the application had been submitted and, therefore, after the substance of the proceedings, which concluded in this judgment of the Inter-American Court, had been defined. This explains why a violation that subsequently ceased was taken into consideration during the proceeding.

When defining the existence of a violation, it is necessary to consider the conduct of the State as a whole. If an organ of the State admits and remedies adequately and promptly the violation committed by another State organ, the State does not incur international responsibility. It is precisely for this reason, that access to the inter-American system is conditioned to the prior exhaustion of domestic remedies. It is hoped that these will resolve the dispute, remedying the violation that has been committed, if appropriate. Thus, the importance of the domestic jurisdiction having primacy over the international jurisdiction, which only acts in a subsidiary manner.

In the case that this judgment refers to, the Peruvian courts issued the relevant protective decisions to safeguard the rights of the complainants until there had been a ruling on the merits of those rights. However, the Administration failed to comply with the judicial decisions. The time that this situation of non-compliance persisted was clearly excessive. In my opinion, in the instant case, the violation of Article 21 of the Convention is closely associated with the violation of Article 25 thereof. The violation of the right to property arises from the prolonged and unjustified non-compliance with the domestic jurisdictional decisions, because it would not have existed if those decisions had been complied with by the Administration, promptly and fully.

3. Progressive development of economic, social and cultural rights

This issue is still new for the inter-American jurisdiction. In several cases, the Court has examined civil rights that border on economic, social and cultural rights, but it has not yet had the opportunity to fully broach the latter issue itself; neither has it been able to rule on the meaning of the so-called progressive development of economic, social and cultural rights provided for in Article 26 of the Convention and embodied in the Protocol of San Salvador.

It is probable that the Court will be able to examine this very relevant issue in the future. There will therefore be an opportunity to underscore once more the hierarchy of those rights, which do not rank lower than civil and political rights. Strictly speaking, both categories are mutually complementary and, as a whole, constitute the "basic statute" of the individual today. The State, committed to respecting civil and political rights, unconditionally and promptly, should make a greater effort to ensure the prompt and complete effectiveness of economic, social and cultural rights, using the available recourses and avoiding setbacks that would diminish this "basic statute."

This case has not allowed the Court to make progress on such a relevant issue for the reasons set forth at the end of chapter IX of the judgment. However, there are some considerations formulated briefly therein, that should be emphasized. One of these is the explicit statement made by the Court that "economic, social and cultural rights have both an individual and a collective dimension." I understand that this individual dimension also translates into an individual ownership: of juridical interest and of a corresponding right that may be shared, of course, with other members of a population or one sector of this.

I consider that the issue is not reduced to the mere existence of a State duty that should orient its tasks as established by this obligation, considering individuals as mere witnesses waiting for the State to comply with its obligation under the Convention. The Convention is a body of rules on human rights precisely, and not just on general State obligations. The existence of an individual dimension to the rights supports the so-called "justiciable nature" of the latter, which has advanced at the national level and has a broad horizon at the international level.

Furthermore, the Court indicated in the judgment to which this opinion corresponds that the progressive development of the rights referred to – a widely debated issue – should be measured "in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to a pension in particular, of the entire population, bearing in mind

the imperatives of social equity." Based on this consideration, the Court will evaluate compliance with the State's obligation and the existence of the individual right, and can decide the specific dispute before it. When considering that, in view of its particularities, the instant case would not adequately sustain a consideration of this nature, the Court did point out, on the one hand, the relationship between the progressive development of the said rights and, on the other hand, the projection that this has "on the entire population" and also the ingredient of "social equity" which should characterize this progressive development.

In view of the limits that the Court itself established to its ruling in function of the characteristics of the case sub judice, I do not consider it appropriate to go further in this concurring opinion. The topic evidently suggests many additional considerations that would entail the development of the inter-American case law on one of the most topical and transcendent issues in the human rights system in our region.

March 5, 2003

Sergio García-Ramírez
Judge

Manuel E. Ventura-Robles
Secretary

REASONED OPINION OF JUDGE DE ROUX RENGIFO

The determination of whether the facts of this case did or did not violate the right to property embodied in Article 21 of the American Convention presented certain specific difficulties. The alleged victims had evidently an acquired right to a pension and this right, considered in the abstract, formed part of their patrimony. However, the execution of that right in a monthly pension payment of a specific amount should have ensued from weighing the domestic constitutional and legal norms that would allow questions such as the following to be clarified:

How and to what extent was the existence of two regimes, one related to the public sector and the other to the private sector, relevant, for the effects of a pension?

Could the pension of individuals subject to the public sector regime, such as the alleged victims, be equalized with the salary received by employees subject to the private sector regime?

What procedure should have been followed when all the employees of the public entity in question became subject to the private sector regime?

In that case, would it have been possible to equalize the pensions with the salary received by employees subject to the public sector regime, but employed in entities other than the one in which the alleged victims were working?

Did the fact that, for several years, the State calculated and paid the monthly pensions of the alleged victims by equalizing them with the salary of employees subject to the private sector

regime lead to the creation, in favor of the said victims, of a right that their pension should continue to be subject to this specific type of equalization?

The Court has acted appropriately by abstaining from entering into these questions of substance – in some of the considering paragraphs there are affirmations that appear to be addressed at resolving them in a specific sense, but in general the Court has avoided them.

It is obvious that the disputes to which these questions gave rise or will give rise can only be decided by the domestic courts. The competence of the Inter-American Court is limited to ensuring that the appropriate procedures are followed, respecting the right of access of justice and, when appropriate, the right to an effective remedy of protection.

With this reference to the effective remedy, we enter into the surest part of the terrain on which the judgment is grounded. In the case under consideration, it has been duly proven: that the victims filed applications for protective measures (acciones de garantía) to avoid their pensions being reduced; that these actions resulted in judgments which ordered the monthly pensions to continue to be calculated and paid as they had been before the corresponding reduction (in other words, that ordered that the status quo should be maintained); and that these judgments were disregarded by the State. This constitutes an evident violation of Article 25 of the Convention, and so the Court decided.

The State has argued that these judgments contained an order addressed to a public entity – the Superintendency of Banks and Insurance – distinct from the one that was supposed to make the payments, according to the legal norms in force at the time: the Ministry of the Economy and Finance. And, it has alleged that the latter was not cited in the proceeding in which the respective judicial decisions were made.

I would like to set out some of the reasons for which, in my opinion, the Court was right in rejecting those arguments (some of these reasons are additional to, and others different from the ones that the Court advanced in its considerations):

- Article 25 of the American Convention refers to a “simple and prompt” recourse and, in any case, to an “effective recourse” for protection against violations of the fundamental rights recognized by the domestic laws or by the Convention itself.
- The corresponding judicial proceeding should not be subject to formalism or ritualism that is inappropriate for a recourse aimed at the prompt safeguard of the fundamental rights of the individual.
- There is nothing to prevent the domestic legal system from adopting provisions concerning the due integration of the adversary proceeding into the respective procedure, but these provisions may not disregard the special nature of the corresponding recourse.
- As provided for in legislation or established by case law in some countries, the judge of the recourse must abstain from delivering a restraining order when joint litigation has not been established and should proceed de oficio to take measures to incorporate the adversary proceeding.
- When evaluating the argument that the plaintiff addressed the recourse against the wrong entity, it is necessary to consider whether the plaintiff proceeded reasonably and advisedly when

he indicated the respondent entity. (In this respect, it should be recalled that the victims in this case submitted their applications for amparo against the Superintendency of Banks and Insurance before Decree Law 25792 transferred the obligation to continue paying the respective pensions to the Ministry of Economy and Finance).

- In view of the prompt nature of the recourse, it is also necessary to take into account whether the State entity that was not formally summoned to the proceeding, knew about it in any way or intervened in it in any way and could, consequently, have appeared at the said proceeding to defend itself (there is evidence in the file that the Ministry of Economy and Finance was aware of the application for amparo and the compliance proceeding).
- In the case of applications for protective measures, it is necessary to consider whether there are close functional and operational relations between the respondent entity and the one that should be present in order to incorporate the adversary proceeding concerning the matter submitted to judicial examination.
- Regarding the incorporation of the adversary proceeding, in applications for protective measures, the plaintiff should not be responsible for situations resulting from the internal restructuring of the State and the redistribution of competences and responsibilities among its different entities.

I also consider that the Court was right to link the violation of the right to property (Article 21) with the right to an effective recourse (Article 25). Since the Court abstained from elucidating the questions posed at the beginning of this document, in principle, it lacked the grounds for declaring that the five pensioners suffered a deprivation of their patrimony. After all, the rulings on the applications for protective measures provided the pensioners with recognitions that clearly have patrimonial effects. By disregarding them, the State violated the pensioners' right to property.

The Court – again, with reason – prefers succinct and sober language. Consequently, it does not like to use expressions with a conceptual emphasis, particularly if they have philosophical embellishments. This is almost always sensible. However, at times, it would be useful to have those emphases; and, I believe this is true in the instant case.

In my opinion, the Court should have made it clear, in the corresponding considering paragraphs, that it considered that there had been a violation of the right to property of the pensioners, conceived in the terms of the judgments on the applications for protective measures, or – and this is another way of saying it – inasmuch as that right had been violated by the failure to comply with these judgments. By avoiding the use of expressions such as these, the judgment to which this separate opinion refers may suggest that the Court found that Article 21 of the Convention had been violated without being related to a violation of Article 25, which is not the case.

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I share the Court's decision to abstain from declaring that Article 26 of the American Convention has been violated, but the reasons which lead me to do so are different from those set out in the considering paragraphs of the judgment.

In the instant case and for the above-mentioned reasons, the Court did not attempt to rule on the merits of the question of what the rights of the five pensioners were under domestic law, nor did it attempt to determine whether the reduction in the pensions corresponded to a valid interpretation of the real purport of the pre-existing legal provisions, or to a modification (more exactly, a reduction) of the normative standards relating to the recognition of the right to a pension and its payment. In these circumstances, the Court lacks a solid basis to declare that Article 26 has been violated and this is what it should have argued in order to act in consequence.

The Court took a different line of reasoning. It indicated that the progressive development of economic, social and cultural rights should be measured in function of their increasing coverage of the entire population, and not in function of the circumstances of a very limited group of pensioners, who were not necessarily representative of the prevailing situation.

The reference to the fact that the five victims in this case are not representative of most Peruvian pensioners is pertinent – they are not, in view of both their number and the amount of the pensions they have received.

However, the reasoning according to which only State actions that affect the entire population could be submitted to the test of Article 26 does not appear to have a basis in the Convention, among other reasons because, contrary to the Commission, the Inter-American Court cannot monitor the general situation of human rights, whether they be civil and political, or economic, social and cultural. The Court can only act when the human rights of specific persons are violated, and the Convention does not require that there should be a specific number of such persons.

Carlos Vicente de Roux-Rengifo
Judge

Manuel E. Ventura-Robles
Secretary