Institution:	Inter-American Court of Human Rights
Title/Style of Cause:	Maria Teresa De La Cruz Flores v. Peru
Doc. Type:	Judgment (Merits, Reparations and Costs)
Decided by:	President: Sergio Garcia Ramirez; Vice President: Alirio Abreu Burelli; Judges: Oliver Jackman; Antonio A. Cancado Trindade; Cecilia Medina Quiroga; Manuel E. Ventura Robles Judge Diego Garcia-Sayan, a Peruvian national, excused himself from hearing the instant case, in accordance with Articles 19(2) of the Statute and 19 of the Rules of Procedure of the Court.
Dated:	18 November 2004
Citation:	De La Cruz Flores v. Peru, Judgment (IACtHR, 18 Nov. 2004)
Represented by:	APPLICANT: Carolina Loayza Tamayo

In the Case of De La Cruz-Flores,

the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court"), in accordance with Articles 29, 56 and 58 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure")** and with Article 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention"), delivers the following judgment.

** This judgment is delivered under the terms of the Rules of Procedure adopted by the Inter-American Court of Human Rights at its forty-ninth regular session in an order of November 24, 2000, which entered into force on June 1, 2001, and according to the partial reform adopted by the Court at its sixty-first regular session in an order of November 25, 2003, in force since January 1, 2004.

I. INTRODUCTION OF THE CASE

1. On June 11, 2003, 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") originating from petition No. 12,138, received by the Secretariat of the Commission on September 1, 1998.

2. The Commission submitted the application in accordance with Article 61 of the American Convention, for the Court to decide whether the State had violated Articles 7 (Right to Personal Freedom), 8 (Right to a Fair Trial), 9 (Freedom from Ex Post Facto Laws) and 24 (Right to Equal Protection) of the American Convention, in relation to Article 1(1) (Obligation to Respect Rights) thereof, to the detriment of María Teresa De La Cruz Flores (hereinafter "the alleged victim" or "Mrs. De La Cruz Flores"). The Commission also requested the Court to declare that the State had failed to comply with the obligation embodied in Article 2 (Domestic Legal Effects) of the Convention, also to the detriment of María Teresa De La Cruz Flores. Lastly, the Commission requested the Court to order the State to adopt a series of measures of pecuniary and non-pecuniary reparation, and also to pay the costs arising from processing the case in the domestic jurisdiction and before the inter-American system for the protection of human rights.

3. According to the Commission, María Teresa De La Cruz Flores, a physician by profession; was detained by police agents on March 27, 1996, after she had completed her shift as a pediatrician with the Peruvian Social Security Institute. She was charged with terrorism, processed under file No. 113-95 and, after she had been detained, was notified of a warrant for her arrest in file No. 723-93 for the crime of terrorism, a file which, according to the Commission, had been reported to be mislaid at that time. The alleged victim was prosecuted by a court composed of a "faceless" judge, which sentenced her on November 21, 1996, for the crime of terrorism to 20 years' imprisonment, under the provisions of Decree Law No. 25,475. This sentence was confirmed by the judgment of the Special Criminal Chamber of the Supreme Court of Justice on June 8, 1998. The Commission also stated that, on January 3, 2003, the Constitutional Court of Peru had delivered a judgment in which it declared the unconstitutionality of several provisions of Decree Laws Nos. 25,475 and 25,659; although it did not issue any special ruling in relation to Article 2 of Decree Law 25,475, which defined the crime of terrorism. Following that decision, the Government issued Legislative Decrees Nos. 923, 924, 925, 926 and 927, on February 19, 2003. These decrees established that, within sixty working days from the entry into force of this legislation, the National Terrorism Chamber should gradually annul, de oficio, the judgment and the oral proceeding and, if applicable, declare the absence of grounds for the charge, in criminal trials for offences of terrorism conducted before secret judges or prosecutors, unless the person convicted waived this right. However, the Commission indicated that, at the date the application was submitted, Mrs. De La Cruz Flores was still detained, convicted of the crime of terrorism.

II. COMPETENCE

4. The Court is competent to hear the instant case, in the terms of Articles 62 and 63(1) of the American Convention, because Peru has been a State Party to the Convention since July 28, 1978, and accepted the contentious jurisdiction of the Court on January 21, 1981.

III. PROCEEDING BEFORE THE COMMISSION

5. The Inter-American Commission opened case No. 12,138 on April 28, 1999, based on a petition filed by Alcira De La Cruz Flores, representing María Teresa De La Cruz Flores, on September 16, 1998, and it was expanded by the alleged victim in a brief dated January 26, 1999.

6. In notes dated February 27, 2002, addressed to the State and to the lawyer, Carolina Loayza Tamayo, who is the alleged victim's representative, the Commission proposed to postpone dealing with admissibility until the discussion and decision on merits, pursuant to Article 37(3) of the Rules of Procedure of the Commission.

7. On October 14, 2002, during the Commission's 116th regular session and at the request of the petitioners, a hearing was held at which the parties made an oral presentation of the case.

8. On March 5, 2003, during its 117th regular session, the Commission adopted Report No. 29/03 on the admissibility and merits of the case, in which it recommended to the State:

That, pursuant to the provisions of domestic law, it should adopt the necessary measures to make comprehensive reparation for the violations of the human rights of María Teresa De La Cruz Flores that were determined in the […] Report [on merits] and, in particular, offer a new proceeding with full respect for the principle of legality (which cannot be characterized by discretional and flexible interpretations of criminal norms), due process and a fair trial.
That it should adopt the necessary measures to reform Decree Law 25,475, in order to make it compatible with the American Convention on Human Rights.

9. On March 11, 2003 the Commission forwarded Report No. 29/03 to the parties, granting the State two months to comply with the Commission's recommendations.

10. On May 15, 2003, the State presented a brief in which it indicated that the judgment of the Constitutional Court of "January 4, 2003 (sic)," and the legislative decrees issued by the Executive as a result of that judgment, were designed to achieve an efficient system for the administration of justice; significant progress had been made, including new proceedings with full respect for the principles of legality and due process, soon to be defined in order to give effect to Legislative Decree No. 926; in the context of these new proceedings, María Teresa De La Cruz Flores would have the right to a fair, impartial and rapid trial "in [which] to prove her alleged innocence."

11. On June 11, 2003, the Commission decided to submit the case to the Court, "in view of the Peruvian State's failure to comply with the recommendations contained in the report on merits."

IV. PROCEEDING BEFORE THE COURT

12. The Commission filed an application before the Inter-American Court on June 11, 2003 (supra para. 1).

13. The Commission appointed Marta Altolaguirre and Santiago A. Canton as delegates to the Court and Ariel Dulitzky and Pedro E. Díaz as legal advisers.

14. On July 7, 2003, after the President of the Court (hereinafter "the President") had made a preliminary review of the application, the Secretariat notified it, together with its appendixs to

the State and informed it about the time limits for answering the application and appointing its representatives in the proceeding. On the instruction of the President, the Secretariat also informed the State of its right to appoint a judge ad hoc to take part in the consideration of the case.

15. On July 8, 2003, pursuant to the provisions of Article 35(1)(d) and (e) of the Rules of Procedure, the Secretariat notified the application to Carolina Loayza Tamayo and Javier J. Ríos Castillo, as representatives of the alleged victim, and advised them that they had 30 days to submit their brief with requests, arguments and evidence (hereinafter "brief with requests and arguments").

16. On August 6, 2003, the State appointed Sócrates Hernán Grillo Bockos and Doris M. Yalle Jorges as agent and deputy agent, respectively. The State also proposed César Rodrigo Landa Arroyo as Judge ad hoc to hear the instant case.

17. Having been granted an extension, the alleged victim's representatives forwarded their brief with requests and arguments on September 3, 2003.

18. After it had also been granted an extension, the State submitted its answer to the application on October 8, 2003.

19. On December 19, 2003, the alleged victim's representatives forwarded documentation "originating after the presentation of their brief" with requests and arguments.

20. On February 20, 2004, César Rodrigo Landa Arroyo, Judge ad hoc proposed by the State to hear the case (supra para. 16), advised that he had been called on to assume the office of Deputy Minister of Justice of Peru, which was incompatible with his participation as Judge ad hoc.

21. On March 2, 2004, the State consulted about the possibility of granting a "temporary suspension" to the Judge ad hoc appointed to the case, while he performed his functions as Deputy Minister of Justice.

22. On March 5, 2004, on the instructions of the President, the Secretariat informed the State that "in this case, the temporary suspension of the position of judge ad hoc was not admissible, because, according to Article 18(1) of the Statute of the Inter-American Court of Human Rights, the positions and activities of members or high-ranking officials of the Executive branch of Government are incompatible with the exercise of the functions of a judge of the Inter-American Court." Consequently, pursuant to the practice of the Court, the State was invited to appoint a new judge ad hoc within 30 days, in the understanding that, if it did not do so, it would be considered that the State had waived this possibility. The State did not appoint a new judge ad hoc.

23. On May 19, 2004, the President issued an order in which, in accordance with Article 47(3) of the Rules of Procedure, he called upon María Teresa De La Cruz Flores and Abdón Segundo Salazar Morán, proposed as witnesses by the Commission, to provide their testimony

by statements made before notary public (affidavits), which should be forwarded to the Court by June 8, 2004, at the latest; the affidavits would then be forwarded to the alleged victim's representatives and to the State so that they could submit any comments they deemed pertinent. The President also called upon Mario Pablo Rodríguez Hurtado and José Daniel Rodríguez Robinson, proposed as expert witnesses by the alleged victim's representatives, to provide their expert reports by means of statements made before notary public (affidavits), to be forwarded to the Court by June 8, 2004, at the latest; the affidavits would then be forwarded to the Inter-American Commission and to the State so that they could submit any comments they deemed pertinent. The President also convened the Commission, the alleged victim's representatives, and the State to a public hearing to be held at the seat of the Inter-American Court, on July 2, 2004, to hear the final oral arguments on merits and possible reparations and costs, and also the testimonial statement and expert reports of the persons named below (infra para. 28). Moreover, in this order, the President informed the parties that they had until August 2, 2004, to submit their final written arguments on merits and possible reparations and costs.

24. On June 4 and 7, 2004, the alleged victim's representatives forwarded the sworn statements made before notary public (affidavits), by José Daniel Rodríguez Robinson and Mario Pablo Rodríguez Hurtado respectively. On June 19, 2004, the State forwarded its comments on these statements.

25. On June 7, 2004, the State appointed Javier Alberto Aguirre Chumbimuni as its agent, in substitution of Sócrates Hernán Grillo Bockos.

26. On June 6 and 8, 2004, Héctor Faúndez Ledesma and Michelangela Scalabrino, respectively, submitted amici curiae briefs in the instant case.

27. On June 8, 2004, the Inter-American Commission forwarded the sworn statements made before notary public (affidavits) by María Teresa De La Cruz Flores and Abdón Segundo Salazar Morán. On June 19, 2004, the State remitted its comments on these statements.

28. On July 2, 2004, the Court received the statement of the witness and the reports of the expert witnesses proposed by the Inter-American Commission and by the alleged victim's representatives at a public hearing on merits and possible reparations and costs. The Court also heard the final oral arguments of the Commission, the alleged victim's representatives, and the State.

There appeared before the Court:

for the Inter-American Commission on Human Rights:

Freddy Gutiérrez, delegate
Pedro E. Díaz, adviser
Manuela Cuvi, adviser, and
Lilly Ching, adviser

for the alleged victim's representatives:

Carolina Loayza Tamayo, representative

for the State of Peru:

Javier Alberto Aguirre Chumbimuni, agent
Doris Yalle Jorges, deputy agent
César Lino Azabache Caracciolo, adviser, and
Miguel Guzmán, First Secretary, Embassy of Peru

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

Álvaro Eduardo Vidal Rivadeneyra.

Expert witness proposed by the Inter-American Commission on Human Rights:

Carlos Martín Rivera Paz.

Expert witness proposed by the alleged victim's representatives:

Manuel Pérez González.

29. During the public hearing, the witness proposed by the Inter-American Commission, Álvaro Eduardo Vidal Rivadeneyra, and the expert witness proposed by the alleged victim's representatives, Manuel Pérez González, and also the State and the alleged victim's representatives, presented various documents (infra para. 52).

30. On July 8, 2004, the State advised that, the same day, the Fourth Criminal Court for Terrorism of Peru had "changed the order of detention for an order of notice to appear (liberty)" with regard to María Teresa De La Cruz Flores. Consequently, the alleged victim "would obtain her release immediately within the next few hours" (infra para. 53).

31. On July 28, 2004, the State forwarded its final written arguments. The Inter-American Commission and the alleged victim's representatives did the same on August 2 and 4, 2004, respectively. The State, the Commission, and the alleged victim's representatives forwarded various documents as appendixs to their final written arguments (infra para. 54).

32. On August 30, 2004, the Inter-American Commission referred to appendix 14 of the brief with final written arguments presented by the State, which consisted in an opinion prepared by Héctor Faúndez Ledesma for the Lori Berenson Mejía case.

33. On September 3, 2004, on the instructions of the President, the Secretariat called upon the State to submit a copy of all the case files of the trials conducted in the domestic jurisdiction against the alleged victim.

34. On September 9, 2004, the alleged victim's representatives, based on one of the provisions of Article 44 of the Rules of Procedure, submitted some documents as additional evidence (infra para. 55).

35. On September 17, 2004, the State forwarded a brief as a "complement to the text of the final arguments," to which it joined an appendix (infra para. 54).

36. On September 20, 2004, the representatives forwarded "documentation originating after the presentation of the [final] written arguments" (infra para. 55).

37. On September 21, 2004, the State forwarded the case files of the domestic proceedings against Mrs. De La Cruz Flores, which had been requested as helpful evidence (supra para. 33, and infra para. 56).

38. On October 22, 2004, the State forwarded a brief in which it referred to the comments presented by the Inter-American Commission on appendix 14 of the final written arguments presented by Peru (supra para. 32).

39. On November 4, 2004, the Center of Investigation and Legal Assistance in International Law (IALDI) presented an amicus curiae brief.

40. On November 18, 2004, the State forwarded a resolution of September 24, 2004, in which the National Terrorism Chamber "confirm[ed] that the detention measure had been changed to a notice to appear in favor of María Teresa De La Cruz Flores."

V. EVIDENCE

41. Before examining the evidence provided, the Court will make some observations, in light of the provisions of Articles 44 and 45 of the Rules of Procedure, which have been developed in its case law and are applicable to this case.

42. The adversary principle, which respects the right of the parties to defend themselves, applies to matters pertaining to evidence. This principle is embodied in Article 44 of the Rules of Procedure, as regards the time at which the evidence should be submitted to ensure equality between the parties. [FN1]

[FN1] Cf. Case of Tibi. Judgment of September 7, 2004. Series C No. 114, para. 66; Case of the "Juvenile Reeducation Institute". Judgment of September 2, 2004. Series C No. 112, para. 63; and Case of Ricardo Canese. Judgment of August 31, 2004. Series C No. 111, para. 47.

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43. In the matter of receiving and weighing evidence, the Court has indicated that its proceedings are not subject to the same formalities as domestic proceedings and, 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 [FN2]. Likewise, the Court has taken account of international case law; by considering that international courts have the authority to assess and evaluate the evidence according to the rules of sound criticism, it has always avoided a rigid determination of the quantum of evidence needed to support a judgment [FN3]. This criterion is true for international human rights courts, which have greater latitude to evaluate the evidence on the pertinent facts, according to the principles of logic and on the basis of experience [FN4].

[FN2] Cf. Case of Tibi, supra note 1, para. 67; Case of the "Juvenile Reeducation Institute", supra note 1, para. 64; and Case of Ricardo Canese, supra note 1, para. 48.
[FN3] Cf. Case of Tibi, supra note 1, para. 67; Case of the "Juvenile Reeducation Institute", supra note 1, para. 64; and Case of Ricardo Canese, supra note 1, para. 48.
[FN4] Cf. Case of Tibi, supra note 1, para. 67; Case of the "Juvenile Reeducation Institute", supra note 1, para. 64; and Case of Ricardo Canese, supra note 1, para. 48.

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44. Based on the foregoing, the Court will now proceed to examine and weigh all the elements of the body of evidence in this case.

A) DOCUMENTARY EVIDENCE

45. The Inter-American Commission provided documentary evidence when submitting its application brief (supra paras. 1 and 12). [FN5]

[FN5] Cf. file of appendixes to the application, appendixes 1-A to 35, folios 1 to 360.

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46. The alleged victim's representatives provided documentary evidence when forwarding their brief with requests and arguments (supra para. 17). [FN6]

[FN6] Cf. file of appendixes to the brief with requests and arguments, appendixes 1 to 34, folios 361 to 659.

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47. The State provided documentary evidence when submitting its brief answering the application and with comments on the brief with requests and arguments (supra para. 18). [FN7]

[FN7] Cf. file of appendixes to the brief answering the application and affidavits, appendixes 1(1) to 4, folios 660 to 777.

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48. On December 19, 2003, the alleged victim's representatives forwarded documentation "originating after the presentation of the brief" with requests and arguments (supra para. 19). [FN8]

[FN8] Cf. file on merits, reparations, and costs, tome II, appendixes 1 to 4 to the brief presented by the alleged victim's representatives on December 19, 2003, folios 488 to 550.

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49. On June 4 and 7, 2004, the alleged victim's representatives forwarded the sworn statements made before notary public (affidavits) of José Daniel Rodríguez Robinson and Mario Pablo Rodríguez Hurtado, respectively (supra para. 24), as required by the President in an order of May 19, 2004 (supra para. 23). [FN9] The Court will now summarize the relevant parts of these statements:

[FN9] Cf. file of appendixes to the brief answering the application and affidavits, folios 778 to 806.

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a. Expert report of José Daniel Rodríguez Robinson, lawyer

Legislative Decree No. 635 of April 3, 1991, adopted the Peruvian Penal Code (hereinafter "the 1991 Penal Code"), which derogated the previous Code on this matter; its Title XIV, entitled "Offences against the public peace," included Chapter II on the different categories of terrorism.
This anti-terrorist legislation related to a dangerous crime; namely, one punishable due merely to a potential damage to a protected interest, without requiring the materialization of a concrete result. The basic category was constituted by various alternative behaviors, which, described, in an ambiguous manner, acts that were normally executed in the course of acts of terrorism. The description in Article 319 (crime of terrorism) of the 1991 Penal Code, constituted an open type of crime that attempted to avoid leaving areas of impunity, and left it to the judge himself to define and complete the classification, by interpretation. This Penal Code included the following categories: terrorism, aggravated terrorism, collaboration, association with terrorists, and disappearance of persons. This anti-terrorist legislation did not establish maximum penalties, with the exception of the crime of association with terrorists, for which a maximum penalty of 20 years' imprisonment was set. The penalties for the crimes of terrorism were extremely severe.
Decree Law No. 25,475 of May 6, 1992, came into being as a result of the closing of Congress by the then President Alberto Fujimori on May 5, 1992. In those circumstances, the President of the Republic adopted numerous decree laws as a way of legislating matters of national importance. The said decree law establishes the following categories of terrorism: terrorism, aggravated terrorism, collaboration in acts of terrorism, membership in terrorist organizations, instigation of terrorist acts, and repetition of terrorist acts.
There was little difference between the basic crime of terrorism defined in Article 2 of Decree Law No. 25,475 and the crime defined in the 1991 Penal Code, because it continued to be an open category with various alternative behaviors. Moreover, it described acts such as

collaboration as an independent crime, when it could be considered complicity, which distorted the latter's raison d'être.

The differences between the 1991 Penal Code and Decree Law No. 25,475 included an increase in the system of penalties, because life imprisonment was even established for the crime of aggravated terrorism; also, new criminal categories were established, such as instigation of terrorist acts, justification of terrorism, obstruction of justice by the crime of terrorism, and repetition of terrorist acts. The principal characteristic of the new legislation was "the possibility that it could be used as an instrument for punishing behaviors that were indeed crimes, and also for over-criminalizing acts that, from a rational point of view, should not determine that a legal right had been affected"; in other words, "it opened the door to the possibility that any behavior the authoritarian regime did not like c[ould] be included as a terrorist act.

Furthermore, Decree Law No. 25,475 contained new procedural norms and rules for the execution of punishments. Among the former (procedural), it is worth underscoring the following: the absolute incommunicado of the defendant during the preliminary investigation stage, the intervention of the lawyer after the defendant had made his first statement, exclusion of any kind of liberty (except unconditional), the appointment of judges ad hoc, private hearings during the oral judgment, the appointment of "faceless" judges, the inadmissibility of objections to the judges, and the appointment of judges with competence at the national level. The latter (execution of punishments), included the exclusion of prison benefits, and solitary confinement for the person convicted.

Decree Law No. 25,475 attempted to establish a "harsh system with the exclusive intention of ending terrorism, but which [...] also included obvious excess [which] violate[d] human rights."

In the context of an action on unconstitutionality filed against Decree Laws No. 25,475, 25,659, 25,708, 25,880 and 25,744, the Constitutional Court of Peru delivered a judgment on January 3, 2003, in which it referred to the anti-terrorist legislation and made some relevant declarations.

Although the plaintiffs had requested it, the Constitutional Court did not declare that Article 2 of Decree Law No. 25,475 defining the crime of terrorism was unconstitutional. The plaintiffs argued that this norm constituted an open definition of the crime, which could leave the door open to extensive, inappropriate interpretations that would affect the principle of legality.

The Constitutional Court's judgment established three ways of interpreting the definition of the crime of terrorism, which the expert witness considered erroneous. In this regard, the said judgment "did not clarify the real concern addressed by the action on unconstitutionality.

b. Expert report of Mario Pablo Rodríguez Hurtado, lawyer

On September 23, 1862, Congress adopted the drafts of the Penal Code and the Criminal Proceedings Code, which entered into force on January 2, 1863. These codes may be considered the first Peruvian texts relating to punishment, owing to their national scope. At the start of the twentieth century, a new Code of Criminal Procedure was promulgated, which adhered to the combined model, and also a Penal Code. Implementation of the codes was hindered by the need for prevention and security that gave rise to the "emergency arbitrary criminal legislation," enacted in the 1930s and characterized by its "openly dictatorial aspect."

The 1940 Code of Criminal Procedure replaced the previous legislation, adhering to the combined model, with an investigative structure "which blended the trial activities of the judges with the task of investigation inherent in the Attorney General's office (Ministerio Público), and place[d] significant restrictions on the full exercise of the defendant's right to defense."

Despite this, an emergency criminal legislation continued to be implemented, characterized by its arbitrary nature and by the intervention of the country's armed forces to suppress certain crimes against the public and social peace. In addition, imprisonment for at least 20 years and the death penalty were established and parole and release on bail were eliminated.

With the onset of the transition to democracy embodied in the 1979 Constitution, it was hoped that the emergency criminal legislation would be eliminated. To the contrary, exceptions were introduced for cases of the crime of terrorism, equaling them to those of drug-trafficking and spying, so that the time permitted for detention by the police was extended. The successive Governments that have taken office since July 1980 have opted to "replicate the ancient arbitrary emergency criminal legislation," and this situation still persists.

From 1981 until May 5, 1992, the anti-terrorist legislation comprised, among other norms, Legislative Decree No. 46 of 1981 and Articles 319 to 324 of the 1991 Penal Code. Legislative Decree No. 46 "violates [the] principle of penal legality." Furthermore, the militarization of the country was expanded by Law No. 24,150 of 1985.

In subsequent years, Laws Nos. 24,651, 24,700, 24,953 and 25,301 reformed aspects related to the suppression of the crime of terrorism defined in the 1924 Penal Code, including those relating to the organ responsible for conducting the investigation, the possibility of the defendant's incommunicado, and the applicable penalties.

Despite its "democratic criminal dogma," the 1991 Penal Code does not make a break with the emergency criminal legislation on terrorism. It also retains the broad definition of acts of collaboration and restricts the procedural benefits and those related to the execution of the sentence in drug-trafficking and terrorism cases.

In April 1992, then President Fujimori carried out a coup d'état and claimed that he was "bringing peace to the country within a legal framework which ensured that terrorists received drastic penalties." Without any parliamentary control, with the support of the Judiciary, and with propaganda in the media, "Fujimori and his team carried the arbitrariness of the counterterrorism norms to extremes." Two Decree Laws were issued in these circumstances: No. 25,475 of May 1992, establishing the penalty and the procedures for investigations, pre-trial proceedings, and trials for the crime of terrorism, which is still in force, and No. 25,659 of August 1992, which established the terrorist form of the crime of treason.

Decree Law No. 25,475 "violates the principle of criminal legality, because it fails to comply with the requirements of specificity and certainty," without which it is impossible to extend guarantees and security to the individual that he will not be tried or convicted for an ambiguous or badly defined behavior. Article 2 of this Decree Law defines the crime of terrorism, describes it without much precision, establishes numerous punishable behaviors, without according them any type of size or quality, and refers to the execution of acts against a diversity of protected legal interests. In addition, the description of the means by which the act is executed is also ambiguous, and the consequences are also very vague. "The possibility of being accused of the crime of terrorism, which entailed at least 20 years' imprisonment, created a real risk for the safety of any individual." Herein lies the importance of modifying the Peruvian anti-terrorist legislation.

The same criticisms can be made about Article 4 of Decree Law No. 25,475, which defines collaboration with terrorism and employs an even greater "looseness" in the terms used, than the definition in force until then. The imprisonment penalty is the same for perpetration of the crime and for collaboration. Acts of collaboration are considered to be "such a wide range of behavior,

that" even actions which have justified reasons allowed by law could be unduly considered acts of collaboration with terrorism.
Furthermore, Decree Law No. 25,475 does not guarantee due process of law, because the police are entrusted with investigating the crime and the participation of the Attorney General's office is limited. "The intervention of the defendant's defense lawyer" is also limited and "during the pre-trial investigation any type of liberty is prohibited, except unconditional discharge[,] and the police who participate in preparing the police deposition are not allowed to appear as witnesses."
"The anti-terrorist legislation is an integral part of the emergency criminal legislation and [...] was inspired by concepts of prevention or extreme security, which were even incompatible with the 1993 Constitution."
The Constitutional Court of Peru delivered a judgment on January 3, 2003, in which it referred to Decree Law No. 25,475 and declared that only some of its articles were unconstitutional. In the case of Article 2 of this Decree Law, which was not declared unconstitutional, it is not possible that such a badly drafted penal text, aimed at encompassing a maximum number of behaviors, can be considered a norm "that allows the citizen to know the content of the prohibition, so that he can differentiate between what is prohibited and what is permitted."
Conclusion No. 78 bis of the judgment "does not correct the defects of the definition examined, because, even though it refers to the concurrence of the three objective elements, or 'categories' of the classification [...], in addition to the intention, there is still the problem of whether we are faced with a plurality of acts or with a single behavior and its material result or its motive or purpose, complementing the dolus."
In some of the conclusions of its judgment, the Constitutional Court reinterprets the prohibition to "propose as witnesses [those persons who] prepared the police deposition" and does not declare this to be unconstitutional. In relation to the previous point, the appropriate decision would have been to eliminate "a provision that was defective from its inception" and "to promote its replacement by norms that state explicitly what is required by a democratic procedural and substantive criminal law."
The legislative decrees against terrorism, Nos. 921 to 927 of January and February 2003, promulgated to give effect to the Constitutional Court's judgment of January 3, 2003, have not overcome the basic objections to the anti-terrorist legislation. The new legislative decrees are limited to establishing "maximum penalties" and to empowering the National Terrorism Chamber to review certain judgments in which Article 2 of Decree Law No. 25,475 had been applied.
The current counterterrorism laws, composed of Law No. 25,475 and other complementary decrees, "are derivations of the [Peruvian] emergency criminal legislation." The solution to this problem is to replace the legislation in force by laws that take into account public security and order, but also respect for "human dignity, the fundamental rights, and the penal and procedural guarantees to which any individual faced with criminal charges or accusations has a right."

50. On June 8, 2004, the Inter-American Commission forwarded the sworn statements made before notary public (affidavits) of María Teresa De La Cruz Flores and Abdón Segundo Salazar Morán (supra para. 27), in accordance with the President's request in the order of May 19, 2004 (supra para. 23). [FN10] The Court will now summarize the relevant part of these statements:

[FN10] Cf. file of appendixes to the brief answering the application and affidavits, folios 807 to 827.

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a. Testimony of María Teresa De La Cruz Flores, alleged victim

She studied medicine and graduated in 1979. She married Danilo Blanco Cabeza, from whom she separated in 1988 and she has two children, Danilo and Ana Teresa. From 1984 and until her detention in 1996, she worked in the Cincha Polyclinic. Her husband, who worked with the newspaper, El Diario, when it circulated legally, was detained in 1988, charged with defense (apologia) of terrorism. A month later, he was liberated because there were insufficient grounds for a trial. These circumstances had consequences in both their lives, and they even separated that same year. She then had to cover the financial needs of her household alone.

In 1990, she was detained in her place of work, when she intervened to avoid a fight between two people who were struggling, and who she believed to be patients; she was accused of being an accomplice of one of the individuals who was allegedly putting up "pegatinas." [FN11] She was detained in the Castro Castro Prison for three months, until she was granted unconditional release "after she had proved [her] innocence in court." This episode affected her significantly; however, she resumed her work and attended several training courses and other professional activities.

In 1992, she learned that her husband had been detained once again. Two years later he was liberated, because it was considered that res judicata existed, in relation to the facts with which he was associated. Mr. Blanco subsequently requested political asylum abroad.

In March 1996, the witness was detained when she was leaving work, taken to the Police Headquarters and, from there, to the Requisition Office located on Avenida Canada. Her family learned of her detention through a colleague who was present during the events. After one night in the Requisition Office, she was taken to the court and the case files could not be found; she spent several hours there before the judge questioned her. Subsequently, she was taken to the Chorrillos High-Security Women's Prison (hereinafter "the Chorrillos Prison"), where she has been detained ever since.

In the Chorrillos Prison she was isolated and incommunicado and could not see either her lawyer or her mother for one month. Her children could visit her once every three months; during the first year, her children did not visit her because it would have been very difficult for them to see their mother in those conditions. Once a month, she was given 30 minutes to write to her family, which she had to do in the penumbra of her cell. She was able to verify that sometimes the letters did not reach their destination. Despite several requests, she was never able to receive a face-to-face visit; visits took place in the locutorio which was very uncomfortable, including the visits of her mother, who is quite elderly. In the prison, there was little food and it was not nutritious. During her first year of detention, she was only allowed out into the exercise yard for 30 minutes a day; she could not use paper, pencil or watch; she had no access to magazines, newspapers, radio or television and was only allowed to read the Bible and certain classics. She was not allowed to have medical books or medical journals in her field of specialization. When she arrived at the prison, she was suffering from diarrhea and fever and only received treatment two weeks after the first symptoms appeared. She could only ask "the police personnel for [what she needed], so that they could communicate this to the INPE [the National Penitentiary Institute] personnel; they only did this in cases of extreme need."

Her mother, who was 80 years of age, was left in charge of her children. Her family has experienced and continues to experience financial difficulties; the expenses, including those for her children's education, were met from her mother's retirement pension and sporadic help from some of her next of kin.

During the first year, she demanded to know more about her case file, through her lawyer; he encountered significant problems in accessing this file, so they had difficulty finding out the details of her detention. The alleged victim knew that the charges were related to allegedly providing medical care to terrorists or their next of kin, but neither she nor her lawyer knew the identity of those people.

In October 1996, she was called before the "faceless" Terrorism Chamber for her trial, but without having had the opportunity to prepare her defense, owing to the lack of information about the charges and the individuals who had presumably accused her. The judges that tried her were behind a mirror, and she only heard their distorted voices; even the questions they asked her were incomprehensible.

During the oral proceeding there were no witnesses who incriminated her, she was merely accused by the prosecutor and the Government attorney. Moreover, none of her patients or an "arrepentido" (repentant terrorism or treason convict) was present to state that she was guilty. Despite this, she was convicted. In the witness's opinion, greater importance was give to the affirmations in the police deposition than to the trial itself. Also, the tribunal took into account that both she and her husband had been detained previously. The purpose of the trial was "above all, to convict any physician who dared provide [help] to 'a terrorist' and this was done using [her]."

Her lawyer requested a pardon; but, this was not granted because a criminal prosecution was pending against her from 1990, which had not yet been heard in an oral proceeding; moreover, the case file had been lost. At that time, her sister, Alcira, had to interrupt her postgraduate studies in Brazil to take over the alleged victim's legal procedures, because her mother was unable to continue handling them. After her sister had tried unsuccessfully to find the 1990 case file, it was reconstructed, on the initiative of her defense lawyer, based on copies kept by her previous lawyer.

In 1998, she was tried for the case opened in 1990. She was accused of having ordered the young man, with whom she had been detained that year, to prepare the "pegatina." In this proceeding, she was sentenced to ten years, because she had a record. Approximately one year later, the Supreme Court declared this proceeding annulled. Her case was then submitted to the international level.

The alleged victim was refused a pardon for the second time and she felt that her situation was being used as an example against the practice of medicine, "because, even in the absence of evidence, [she] had been convicted" and her "innocence was prejudged owing to her family connection, since [her] husband [had also been] detained once because it was considered that he had connections with terrorism."

In 2000, there was a change of Government, but the anti-terrorist legislation was maintained. As she had served a third of her sentence, she requested the benefit of parole, which was denied because "norms [were] applied to her case that had entered into force in 2003, subsequent to [her] detention."

The laws that would be applied during any new trial "continue to consider that providing medical care and attention can be defined as a terrorist act." She stated that she condemned violence, whatever its origin "and although [she has] not treated anyone who has committed crimes of

terrorism, at least not knowingly, [she] consider[s] that nowhere in the world could the provision of medical care be considered a crime and be punished."
Since 2000, when some flexibility was introduced into the prison regime, she has, on several occasions, requested exchanging her punishment for work within the prison and, thereby, exercising her profession and "recovering [her] self-respect and [her] expertise." However, the prison's legal adviser told her that she could not be given "the same work for which she [had been] sentenced, as her prison regime."
Following the report on the merits of her case issued by the Inter-American Commission in June 2003, her conviction was annulled de oficio, and the State undertook to resolve her case as soon as possible. However, one year later, the status of the case remained the same, without being resolved. She considers that the State has wanted to "destroy [her] professionally, because, from the start of [her] detention, [she] was denied medical literature, [her] professional equipment, and the possibility of practicing medicine in the prison."
As a result of her imprisonment for eight years and four months, her health has deteriorated; she has osteopenia, her vision has decreased, she has been affected emotionally, and she has not kept up with advances in her profession. She has tried to do some medical research in the prison and to offer talks to the prison population, but her attempts have been rejected several times. She is very frustrated professionally.
Her children are distanced from her mother and herself, "owing to the financial situation which makes their education unsustainable," and her siblings, who are not working, have not been able to continue contributing to their education. Her mother is 88 years of age, deaf and blind, and needs a cataract operation and permanent specialized care, which she cannot receive owing to the financial situation.
The witness has always had the support of her colleagues at work, of the Medical Federation, of the Medical Association of the Peruvian Social Security Institute (hereinafter "the AMSSOP") and the Physicians' Professional Association of Peru, which have assumed her defense at the domestic and the international level.
She asked the Court to put an end to injustice, because her life has changed and been frustrated, and she has not been able to watch her children grow, which cannot be repaired. Her situation and her anguish have affected her whole family – her mother, her children and her siblings – who "suffer as if they had been imprisoned with [her] and, for many years, with the threat of being associated with [her] and losing their liberty." She hopes that the resolution of the case will allow "physicians to exercise their profession freely, as an act of humanity that should be exercised without fear of any kind of discrimination."

[FN11] "1.f. Adhesivo pequeño que lleva impresa propaganda política, comercial, etc." [Small sticker with political, commercial propaganda, etc.], Diccionario de la Real Academia Española.

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b. Testimony of Abdón Segundo Salazar Morán, physician

He was born in Piura, Peru; he is 59 years of age, and a cardiologist.
The Medical Association of the Peruvian Social Security Institute and the Human Rights Committee of the Physicians' Professional Association of Peru, as professional associations of medical professionals, defend physicians in their legal disputes and when their rights are

violated. The Physician's Professional Association always supports any members who is detained, tried and imprisoned for medical activities, and provides financial and institutional support for the defense of physicians who are unfairly imprisoned. Both institutions defended numerous physicians during the dictatorship of former President Alberto Fujimori, when many physicians were detained for having treated alleged terrorists.

In 1992, the witness and Physician Álvaro Vidal Rivadeneyra, who were Presidents of AMSSOP and the Defense Unit of the Social Security Institute, respectively, were attacked, and suffered several injuries. Subsequently, they were dismissed from their posts in public hospitals. As physicians and, in accordance with the Hippocratic Oath, they are obliged to protect the lives of all human beings without discrimination.

The Physician's Professional Association only assumed the defense of a member when the case referred to the criminalization of medical activities, because this directly affected all members and the fundamental principles of the medical profession.

The next of kin of Physician De La Cruz Flores advised AMSSOP and the Physicians' Professional Association about her detention when the witness was a member of the administrative staff of both institutions. The witness has been kept up to date about the detention, trials and conviction of the alleged victim, through her next of kin, specifically, her mother and her sister, Alcira.

When he was a member of the AMSSOP administrative personnel, this association supported the case of Physician María Teresa De La Cruz Flores by communiqués and petitions to different public and jurisdictional instances. Although the Physician's Professional Association does not provide direct legal advice to its members in cases before the domestic courts, it provided advice to the next of kin of Physician De La Cruz Flores for the defense of her case; this support was, above all, before the international instances.

In this regard, the Physicians' Professional Association commissioned Javier Ríos Castillo, the Association's legal adviser, to assume Physician De La Cruz Flores' defense; consequently, he took part in the hearing before the Inter-American Commission in Washington, together with her legal representative, Carolina Loayza Tamayo. Javier Ríos submitted arguments on the non-criminalization of medical activities. The adviser's expenses, air travel and per diems were assumed by the Physician's Professional Association, by unanimous decision of the Association's National Council.

The witness visited Physician De La Cruz Flores twice; once he was accompanied by Physician Vidal Rivadeneyra, at the time Dean of the Physicians' Professional Association, and by Congressman, Víctor Velarde Arrunátegui. The visits took place in a special separate room, but they could see "the precarious situation in which Physician De La Cruz found herself, without the minimum necessary conditions." Her situation and the treatment she received improved when the dictatorship of the Government of Alberto Fujimori ended. During these visits, they took her medical journals, and also some medical equipment and material, but he does not know whether this was handed over to Physician De La Cruz Flores or whether she was allowed to keep it.

The detention conditions for those imprisoned in terrorism cases were very difficult: isolation and the impossibility of seeing their loved ones, because only one member of the family was allowed to visit them each month, in the locutorio, which significantly limited communication. Physician De La Cruz Flores was unable to watch her children grow or exercise her profession, facts which caused her non-pecuniary harm. The witness was deeply moved during the visits, owing to the physical and mental state in which he found Physician De La Cruz Flores, who also suffered from respiratory, bronchial and allergic ailments contracted in the prison.

During Fujimori's time, a significant number of physicians were imprisoned for exercising medical activities, unfairly accused of the crime of terrorism, and their imprisonment was justified by legal strategies [...] and 'faceless' tribunals." The witness mentioned a similar case, that of Dr. César David Rodríguez, who was detained for seven years and who was released owing to the support of the medical profession, by being acquitted, but not pardoned. The State paid Dr. César David Rodríguez one year of medical training at a public teaching hospital, because he was a surgeon.
Physician De La Cruz Flores has endured personal, family and professional harm, owing to the State's actions. Peru should assume responsibility and vindicate the alleged victim's name publicly, granting her financial compensation, reincorporating her into her work, and paying her the salary she would have earned and her work-related entitlements. The State should also "guarantee and assume the cost of updating [Physician De La Cruz] in her field of expertise." The next of kin of the alleged victim should also receive reparation. Physician María Teresa De La Cruz' immediate release should be ordered, vindicating her and also medical activities publicly, and stating that the latter can never be criminalized.

51. On June 19, 2004, the State presented several documents as appendixs to its briefs with observations on the statements made before notary public (affidavits) by María Teresa De La Cruz Flores, Abdón Segundo Salazar Morán, Mario Pablo Rodríguez Hurtado and José Daniel Rodríguez Robinson (supra paras. 24 and 27). [FN12]

[FN12] Cf. file with the State's comments on the affidavits, appendixes 1 to 6 of the brief with comments on the testimonial statement made before notary public by María Teresa De la Cruz Flores, folios 841 to 898; file with the State's comments on the affidavits, appendix 1 of the brief with comments on the testimonial statement made before notary public by Abdón Segundo Salazar Morán, folios 904 to 905; file with the State's comments on the affidavits, appendixes 1 to 13 of the brief with comments on the expert report made before notary public by Mario Pablo Rodríguez Hurtado, folios 915 to 991; and file with the State's comments on the affidavits, appendixes 1 to 15 of the brief with comments on the expert report made before notary public by José Daniel Rodríguez Robinson, folios 1008 to 1092.
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52. During the public hearing, the witness proposed by the Inter-American Commission, Álvaro Eduardo Vidal Rivadeneyra, [FN13] the expert witness proposed by the alleged victim's representatives, Manuel Pérez González, [FN14] and the State [FN15] and the alleged victim's representatives [FN16] presented various documents (supra para. 29).

[FN13] Cf. file on merits, reparations, and costs, tome III, folios 816 to 944.
[FN14] Cf. file on merits, reparations, and costs, tome IV, folios 982 to 1012.
[FN15] Cf. file on merits, reparations, and costs, tome III, folios 948 to 950.
[FN16] Cf. file on merits, reparations, and costs, tome III, folios 953 to 970.
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53. On July 8, 2004, the State submitted documents relating to the change of the alleged victim's order of detention to one of conditional appearance (supra para. 30). [FN17]

[FN17] Cf. file on merits, reparations, and costs, tome III, folios 781 to 789.

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54. The State, [FN18] the Commission [FN19] and the alleged victim's representatives [FN20] forwarded various documents as appendixs to their final written arguments submitted on July 28, August 2 and 4, 2004, respectively (supra para. 31). The State also forwarded an appendix with its brief of September 17, 2004 (supra para. 35). [FN21]

[FN18] Cf. file of appendixes to the final written arguments, appendixes 1 to 14 to the final written arguments of the State, folios 1232 to 1300.
[FN19] Cf. file of appendixes to the final written arguments, appendixes 1 to 4 to the final written arguments of the Inter-American Commission on Human Rights, folios 1198 to 1231.
[FN20] Cf. file of appendixes to the final written arguments, appendixes 1 to 16 to the final written arguments of the alleged victim's representatives, folios 1095 to 1197.
[FN21] Cf. file on merits, reparations, and costs, tome V, folios 1240 to 1260.

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55. The alleged victim's representatives submitted several documents, based on Article 44 of the Rules of Procedure (supra para. 34), [FN22] some of them originating "after the presentation of the [final] written arguments" (supra para. 36). [FN23]

[FN22] Cf. file on merits, reparations, and costs, tome V, folios 1280 to 1287.
[FN23] Cf. file on merits, reparations, and costs, tome V, folios 1263 to 1271.

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56. On September 21, 2004, the State forwarded the case files of the domestic proceeding against María Teresa De La Cruz Flores, which had been requested as helpful evidence (supra paras. 33 and 37). [FN24]

[FN24] Cf. files of helpful evidence presented by the State, tomes I to XVII, folios 1 to 10787.

B) TESTIMONIAL AND EXPERT EVIDENCE

57. On July 2, 2004, the Court received the statements of the witness proposed by the Inter-American Commission and the opinion of the expert witnesses proposed by the Inter-American Commission and the alleged victim's representatives. The Court will now summarize the relevant part of these statements:

a. Testimony of Álvaro Eduardo Vidal Rivadeneyra, surgeon

He met María Teresa De La Cruz Flores in 1999. She had been detained when an individual was being mistreated because he had been caught distributing subversive leaflets within the Polyclinic where Physician De La Cruz Flores worked. In accordance with the Peruvian Constitution, the medical associations presume the innocence of their colleagues and, in this case, assumed the defense of the member, De La Cruz Flores.
He knew about another lawsuit against the alleged victim in 1996, when he had been advised that she had been detained for treating individuals who were allegedly involved in terrorism. Several associations assumed the defense of Mrs. De La Cruz Flores, and also other professionals, acting on the principle that, since it is designed to safe someone's life, medical activities are activities that deserve the protection of the Code of Ethics and Deontology of the Physician's Professional Association of Peru, according to which, a physician has the moral obligation to safe the lives of human beings. Medical activities cannot be penalized and reprisals cannot be taken against them. The World Medical Association has an oath and also an International Code of Medical Ethics, which affirms that medical activities are cannot be prosecuted or be the object of reprisals because they are designed to safe the lives of human beings.
The Medical Association of the Social Security Institute and the Physician's Professional Association of Peru appointed a lawyer to defend Mrs. De La Cruz Flores. The lawyer, Javier Ríos Castillo, and the Physician's Professional Association of Peru were co-petitioners before the Inter-American Commission on Human Rights.
The Physician's Professional Association of Peru, the Peruvian Medical Federation and the Medical Association of the Peruvian Social Security Institute defended numerous physicians who were detained for "treating alleged terrorists." Most of these physicians were freed after they had been detained for several months or years; some were absolved, but others are still detained. The report presented by the Peruvian Medical Federation to the Peruvian Mission to the American Association for the Advancement of Science in November 1993, published in 1994, includes the complete list of all the physicians detained, case by case, with a summary of the status of each one. This Association addressed then President Fujimori calling for the release of the physicians listed in the report, because the national authorities were taking reprisals against medical acts.
The Medical Association of the Peruvian Social Security Institute issued pubic communiqués requesting the release of Mrs. De La Cruz Flores, because she had been detained unfairly for the alleged crime of terrorism, and had proved her innocence in all instances. The case was accepted by the Inter-American Commission on Human Rights.
In 1997, the Dean of the Physician's Professional Association of Peru requested the Head of the National Police to allow the witness, who was then President of the Human Rights Commission, to enter the prison to visit the physicians detained there, including the alleged victim. The same year, the Physician's Professional Association of Peru requested the President of the Supreme Court of Justice to ensure that justice was done in the case of María Teresa de La Cruz Flores. The Medical Association of the Peruvian Social Security Institute requested the authorities of the Supreme Court to free the alleged victim.
The witness visited the alleged victim in 1990, when she was detained in the Magdalena del Mar Detention Center and, subsequently, in the Santa Mónica Detention Center, where the alleged victim was losing weight, growing pale and aging, with symptoms of depression, owing to her detention. Mrs. De La Cruz Flores stated that she had not been tortured or mistreated, but that the

detention conditions were very difficult. As there were many cases of disappearances, torture and violations at that time, the heads of the physicians' professional associations acted rapidly to defend their colleagues who were detained. The physicians' professional associations took measures in favor of those detained, because they knew about their egregious situation, and the infectious and contagious diseases that abounded in prisons.

Through the alleged victim's next of kin, he knew that she had asked the prison authorities to allow her to exercise her profession as a physician for the benefit of the prison population. According to the Constitution, prisoners must be given the opportunity to rehabilitate themselves; in this case, to exercise the medical profession.

While the alleged victim was detained, she was not allowed to exercise her profession. At the request of the alleged victim and her next of kin, the professional association sent her scientific journals and books on medicine; and, prior to 2000, it was difficult to ensure they reached her. With the advent of democracy, they could send her journals, and she was very happy to be able to read them and update herself. Physicians in Peru, and throughout Latin America, believe that, when a surgeon does not have contact with technological advances for five years, he can lose up to 50% of his knowledge, and even more if he is unable to practice.

The alleged victim and the other physicians should be compensated for their suffering, as well as that of their next of kin, but also for having lost the possibility of exercising and developing their personal, professional and academic skills. All these aspects should be taken into account so that Mrs. De La Cruz Flores can return to her work.

The medical associations have training programs, in coordination with the faculties, so that these professionals can reincorporate the labor market. It is essential to allow them to reincorporate the work they had to give up involuntarily, and to upgrade themselves academically, so they can treat their patients. It has not been possible to ensure immediate reincorporation; physicians have to undergo a stage of updating and training.

In 1990, when the witness was President of the Medical Association of the Peruvian Social Security Institute, various decrees were issued that adversely affected social security and an action of unconstitutionality was filed against them. On the night of April 3, 1992, the witness and others were attacked, allegedly by soldiers, and all were injured.

Mrs. De La Cruz Flores is being prosecuted for treating a patient who had injuries to one of his upper members, acting as assistant surgeon. Mrs. De La Cruz Flores has not acknowledged that she took part in that medical activity. At that time, the country was traversing a situation when all human rights were being violated; the so-called "arrepentidos" [repentant terrorism and treason convicts] accused some individuals in order to win their own freedom. More than a dozen physicians who have been released were also pinpointed by this type of accusation. Some had been coerced, under threat that they or their next of kin would suffer physical harm.

b. Expert report of Carlos Martín Rivera Paz, lawyer

He is a lawyer and coordinator of the legal area of the Legal Defense Institute, a human rights organization that has worked in Peru for more than 21 years. He also belongs to the legal working group of the Human Rights Coordinator. He has been a trial lawyer in many terrorism cases in the military jurisdiction and before the Judiciary. He has specialized in examining anti-terrorist legislation and has collaborated in drafting proposals to modify these laws. He has published various essays on Peruvian anti-terrorist legislation.

From the early 1980s, Peru had an anti-terrorist legislative framework, incorporated into the Penal Code in force since 1924. In April 1991, the crime of terrorism and other categories criminalizing different types of terrorism were incorporated. After the 1992 coup d'état, the legislation was modified abruptly, with the creation of a new anti-terrorist legislative framework; its fundamental qualities and characteristics constituted an emergency criminal legislation.

In 1992, a series of anti-terrorist laws were adopted: Decree Law No. 25,475, Peru's new anti-terrorist law; Decree Law No. 25,499, the new repentance law for terrorists; Decree Law No. 25,659, which defined the crime of treason in terrorism cases; Decree Law 25,768, which established the procedure for cases of treason, and Decree Law 25,744 which expanded the police's authority to investigate terrorism cases. These decrees formed the anti-terrorist legal framework, and Decree Law No. 25,475 was the core of the new system.

It was a new system because it regulated the preliminary investigation of a terrorist act, established a new definition of the crime and of various acts of a terrorist nature, stipulated a new criminal procedure for terrorism cases and regulated penitentiary matters.

Subsequently, modifications were introduced, the most important ones were: in 1993 and 1994, the possibility of unconditional release during the first stage of the judicial proceeding was introduced (previously it had been virtually prohibited); the admissibility of actions for protection, such as habeas corpus, which had also been prohibited previously in terrorism cases, was established; the presentation to the public of those detained for terrorism, which had been a practice of the National Counterterrorism Directorate (hereinafter "DINCOTE"), was prohibited; a progressive modification of the penitentiary regime was introduced for those imprisoned for terrorism and treason. Also, at the end of 1997, the "faceless" tribunals were eliminated and an ordinary system for trying such crimes was established with the creation of the Corporative Superior Chamber for Terrorism Cases, subsequently the National Terrorism Chamber.

The most important characteristics were the "ambiguous and vague" definition of the crime of terrorism; the new regime of penalties; the increase in the powers of the police without any oversight by the courts or prosecutors; the modifications to the procedures, such as a reduction in the powers of the Attorney General's office (Ministerio Público); the obligation of the judge of the criminal court to file a complaint and open a preliminary investigation in all terrorism cases; the imposing of summary proceedings; and a judicial system with "faceless" judges.

DINCOTE was a specialized unit of the Peruvian National Police (hereinafter "the PNP") mandated to investigate acts of a terrorist nature and individuals linked to such acts. The police not only investigated; they directed the investigation, subordinated the prosecutor de facto, and extended the duration of the investigations; they also issued conclusions on the investigation and determined the criminal category of the act that had allegedly been committed. These powers were not supervised or controlled adequately by the Attorney General's office or by the Judiciary, particularly at the time of the "faceless" judges. The Attorney General's office became an institution in charge of formalizing the investigation procedures, an inversion of its constitutional mandate.

The physicians prosecuted under the anti-terrorist legislation have been convicted for what is considered a medical activity. There is a problem with the definition when medical activities are considered an alleged act of collaboration.

On January 3, 2003, the Constitutional Court delivered a judgment establishing, with regard to the basic category of terrorism contained in Article 2 of Decree Law No. 25,475, that a new interpretation should be given to the crime of terrorism, incorporating the intentionality of the

perpetrator when committing the crime of terrorism; but it did not declare this article unconstitutional.

The judgment of the Constitutional Court gave rise to a series of legislative decrees formulated over the following months. These included, Legislative Decree No. 926, which regulated the annulment of terrorism proceedings in the civil courts in the Judiciary, by establishing the annulment of the judgment in the oral trial and the possibility of declaring that the Superior Criminal Prosecutor's charge was unsubstantiated. The same decree allowed the prosecutor's charge to be contested, and virtually annulled. It also established that the trial should be held in the ordinary jurisdiction, substituting the procedural rules of Decree Law No. 25,475 by those of the Peruvian ordinary criminal proceedings.

The legislative decrees of February 2003 established a period of 60 days for the National Terrorism Chamber to declare the annulment of both the oral trials in treason cases and the cases tried under Decree Law No. 25,475. Once the judgment in the trial had been annulled, and the failure to substantiate the Superior Criminal Prosecutor's charge had been declared, the files would be forwarded immediately to the Superior Criminal Prosecutor so that he could re-formulate the charge. The new trial would begin when the annulment had been declared.

Trials are now public in Peru, it is possible to question the witnesses, whether they are individuals who have witnessed terrorist acts or police agents who have taken part in preparing the police depositions. It is also possible to question the "arrepentidos", and to know their identities.

As for an evaluation of the actions of the National Terrorism Chamber, and the number of people absolved, who had previously been convicted of terrorism or treason, it can be observed that the way the Chamber assesses the evidence is different from the way it was assessed in the judgments handed down by the "faceless" judges or the military judges.

Many people have appealed their prison sentences in new trials; however, the National Terrorism Chamber has annulled very few of them.

Pursuant to Legislative Decree No. 926, recent trials are based on the police depositions. Previously, it was not possible to contest the content of the police deposition and the alleged evidence that the police had gathered or established during the preliminary investigation. In the new trials, this can be contested during the pre-trial investigation and the oral proceeding.

According to Legislative Decree No. 926, trials must be public; otherwise, the proceeding is null.

The legal grounds for the imprisonment of those prosecuted after the annulments under Legislative Decree No. 926, is an extremely controversial issue. The Constitutional Court issued a ruling to the effect that the prison sentences should be established in light, not of the terrorism legislation, but of the criminal procedural legislation, specifically Article 135 of the Code of Criminal Procedure, on the measures and the circumstances in which a judge can hand down a prison sentence, combined with Legislative Decree No. 926, which determines that the annulment of the proceedings, the sentences, the trials and the charges does not produce the release of the defendants. The maximum period of detention, according to the Code of Criminal Procedure is 36 months, calculated from the start of the new trial. Consequently, the time spent in prison under the previous proceeding is disregarded.

c. Expert report of Manuel Pérez González, lawyer

The expert witness is Head of the Department of International Public Law at the Universidad Complutense de Madrid.

Both international human rights law and international humanitarian law are designed to protect human dignity. Although the application of international humanitarian law is restricted to situations of armed conflict, human rights continue to be applicable in other situations. In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice stated that the protection established in the International Covenant of Civil and Political Rights did not cease in time of war, except when its Article 4 was applied to the suspension of certain rights in situations of national emergency.

There is still an irrefutable nucleus of rights, which cannot be suspended, even in exceptional circumstances, which constitute the minimum protection guarantees by Article 3 common to the Geneva Conventions of August 12, 1949 (hereinafter "the Geneva Conventions") and the Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter "Protocol II"). Article 72 of the Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (hereinafter "Protocol I") and the preamble to Protocol II recall that the international human rights instruments offer the human being fundamental protection. Hence, both branches of international law should be coordinated to come to the aid of all those who suffer the consequences of a situation of armed conflict.

The criminal prosecution of lawful professional activities, on the pretext of combating terrorism violates Article 9 of the American Convention, by penalizing a lawful act: a medical activity.

The application of Article 3 common to the Geneva Conventions and Protocol II does not prevent the prosecution and, if applicable, sentencing of acts proved in a trial with sufficient guarantees that may have endangered the constitutional order. Moreover, international humanitarian law condemns terrorist activities absolutely, in situations of both international and internal conflict. Nevertheless, a State's actions against terrorism do not exempt it from the obligation to respect the individual rights and freedoms protected by international humanitarian law and international human rights law.

For some years, Peru experienced a period of armed conflict, a situation that was confirmed by the Peruvian Truth and Reconciliation Commission (hereinafter "The Truth Commission"), created to clarify the nature and process of the acts of this armed conflict. The Truth Commission took the position that international human rights law and international humanitarian law apply. In the context of the existence of an internal armed conflict, the application of the latter gave rise to concerns that it would grant the condition of combatant to the subversive groups, which would weaken the sovereign position of the State.

The Truth Commission took the position that the application of international humanitarian law did not affect the legal status of the subversive groups or the armed groups, and it considered that Article 3 common to the 1949 Geneva Conventions and also Protocol II should apply.

The medical protection granted by international humanitarian law is linked to the principles of medical ethics and, as such, is raised to the level of a binding norm of international law, which means that no one may be punished for exercising medical activities in accordance with medical ethics. Article 10, paragraph 1, of Protocol II determines that, under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.

The possibility of incriminating medical activities must be eliminated, because, when carrying out health-related activities, the physician is performing a humanitarian mission in the context of an armed conflict. According to the rules of the World Medical Association, no discrimination may be made between patients, except those required by medical priority. Members of the

medical and para-medical profession must receive the necessary protection to exercise their professional activities freely. Finally, under no circumstance, can the exercise of an activity of a medical nature be considered a crime. Nor can the physician be harassed or penalized for having respected the confidentiality of his relationship with his patient.

The protection of medical activities is a norm of international humanitarian law, and of general international law, because it is a customary norm contained in Article 16 of Protocol I for situations of international armed conflict and in Article 10 of Protocol II for internal armed conflicts. Consequently, it can be said that it is an international norm of a dual treaty-based nature, since it is reflected in human rights treaties and in customary law, because it corresponds to a general practice and to the opinio iuris of the States.

Domestic norms that are contrary to the principles of medical ethics cannot be imposed on medical personnel under any circumstance. The Geneva Conventions do not provide an exact definition of the content of medical ethics. The 1977 Protocols I and II made significant progress, in the sense of not obliging health personnel to carry out tasks that are incompatible with their humanitarian mission, or tasks contrary to medical ethics or other medical norms designed to protect the wounded and the sick.

Medical activities are inherently neutral and, if they does not include any act of armed violence, are humanitarian activities. The problem in this case is the scope of the criminal category of terrorism in the Peruvian anti-terrorist legislation, which has made it possible to criminalize medical activities.

Regarding the physician's right to confidentiality, paragraphs 3 and 4 of Article 10 of Protocol II prohibit the penalization of the physician who does not betray this confidentiality. In a situation of armed violence, an international body for the protection of human rights may take into account norms of international humanitarian law.

The norms of international humanitarian law may strengthen or be used in the interpretation of the norms of the American Convention. Article 3 common to the Geneva Conventions prohibits "the passing of sentences and the carrying out of executions" without previous trial. Article 6 of Protocol II sets out a series of guarantees that must be ensured to persons in an internal armed conflict.

C) ASSESSMENT OF THE EVIDENCE

Assessment of the Documentary Evidence

58. In this case, as in others, [FN25] the Court accepts the probative value of the documents presented by the parties at the proper procedural opportunity or as helpful evidence, that were not contested or opposed, and whose authenticity was not questioned. The Court also accepts, in accordance with Article 44 of the Rules of Procedure, the evidence submitted by the parties in relation to events that occurred after the presentation of the application.

[FN25] Cf. Case of Tibi, supra note 1, para. 77; Case of the "Juvenile Reeducation Institute", supra note 1, para. 80; and Case of Ricardo Canese, supra note 1, para. 61.

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59. Regarding the statements made before notary public by the two expert witnesses proposed by the alleged victim's representatives and by the two witnesses proposed by the Inter-American Commission (supra paras. 24, 27, 49 and 50), pursuant to the provisions of Article 47(3) of the Rules of Procedure and the decision of the President in the order of May 19, 2004 (supra para. 23), the Court admits them insofar as they correspond to the purpose defined by the Court and assesses them with the body of evidence, using the rules of sound criticism.

60. With regard to the statement made by María Teresa De La Cruz Flores (supra para. 50(a)), the Court considers that, as she is the alleged victim who has a direct interest in the case, her statement must be assessed together with all the evidence in the proceedings and not in isolation. In matters concerning merits and reparations, the statement of the alleged victim is useful insofar as it can provide more information on the consequences of the violations. [FN26]

[FN26] Cf. Case of Tibi, supra note 1, para. 86; Case of Ricardo Canese, supra note 1, para. 66; and Case of Herrera Ulloa. Judgment of July 2, 2004. Series C No. 107, para. 72.

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61. In accordance with Article 44(3) of its Rules of Procedure, the Court admits opinion No. 167-2003-2FSEDT-MP/FN formulated on September 2, 2003, by the Superior Prosecutor of the office of the Second Special Superior Prosecutor for terrorism in the proceeding against María Teresa De La Cruz Flores and others for the crime of terrorism; the Final Report of the Truth and Reconciliation Commission submitted on a compact disc entitled: "¡Nunca más!" [Never again] prepared by the Asociación Pro Derechos Humanos (APRODEH); the decision issued on November 6, 2003, by the National Terrorism Chamber in file No. 113-95 "S"; report No. 09 formulated on July 1, 2003 by the Titular Provincial Prosecutor of the office of the Third Provincial Prosecutor specializing in Crimes of Terrorism in file No. 502-03; the decision issued on October 16, 2003, by the National Terrorism Chamber in file No. 113-95; and the decision issued on November 5, 2003, by the National Terrorism Chamber in file No. 113-95, submitted by the alleged victim's representatives on December 19, 2003 (supra paras. 19 and 48), because this evidence relates to supervening events, and was not contested or opposed, and its authenticity was not questioned.

62. In accordance with Article 44(3) of its Rules of Procedure, the Court admits the decision changing the detention order for conditional appearance in file No. 531-03-4JPT issued on July 8, 2004, by the Fourth Criminal Court Specializing in Crimes of Terrorism, and the brief requesting the change of the detention order for one of (appearance) filed before the Fourth Criminal Court Specializing in Crimes of Terrorism in file No. 531-03 on July 6, 2004, by the alleged victim's defense lawyer, forwarded by the State on July 8, 2004 (supra para. 30 and 53), because this evidence relates to supervening events, and was not contested or opposed, and its authenticity was not questioned.

63. The Court considers that the documents presented by the witness proposed by the Inter-American Commission, Álvaro Eduardo Vidal Rivadeneyra; by the expert witness proposed by the alleged victim's representatives, Manuel Pérez González; by the State, and by the alleged victim's representatives on July 2, 2004, during the public hearing on merits and possible

reparations and costs (supra paras. 28, 29 and 52), and those presented by the Inter-American Commission, the alleged victim's representatives and the State in their final written arguments (supra paras. 31 and 54), which were not contested or opposed, and whose authenticity was not questioned, are useful for deciding the instant case, so the Court adds them to the body of evidence.

64. The Inter-American Commission referred to appendix 14 to the brief with final written arguments presented by the State, which consists of a report prepared by Héctor Faúndez Ledesma (supra para. 32). The Commission considered that this document "is an expert report on aspects of law that was not submitted opportunely by the State," and stated that "even though this document has not been presented in this case as an expert report, the Commission considers it pertinent to put on record that it contested the document." The State indicated that "it did not intend the report to be considered an expert report, but merely the report of an adviser [and, ...] in the instant case, it had not even presented what Professor Faúndez had said as a report, but had only cited an extract of what he had stated on another occasion"; consequently, it considered "the observation made by the Commission made no sense and lacked justification"; hence, it requested that the objection be rejected (supra para. 38).

65. The report in question, presented as an appendix of the State's final arguments (supra para. 31), was contested by the Commission, because it had not been produced at the corresponding procedural opportunity (supra para. 32). This Court admits it and assesses it in the body of evidence, using the rules of sound criticism, and also bearing mind the said objection.

66. In accordance with Article 44(3) of its Rules of Procedure, the Court admits the decision on the objection to the nature of the trial, file No. 531-03, issued by the Fourth Criminal Court Specializing in Crimes of Terrorism on August 10, 2004, and the appeal against the decision on the objection to the nature of the trial, filed by the alleged victim's defense lawyer on September 1, 2004, documents forward to this Court by the alleged victim's representatives on September 9, 2004 (supra paras. 34 and 35), because this evidence relates to supervening events, and was not contested or opposed, and its authenticity was not questioned.

67. In accordance with Article 44(3) of its Rules of Procedure, the Court admits official communication No. 531-03-4ºJPT-CSG addressed by the Fourth Criminal Trial Judge Specializing in Crimes of Terrorism to the Executive Secretary of the National Human Rights Council of the Ministry of Justice on September 6, 2004, which the State presented to this Court on September 17, 2004 (supra paras. 35 and 54), because this evidence relates to supervening events, and was not contested or opposed, and its authenticity was not questioned.

68. In accordance with Article 44(3) of its Rules of Procedure, the Court admits the decision on the motion for extinguishment of the criminal proceeding, file No. 531-03, issued by the Fourth Criminal Court Specializing in Crimes of Terrorism on August 16, 2004; the appeal against the decision on the motion for extinguishment of the criminal proceeding, filed by the alleged victim's defense lawyer on September 15, 2004; and the decision on the motion for extinguishment of the criminal proceeding, file No. 531-03, issued by the Fourth Criminal Court Specializing in Crimes of Terrorism on September 16, 2004; documents forwarded to this Court by the alleged victim's representatives on September 20, 2004 (supra paras. 36 and 55), because

this evidence relates to supervening events, and was not contested or opposed, and its authenticity was not questioned.

69. The Court incorporates into the body of evidence, the file of the trial in the military jurisdiction against María Teresa De La Cruz Flores, forwarded by the State as helpful evidence (supra paras. 37 and 56), under the provisions of Article 45(2) of its Rules of Procedure.

70. In the case of the newspaper articles, this Court has considered that, even though they do not correspond to documentary evidence stricto sensu, they can be assessed to the extent that they refer to well-known public facts, or statements by State officials, or corroborate elements established in other documents or testimonies received during the proceeding. [FN27]

[FN27] Cf. Case of the "Juvenile Reeducation Institute", supra note 1, para. 81; Case of Ricardo Canese, supra note 1, para. 65; and Case of the Gómez Paquiyauri brothers. Judgment of July 8, 2004. Series C No. 110, para. 51.

Assessment of the Testimonial and Expert Evidence

71. The Court admits and accords probative value to the testimonial statement made by Álvaro Eduardo Vidal Rivadeneyra and the expert reports submitted by Carlos Martín Rivera Paz and Manuel Pérez González during the public hearing held at the seat of the Court on July 2, 2004 (supra para. 28), insofar as they correspond to the purpose established in the order of the President of May 19, 2004 (supra para. 23) and assesses their content in the context of the body of evidence, according to the rules of sound criticism.

72. In light of the above, the Court will assess the probative value of the documents, statements and expert reports presented in writing or made before it. The evidence presented during all the stage of the proceeding has been incorporated into a single body of evidence, which is considered as a whole. [FN28]

[FN28] Cf. Case of Tibi, supra note 1, para. 89; Case of the "Juvenile Reeducation Institute", supra note 1, para. 100; and Case of Ricardo Canese, supra note 1, para. 68.

VI. PROVEN FACTS

73. Based on the facts described in the application, the documentary evidence, the statements of the witnesses, the reports of the expert witnesses, and the arguments of the Commission, the alleged victim's representatives, and the State, the Court considers that the following facts are proven:

Background and juridical context

73(1) From 1980 to 1994, Peru experienced serious social upheaval as a result of terrorist acts. [FN29]

[FN29] Cf. Case of the Gómez Paquiyauri brothers, supra note 27, para. 67(a); Case of Cantoral Benavides. Judgment of August 18, 2000. Series C No. 69, para. 63(t); Case of Castillo Petruzzi et al.. Judgment of May 30, 1999. Series C No. 52, para. 86(1); Case of Castillo Páez. Judgment of November 3, 1997. Series C No. 34, para. 42; Case of Loayza Tamayo. Judgment of September 17, 1997. Series C No. 33, para. 46(l); Inter-American Commission on Human Rights, Report No. 101/01, Cases Nos. 10,247 et al., paras. 160 to 171; Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Peru, 1993, Document OEA/Ser.L/V/II.83. Doc. 31, March 12, 1993, para. 16; and final report of the Truth and Reconciliation Commission, general conclusions (file on merits, reparations, and costs, tome II, appendix 2 to the brief presented by the alleged victim's representatives on December 19, 2003).

73(2) Within the framework of the anti-terrorist legislation enacted in Peru, on May 5, 1992, Decree Law No. 25,475 entitled "Establishing the penalties for crimes of terrorism and the procedures for their investigation, pre-trial proceedings, and trial," was promulgated. It defined crimes such as terrorism and collaboration with terrorism, and established procedural rules for investigating and trying these crimes. [FN30]

[FN30] Cf. Decree Law No. 25,475 (file with the State's comments on the affidavits, appendix 10 of the brief with comments on the expert report made before notary public by Mario Pablo Rodríguez Hurtado, folios 975 to 980).

73(3) DINCOTE was the organ responsible for preventing, denouncing and combating terrorist activities; it prepared a document called a "police deposition," which provided the grounds for trying crimes of terrorism. [FN31]

[FN31] Cf. Decree Law No. 25,475 (file with the State's comments on the affidavits, appendix 10 of the brief with comments on the expert report made before notary public by Mario Pablo Rodríguez Hurtado, folios 975 to 980).

73(4) In accordance with Decree Law No. 25,475 promulgated on May 5, 1992, trials for crimes of terrorism were characterized, inter alia, by: the possibility of ordering the absolute incommunicado of those detained for the maximum time defined by law; the restriction of the defense lawyers' participation until after the person detained had made a statement; the inadmissibility of parole for the defendant during the pre-trial proceedings; the prohibition to offer as a witness anyone who had intervened, because of his functions, in the preparation of the police deposition; the obligation of the Superior Prosecutor to formulate a charge "under his own

responsibility"; the holding of the trial in private hearings; the inadmissibility of raising objections to any of the judges and judicial agents intervening in the trial; the participation of unidentified judges and prosecutors; and continuous solitary confinement during the first year of the resulting prison sentence. [FN32]

[FN32] Cf. Articles 12(d), 12(f), 13(a), 13(c), 13(d), 13(f), 13(h), 15 and 20 of Decree Law No. 25,475 (file with the State's comments on the affidavits, appendix 10 of the brief with comments on the expert report made before notary public by Mario Pablo Rodríguez Hurtado, folios 975 to 980).

73(5) Decree Law No. 25,475 was modified by subsequent provisions, particularly by Law No. 26,671, promulgated on October 12, 1996, and entitled "Establishing a date as of which trials for the crimes of terrorism established in Decree Law 25,475 would be held by the appropriate judges under the norms in force"; by the judgment handed down by the Constitutional Court on January 3, 2003; and by Legislative Decrees Nos. 921, 922, 923, 924, ,925, 926 and 927 promulgated in February 2003 (infra paras. 73(35), 73(36), 73(37) and 73(38)). [FN33]

[FN33] Cf. Law No. 26,671 (file with the State's comments on the affidavits, appendix 13 of the brief with comments on the expert report made before notary public by Mario Pablo Rodríguez Hurtado, folio 991); judgment delivered by the Constitutional Court of Peru on January 3, 2003, to decide a popular action on constitutionality filed by Marcelino Tineo Silva and more than 5,000 citizens, file No. 010-2002-AI/TC Lima (file of appendixes to the application, appendix 30, folios 303 to 334); and Legislative Decrees Nos. 921, 922, 923, 924, 925, 926 and 927 (file of appendixes to the application, appendix 31, folios 336 to 346).

Regarding María Teresa De La Cruz Flores

73(6) María Teresa De La Cruz Flores is a physician, and from 1984 until her detention in March 1996, she worked as a pediatrician attached to the Peruvian Social Security Institute in the "Chincha" Polyclinic in Lima. As a result of this detention, Mrs. De La Cruz Flores was imprisoned for eight years, three months and twelve days, from March 27, 1996, until July 9, 2004. [FN34]

[FN34] Cf. sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818); letter No. 065-CMCCH-97 addressed by the President of the Medical Corps of the IPSS "Chincha" Clinic, Lino Ramírez S., to the President of AMSSOP, Guillermo Terry V., on January 31, 1997 (file of appendixes to the application, appendix 3, folio 30); letter No. 075-CMCCH-97 addressed by the President of the Medical Corps of the IPSS "Chincha" Clinic, Lino Ramírez S., to the President of the Peruvian Medical Federation, Isaías Peñaloza, on July 4, 1997 (file of appendixes to the application, appendix 3, folio 33); sworn statement by María Paz

Torre made on August 8, 2003 (file of appendixes to the brief with requests and arguments, appendix 2, folio 375); sworn statement by Herbert Ramírez Alemán made on August 1, 2003 (file of appendixes to the brief with requests and arguments, appendix 2, folio 376); certification of notification of detention of March 27, 1996 (file of appendixes to the application, appendix 13, folio 120); and certification of release from prison issued on July 9, 2004, by the PNP Colonel, Director of the Chorrillos maximum security Women's Prison (file of appendixes to the final written arguments, appendix 2 to the final written arguments of the alleged victim's representatives, folio 1114).

73(7) Mrs. De La Cruz Flores was married to Danilo Blanco Cabeza, from whom she is separated de facto. [FN35]

[FN35] Cf. sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818).

First detention of María Teresa De La Cruz Flores

73(8) On March 27, 1990, María Teresa De La Cruz Flores was detained and prosecuted for the crime of terrorism, in the category of unlawful association (hereinafter "the first detention"). Rolando Estrada Yarleque was detained at the same time. [FN36] The facts set out in the complaint and in the court order to investigate the crime were as follows: "that on March 27, 1990, the defendants, Rolando Estrada Yarlequé and María Teresa De la Cruz Flores were detained inside the 'Chincha' Polyclinic by [private] security personnel, because [a] guard [...] observed the defendant Estrada Yarlequé attaching "pegatinas" inciting the population to an armed strike on March 28, 1990, convened by the subversive group, Sendero Luminoso, to the walls of one of the washrooms on the third floor when he was following him. He informed the Supervisor of the facility […], who detained them moments later when the defendants were talking. The defendant, De la Cruz Flores de Blanco, tried to cover up for her co-defendant by seizing the package he had between his legs, while stating that Estrada Yarlequé was her patient and the package was hers." [FN37]

[FN36] Cf. judgment delivered on February 21, 1991, by the Twelfth Correctional Court of the Superior Court of Justice of Lima in file No. 257-90 (file of appendixes to the application, appendix 26, folios 276 to 278); judgment delivered on June 15, 2000, by the Criminal Chamber of the Supreme Court of Justice in file No. 1432-99 (file of appendixes to the application, appendix 28, folios 290 to 291); sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 8118); and testimony of Álvaro Eduardo Vidal Rivadeneyra before the Inter-American Court on July 2, 2004.

[FN37] Cf. judgment delivered on February 21, 1991, by the Twelfth Correctional Court of the Superior Court of Justice of Lima in file No. 257-90 (file of appendixes to the application, appendix 26, folios 276 to 278).

73(9) Following her detention, Mrs. De La Cruz Flores was kept in the Castro Castro Prison for four months, after which she was granted unconditional liberty on July 26, 1990, under Article 201 [FN38] of the Code of Criminal Procedure. [FN39]

[FN38] Article 201 of the Peruvian Code of Criminal Procedures establishes: "If, at any stage of the pre-trial investigation, it is fully proved that the defendant is not guilty, the Judge, de oficio or at the request of the accused must order his unconditional liberty and the order deciding this shall be executed immediately […]".
[FN39] Cf. sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818); and official communication No. 15-90-VRM-T of July 26, 1990 (file of appendixes to the application, appendix 26, folio 275).

73(10) The facts that led to the first detention of María Teresa De La Cruz Flores were heard, on different occasions, by the Twelfth Correctional Court of the Superior Court of Justice of Lima, under file No. 257-90; by the National Corporative Superior Criminal Chamber for Terrorism Cases of the Lima Superior Court of Justice, under file No. 723-93; and by the Criminal Chamber of the Supreme Court of Justice, under file No. 1432-99. [FN40]

[FN40] Cf. judgment delivered on February 21, 1991, by the Twelfth Correctional Court of the Superior Court of Justice of Lima in file No. 257-90 (file of appendixes to the application, appendix 26, folios 276 to 278); judgment delivered on May 18, 1992, by the National Corporative Superior Criminal Chamber for Terrorism Cases of the Lima Superior Court of Justice in file 510-91-B (file of appendixes to the application, appendix 26, folios 279 and 280); judgment delivered on March 4, 1999, by the National Corporative Criminal Chamber for Terrorism Cases of the Lima Superior Court of Justice in file No. 723-93 (file of appendixes to the application, appendix 27, folios 282 to 288); and judgment delivered on June 15, 2000, by the Criminal Chamber of the Supreme Court of Justice in file 1432-99 (file of appendixes to the application brief, appendix 28, folios 290 to 291).

73(11) Rolando Estrada Yarleque was sentenced to two years' imprisonment for the crime of terrorism, in a judgment of the Twelfth Correctional Court of the Superior Court of Justice of Lima, delivered on February 21, 1991. This sentence was modified on May 18, 1992, by the National Corporative Superior Criminal Chamber for Terrorism Cases of the Lima Superior Court of Justice, which declared that the section imposing the penalty was null, modified the penalty imposed, and ordered the release of Rolando Estrada Yarleque. In the same judgment, the Criminal Chamber decided to restrict the trial for the facts to María Teresa De La Cruz Flores

alone (supra para. 73(8)), and to re-issue orders for her arrest (infra paras. 73(30) and ff.). [FN41]

[FN41] Cf. judgment delivered on February 21, 1991, by the Twelfth Correctional Court of the Superior Court of Justice of Lima in file No. 257-90 (file of appendixes to the application, appendix 26, folios 276 to 278); and judgment delivered on May 18, 1992, by the National Superior Criminal Chamber for Terrorism Cases of the Lima Superior Court of Justice in file 510-91 (file of appendixes to the application, appendix 26, folios 279 and 280).

Second detention of María Teresa De La Cruz Flores and the corresponding proceedings against her

73(12) Mrs. De La Cruz Flores was again deprived of her liberty on March 27, 1996, for facts unrelated to the first detention (hereinafter "the second detention"). At the time, she was not presented with the corresponding court order. She was taken to the police station, where she was notified that her arrest resulted from a requisition in case file No. 113-95. [FN42]

[FN42] Cf. certification of notification of detention of March 27, 1996 (file of appendixes to the application, appendix 13, folio 120); and sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818).

73(13) Case file No. 113-95 had been opened as the result of the seizure of various documents from six individuals, which resulted in police deposition No. 099-DIVICOTE IV-DINCOTE of September 14, 1995, and expanded police deposition No. 106-DIVICOTE IV-DINCOTE of October 9, 1995, both prepared by DINCOTE. [FN43]

[FN43] Cf. police deposition No. 099-DIVICOTE IV-DINCOTE of September 14, 1995 (file of helpful evidence presented by the State, tome II, folios 1741 to 1849); and expanded police deposition No. 106-DIVICOTE IV-DINCOTE of October 9, 1995 (file of appendixes to the final written arguments, appendix 1 to the final written arguments of the Inter-American Commission on Human Rights, folios 1198 to 1218).

73(14) The expanded police deposition No. 106-DIVICOTE IV-DINCOTE prepared by DINCOTE on October 9, 1995, presumed the guilt of María Teresa De La Cruz Flores, based on the contents of the documents seized from six persons that mentioned an alleged woman pediatrician, who operated under the alias of "Elíana". From the contents of these documents, DINCOTE considered that the alleged victim was "fully identified" as "Elíana"; [and also] "her links [...] to the organization [...] Sendero Luminoso, for which she performed different medical activities, including operations and supplying medication; also that she had been "indoctrinated

with the Party's ideological and doctrinal beliefs" and "occupied a high rank [in this] organization." [FN44]

[FN44] Cf. expanded police deposition No. 106-DIVICOTE IV-DINCOTE of October 9, 1995 (file of appendixes to the final written arguments, appendix 1 to the final written arguments of the Inter-American Commission on Human Rights, folios 1198 to 1218).

73(15) The testimonies of the "arrepentida" code No. A2230000001, of Jacqueline Aroni Apcho and of Elisa Mabel Mantilla Moreno, also provided DINCOTE with grounds for establishing that the person identified by the alias "Elíana" was María Teresa De La Cruz Flores. [FN45]

[FN45] Cf. expanded police deposition No. 106-DIVICOTE IV-DINCOTE of October 9, 1995 (file of appendixes to the final written arguments, appendix 1 to the final written arguments of the Inter-American Commission on Human Rights, folios 1198 to 1218).

73(16) The "arrepentida" code No. A2230000001, Jacqueline Aroni Apcho and Elisa Mabel Mantilla Moreno testified on different occasions during the preparation of the trial against María Teresa De La Cruz Flores. Their testimonies are inconsistent. [FN46]

[FN46] Cf. expanded police deposition No. 106-DIVICOTE IV-DINCOTE of October 9, 1995 (file of appendixes to the final written arguments, appendix 1 to the final written arguments of the Inter-American Commission on Human Rights, folios 1198 to 1218); testimony of Jacqueline Aroni Apcho given on November 17 and 20, 1995 (file of appendixes to the brief with requests and arguments, appendix 6, folios 414 to 423); expansion of the testimony of the prisoner Code No. A2230000001 who took advantage of the Repentance Act, made on August 17, 1993 (file of appendixes to the brief with requests and arguments, appendix 7, folios 426 to 440); statement made by Elisa Mabel Mantilla Moreno on September 7, 1995 (file of appendixes to the brief with requests and arguments, folios 452 to 477); sworn statement made by Elisa Mabel Mantilla Moreno on September 21, 2002 (file of appendixes to the brief with requests and arguments, appendix 10, folio 479); and statement made by Jacqueline Aroni Apcho on September 19, 1995 (file of appendixes to the brief with requests and arguments, appendix 11, folios 481 to 490).

73(17) During the trial, under the legislation in force, Mrs. De La Cruz Flores was not able to question "arrepentida" code No. A2230000001, whose testimony was key to the formulation of the charge against her. Mrs. De La Cruz Flores was not informed about the police depositions and was unable to comment on them. [FN47]

[FN47] Cf. Decree Law No. 25,475 (file with the State's comments on the affidavits, appendix 10 of the brief with comments on the expert report made before notary public by Mario Pablo Rodríguez Hurtado, folios 975 to 980).

73(18) The trial against Mrs. De La Cruz Flores resulting from her second detention was held before a "faceless" civilian court. [FN48]

[FN48] Cf. Decree Law No. 25,475 (file with the State's comments on the affidavits, appendix 10 of the brief with comments on the expert report made before notary public by Mario Pablo Rodríguez Hurtado, folios 975 to 980).

73(19) On September 16, 1995, the Titular Provincial Prosecutor of the Lima Fourteenth Provincial Criminal Prosecutor's office formulated an expanded complaint for the "crime of terrorism (acts of collaboration)" harmful to the State against María Teresa De La Cruz and others. [FN49]

[FN49] Cf. expanded complaint No. 113-95 formulated by the Titular Provincial Prosecutor of the Fourteenth Criminal Prosecutor's Office of Lima for terrorism cases on September 16, 1995 (file of appendixes to the application, appendix 15, folios 124 to 125).

73(20) On the same date, the Fourteenth Criminal Court of Lima issued a order to open the pre-trial investigation against María Teresa De La Cruz Flores and others, because they "were members of the Peruvian Communist Party (Sendero Luminoso), and had provided medical attention, treatment and operations, supply of medicines and medical instruments for the care of criminal terrorist[;] acts [that] constitute the crime established and penalized in Article 4 of Decree Law No. 25,475." [FN50]

[FN50] Cf. order to open the pre-trial investigation issued by the Fourteenth Criminal Court issued in file No. 94-95 on September 16, 1995 (file of appendixes to the application, appendix 16, folios 127 to 131).

73(21) On March 28, 1996, María Teresa De La Cruz Flores made her preliminary statement denying the charges against her. [FN51]

[FN51] Cf. statement made by María Teresa De la Cruz Flores in the pre-trial investigation on March 28, 1996 (file of appendixes to the application, appendix 17, folios 133 to 137).

73(22) On April 1, 1996, the Prosecutor of the Lima Fourteenth Provincial Prosecutor's Office issued his report and stated "that, in the civil proceedings, the CRIMINAL LIABILITY of the defendant, MARIA TERESA DE LA CRUZ FLORES, HAS NOT BEEN PROVED, or that she committed the crime of terrorism-acts of collaboration harmful to the State." He also indicated that the defendants acted "under threat that overcame their resistance[,] as a result of coercion." [FN52]

[FN52] Cf. opinion of the Titular Provincial Prosecutor of the Fourteenth Provincial Criminal Prosecutor's Office of Lima issued on April 1, 1996 (file of appendixes to the application, appendix 18, folios 139 to 171).

73(23) On June 7, 1996, the Lima Superior Prosecutor issued his report, in which he suggested to the Criminal Chamber that there were no grounds for a trial against María Teresa De La Cruz Flores, because her "participation [...] had consisted in providing medical care to militants." [FN53]

[FN53] Cf. opinion of the Superior Prosecutor issued on June 7, 1996 (file of appendixes to the application, appendix 19, folios 173 to 181).

73(24) The Special Terrorism Chamber of the Lima Supreme Court did not admit either of these two reports (supra paras. 73(22 and 73(23)) and on July 3, 1996, decided to submit the case records to the office of the Supreme Criminal Prosecutor. [FN54]

[FN54] Cf. report of the Special Terrorism Chamber of the Lima Supreme Court issued on July 3, 1996 (file of appendixes to the application, folios 183 to 186).

73(25) On October 16, 1996, the hearing at the oral proceeding stage was initiated, in private. [FN55]

[FN55] Cf. record of the hearing of October 16, 1996 (file of helpful evidence presented by the State, tome X, folios 6509 to 6510); record of the hearing of October 23, 1996 (file of appendixes to the application, appendix 21, folios 188 to 193); record of the hearing of October 30, 1996 (file of appendixes to the application, appendix 22, folios 195 to 199); and record of the hearing of November 5, 1996 (file of appendixes to the application, folios 201 to 205).

73(26) Mrs. De La Cruz Flores and her lawyers had very limited access to her case file, which made it difficult to know the details of the facts she was accused of, and even the identity of those she was alleged to have treated. [FN56]

[FN56] Cf. sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818).

73(27) On November 21, 1996, the Special Criminal Chamber of the Lima Superior Court of Justice, constituted in a "faceless" tribunal, delivered judgment convicting Mrs. De La Cruz Flores and others, and sentenced her to 20 years' imprisonment for terrorism, under Article 4 of Decree Law No. 25,475 (hereinafter "the judgment of November 21, 1996"). [FN57] In this judgment, the Chamber considered that "[the case file] contained documentation from 1992 [...], which implicated the defendant, and in which she appears with the alias 'Elíana'; one of these documents refers not only to meetings with the defendant, but there is also an analysis of her doctrinal and ideological evolution within the organization; there are descriptions of talks [...] she has given, as a physician; that she has taken part in an operation as the assistant surgeon, and of problems within the health sector, all of which has been corroborated [...] by the defendant, Elisa Mabel Mantilla Moreno, who, in the presence of the Prosecutor states that, on one occasion, she met with María Teresa De la Cruz on the orders of her 'handler,' to coordinate several matters; […] the same defendant […] accuses her of being one of the supportive elements responsible for providing treatment and performing operations; [...] accuses her of participating in an operation on 'Mario' whose hand had been burned, which corroborates the foregoing; namely, that she took part as assistant surgeon in a skin-grafting operation; and it is evident that the defendant has denied this during the proceeding so as to elude her criminal liability, which has been adequately proved." [FN58]

[FN57] Cf. judgment delivered by the Special Criminal Chamber of the Lima Superior Court of Justice on November 21, 1996 (file of appendixes to the application, appendix 24, folios 207 to 254).

[FN58] Cf. judgment delivered by the Special Criminal Chamber of the Lima Superior Court of Justice on November 21, 1996 (file of appendixes to the application, appendix 24, folios 207 to 254).

73(28) The judgment of November 21, 1996, admitted [sic] de oficio the special appeal for annulment, "because it was a matter contrary to the interests of the State," and ordered that the case file should be remitted to the Supreme Criminal Prosecutor. [FN59]

[FN59] Cf. judgment delivered by the Special Criminal Chamber of the Lima Superior Court of Justice on November 21, 1996 (file of appendixes to the application, appendix 24, folios 207 to 254).

73(29) On June 8, 1998, the Corporative Criminal Chamber for Terrorism Cases of the Supreme Court of Justice confirmed the judgment of November 21, 1996 (supra paras. 73(27 and 73(28)). [FN60]

[FN60] Cf. judgment delivered by the Corporative Criminal Chamber for Terrorism Cases of the Supreme Court of Justice on June 8, 1998 (file of appendixes to the application, appendix 25, folios 256 to 272).

Proceedings against Mrs. De La Cruz Flores as a result of the first detention

73(30) During the initial stages of the proceedings opened as a result of the second detention of María Teresa De La Cruz Flores, she was informed that she was also implicated in another proceeding that was being processed under case file No. 723-93 before the National Corporative Superior Criminal Chamber for Terrorism Cases of the Lima Superior Court of Justice, corresponding to the first detention; this file had been mislaid (supra paras. 73(8) and ff.). [FN61]

[FN61] Cf. sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818).

73(31) The reconstruction of the file relating to the first detention was ordered at the request of María Teresa De La Cruz Flores' lawyers. Based on this, the oral proceeding before the National Corporative Superior Criminal Chamber for Terrorism Cases of the Lima Superior Court of Justice was brought forward. [FN62]

[FN62] Cf. sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818).

73(32) On March 4, 1999, the National Corporative Superior Criminal Chamber for Terrorism Cases of the Lima Superior Court of Justice delivered judgment in case file No. 723-93, sentencing María Teresa De La Cruz Flores to 10 years' imprisonment for the crime of terrorism, in the category of unlawful association, defined in the Penal Code. [FN63]

[FN63] Cf. judgment delivered on March 4, 1999, by the National Corporative Criminal Chamber for Terrorism Cases of the Lima Superior Court of Justice in file No. 723-93 (file of appendixes to the application, appendix 27, folios 282 to 288).

73(33) A judgment delivered by the Criminal Chamber on June 15, 2000, decreed the annulment of the judgment of March 4, 1999, under Article 51 of the Penal Code, [FN64] because, in view of the judgment of November 21, 1996 (supra paras. 73(27) and 73(28)), there was a concurrence of criminal proceedings. [FN65]

[FN64] Article 51 of the Peruvian Penal Code establishes: "If, following a conviction, another punishable act of the same or a different nature is discovered, which was committed previously by the person who has been convicted, and which merits a lesser penalty to the one imposed, whatsoever the circumstances, the jurisdictional organ or the subjects of the proceeding shall request a certified copy of the judgment and, based on this, the jurisdictional organ shall order the final dismissal of the case and order it to be filed. If the punishable act discovered merits a more severe punishment than the one applied, the convicted person shall be submitted to a new trial and the new penalty that corresponds shall be imposed."
[FN65] Cf. judgment delivered by the Criminal Chamber of the Supreme Court of Justice on June 15, 2000 (file of appendixes to the application brief, appendix 28, folios 290 to 291).

Other events leading up to the criminal proceedings against María Teresa De La Cruz Flores

73(34) In at least four cases of physicians accused of the crime of collaboration with terrorism, in similar circumstances to Mrs. De La Cruz Flores, the legal figure of in dubio pro reo was applied. And, in the judgment of June 8, 1998, delivered in case file No. 113-95, the file under which the proceeding against Mrs. De La Cruz Flores was also being processed, the figure of in dubio pro reo was applied to Drs. Richard Morales Torrín and César Augusto Guerrero Caballero. The judgment delivered on January 5, 1999, in case file No. 115-95 in relation to Drs. Luis Alberto Paquilló and Miguel Ángel Melgarejo Encinas reached the same decision. [FN66]

[FN66] Cf. judgment delivered by the Special Criminal Chamber of the Lima Superior Court of Justice on November 21, 1996 (file of appendixes to the application, appendix 24, folios 207 to 254); and judgment delivered by the National Criminal Chamber for Terrorism Cases with jurisdiction at the national level on January 5, 1999 (file of appendixes to the application, appendix 29, folios 293 to 301).

73(35) As a result of the action for unconstitutionality filed by Marcelino Tieno Silva and more than 5,000 citizens, the Constitutional Court of Peru handed down a judgment on January 3, 2003, in which it ruled on the constitutionality of Decree Laws Nos. 25,475 (crime of terrorism), 25,659 (crime of treason), 25,708 and 25,880. [FN67]

[FN67] Cf. judgment delivered by the Constitutional Court of Peru on January 3, 2003, to decide a popular action on constitutionality filed by Marcelino Tineo Silva and more than 5,000

citizens, file No. 010-2002-AI/TC Lima (file of appendixes to the application, appendix 30, folios 303 to 334).

73(36) The judgment of the Constitutional Court declared that article 2 of Decree Law No. 25,475, defining the crime of terrorism, was constitutional and that "it was a norm that does not fail to recognize the principle of legality, since it is one of those open criminal definitions that, owing to its imprecision, needs to be completed by the judge's interpretation." The judgment did not examine article 4 of this Decree Law, which defines the crime of collaboration with terrorism. [FN68]

[FN68] Cf. judgment delivered by the Constitutional Court of Peru on January 3, 2003, to decide a popular action on constitutionality filed by Marcelino Tineo Silva and more than 5,000 citizens, file No. 010-2002-AI/TC Lima (file of appendixes to the application, appendix 30, folios 303 to 334).

73(37) As a result of the Constitutional Court's judgment, the Executive issued Legislative Decrees Nos. 921, 922, 923, 924, 925, 926 and 927, to regulate the effects of this judgment, in relation to the annulment of the trials for crimes of terrorism held before unidentified judges and prosecutors. [FN69]

[FN69] Cf. judgment delivered by the Constitutional Court of Peru on January 3, 2003, to decide a popular action on constitutionality filed by Marcelino Tineo Silva and more than 5,000 citizens, file No. 010-2002-AI/TC Lima (file of appendixes to the application, appendix 30, folios 303 to 334); and Legislative Decrees Nos. 921, 922, 923, 924, 925, 926 and 927 (file of appendixes to the application, appendix 31, folios 336 to 346).

73(38) Article 2 of Legislative Decree No. 926 of February 19, 2003 established that the National Terrorism Chamber should, gradually within 60 days, annul de oficio, unless the prisoner waived this, the judgment and the oral proceeding and should declare, if applicable, the failure to substantiate the prosecutor's charge in the criminal proceedings for the crimes of terrorism held in the criminal jurisdiction before unidentified judges or prosecutors. This period ended on April 19, 2003. [FN70]

[FN70] Cf. Legislative Decree No. 926 (file of appendixes to the application, appendix 31, folios 344 and 345).

New proceedings against María Teresa De La Cruz Flores

73(39) On June 20, 2003, the National Terrorism Chamber declared that all the previous proceedings were null and that the prosecutor's charge in the trial of María Teresa De La Cruz Flores relating to the second detention was unsubstantiated, "although this did not change her legal status." [FN71]

[FN71] Cf. decision of June 20, 2003, issued by the National Terrorism Chamber in file No. 113-95 (file of appendixes to the brief with requests and arguments, appendix 3, folios 380 to 389).

73(40) On September 2, 2003, the Superior Prosecutor of the Office of the Second Special Superior Prosecutor for terrorism issued opinion No. 167-2003-2FSEDT-MP/FN in file No. 113-95, in which he considered that there were grounds to go to trial. [FN72]

[FN72] Cf. opinion No. 167-2003-2FSEDT-MP/FN issued by the Superior Prosecutor of the Office of the Second Special Superior Prosecutor for terrorism on September 2, 2003, in file No. 113-95 (file on merits, reparations, and costs, tome II, folios 488 to 534).

73(41) On November 6, 2003, the National Terrorism Chamber issued a decision confirming a decision of August 28, 2003, and declaring that the prison benefit of parole requested by María Teresa De La Cruz Flores was inadmissible, because it "had been established for convicted prisoners, so that they could leave prison before they have completed their full term of imprisonment" and Mrs. De La Cruz Flores "had not been convicted, [but] was merely being tried." [FN73]

[FN73] Cf. decision issued by the National Terrorism Chamber on November 6, 2003, in file No. 113-95 (file on merits, reparations, and costs, tome II, folio 535).

73(42) On January 20, 2004, María Teresa De La Cruz Flores' lawyer filed a brief in which he filed pleas based on extinguishment and on the nature of the proceeding, and requested "the judge to determine the category of the crime precisely, and to define the applicable legal norm at the time the alleged acts were supposedly committed." [FN74]

[FN74] Cf. brief filed before the Special Chamber for crimes of terrorism on January 20, 2004, in file No. 113-95 (file of appendixes to the final written arguments, appendix 1 to the final arguments presented by the alleged victim's representatives, folios 1101 to 1112).

73(43) In a decision of March 9, 2004, the National Terrorism Chamber ordered, inter alia, that the case should be remitted to the Superior Criminal Prosecutor's office, "so that he could rule, pursuant to his authority," on the brief filed by Mrs. De La Cruz Flores' defense lawyer, with the

pleas based on extinguishment and on the nature of the proceeding, and requesting a change in the criminal category. [FN75]

[FN75] Cf. decision issued by the National Terrorism Chamber on March 9, 2004, in file No. 113-95 (file of appendixes to the final written arguments, appendix 1 to the final written arguments presented by the alleged victim's representatives, folios 1096 to 1100).

73(44) Of May 6, 2004, the National Terrorism Chamber issued a decision, extending the pre-trial investigation for 15 days, "so that the judge could rule on the issues requested by the Superior Prosecutor concerning: a) the brief filed by the defendant, María Teresa De la Cruz Flores, […] with the plea based on the nature of the proceeding; c) the brief filed by the said defendant, […] with the plea based on extinguishment." [FN76]

[FN76] Cf. decision issued by the National Terrorism Chamber on May 6, 2004, in file No. 113-95 (file of appendixes to the final written arguments, appendix 2 to the final written arguments presented by the State, folios 1241 to 1244).

73(45) On June 9, 2004, the Fourth Criminal Court Specializing in Crimes of Terrorism decided to extend the pre-trial investigation for the peremptory period of 15 days, "because, according to an examination of the case file and owing to the facts that occurred at the time described below […] the defendant, María Teresa De la Cruz Flores, cc. 'Elíana', is accused of being an 'activist' within the subversive organization, Sendero Luminoso, caring for patients, having performed operations from 1989 to 1992; and this has been corroborated in statements made by Elisa Mabel Mantilla Moreno which appear in the case file […]; consequently, IT CLARIFIES the orders to open the pre-trial investigation of September 1, 1995, […], of September 16, 1995 [(supra para. 73(20) …] and of October 11, 1995 […], respectively; in order to charge the defendant, María Teresa De la Cruz Flores […], with the unlawful criminal acts perpetrated from 1989 to April 3, 1991, which are established and penalized by article 188 'E', paragraph (b), (c) and (e) of the 1924 Penal Code, promulgated by Law No. 24,651, modified by Law No. 24,953; the acts committed after April 3, 1991, are established and penalized in article 321, paragraphs 2 and 6 of the 1991 Penal Code, promulgated in Legislative Decree No. 635; the acts committed after May 5, 1992, are established and penalized in article 4 of Decree Law No. 25,475, and the corresponding arrest warrant subsists." [FN77]

[FN77] Cf. decision issued by the Fourth Criminal Court Specializing in Crimes of Terrorism on June 9, 2004 (file of appendixes to the final written arguments, appendix 3 to the final written arguments presented by the State, folios 1245 to 1250).

73(46) On July 1, 2004, at the request of the alleged victim's defense lawyer and for the first time during the proceeding, a confrontation procedure was conducted between the alleged victim

and Jacqueline Aroni Apcho, she said that Mrs. De La Cruz Flores was not "Elíana", that she did not know Mrs. De La Cruz Flores, that she did not recall the physical characteristics of "Elíana" and that she did not know the latter's real name. Moreover, two other testimonial statements made by individuals identified with the code Nos. WN203002 and 1MMC004 said that "they did not know" María Teresa De La Cruz Flores. [FN78]

[FN78] Cf. record of the procedure of confrontation between the defendant, María Teresa De la Cruz Flores de Blanco and the witness, Jacqueline Aroni Apcho on July 1, 2004 (file of appendixes to the final written arguments, appendix 8 to the final written arguments presented by the State, folios 1260 to 1263); testimonial statement of the person identified with code No. WN203002 made on July 6, 2004 (file of appendixes to the final written arguments, appendix 10 to the final written arguments presented by the State, folios 1266 to 1273); testimonial statement of the person identified with code No. 1MMC004 made on July 6, 2004 (file of appendixes to the final written arguments, appendix 11 to the final written arguments presented by the State, folios 1274 to 1279); decision issued by the Third Criminal Court specializing in crimes of terrorism on August 28, 2003 (file on merits, reparations, and costs, folios 963 to 966); decision issued by the Fourth Criminal Court for terrorism in file Nº 531-03 on July 8, 2004,(file on merits and reparations folios 781 to 789).

73(47) On July 8, 2004, the Fourth Criminal Court for Terrorism declared that the request of María Teresa De La Cruz Flores' defense lawyer to modify the detention order for one of conditional appearance was admissible. The court considered that "new facts cast doubt on the adequacy of the evidence that led to the coercive detention measures; on the other hand, the personal condition of the defendant should be borne in mind; she has a known domicile and profession, […] which suggests that there is no danger of her escaping or obstructing probative activities." The following restrictions were ordered to the category of conditional appearance a) not to absent herself from her place of residence, or change the domicile indicated in the case file, without the prior authorization of the court; b) to appear when summoned by the court or the corresponding criminal chamber, for activities inherent in the pre-trial investigation or the hearing sessions, during the oral proceeding, if applicable; c) not to visit dwellings, closed premises or places open to the public that are linked to terrorist activities or in which such activities take place, or where there is propaganda related to such activities or activities of collaboration; d) to appear personally and obligatorily at the court at the end of each month to provide information on her activities and sign the corresponding register of control; e) not to visit prisoners for the crime of terrorism or establish contact with them by any means, except in the case of the defendant's next of kin in the ascending and descending line, spouse or companion; f) prohibition to make declarations to the mass media, such as the press, radio and television on issues relating to the criminal investigation underway, which is of a confidential nature. The decision also established that

María Teresa De La Cruz Flores could not leave the country. [FN79]

[FN79] Cf. decision issued by the Fourth Criminal Court for terrorism in file Nº 531-03 on July 8, 2004 (file on merits and reparations folios 781 to 789).

73(48) Mrs. De La Cruz Flores was released from prison on July 9, 2004. [FN80]

[FN80] Cf. certification of release from prison issued on July 9, 2004, by the PNP Colonel, Director of the Chorrillos maximum security Women's Prison (file of appendixes to the final written arguments, appendix 2 to the final written arguments of the alleged victim's representatives, folio 1114).

73(49) On July 13, 2004, the Titular Provincial Prosecutor the Office of the Fourth Prosecutor specializing in crimes of terrorism filed an appeal contesting the decision of July 8, 2004, that ordered the detention order to be changed to one of conditional appearance in favor of Mrs. De La Cruz Flores. [FN81]

[FN81] Cf. appeal filed by the Titular Provincial Prosecutor the Office of the Fourth Prosecutor specializing in crimes of terrorism of July 13, 2004 (file on merits, reparations, and costs, tome V, folios 1257 to 1258).

73(50) On August 10, 2004, the Fourth Criminal Court for terrorism declared the plea based on the nature of the proceeding filed by the alleged victim's lawyer inadmissible (supra para. 73(42)). [FN82] Mrs. De La Cruz Flores' lawyer filed an appeal against this decision on September 1, 2004. [FN83]

[FN82] Cf. decision issued by the Fourth Criminal Court for terrorism on August 10, 2004 (file on merits, reparations, and costs, tome IV, folios 1280 to 1282).

[FN83] Cf. appeal filed by Jorge Olivera Vanini before the Fourth Criminal Court for Crimes of Terrorism on September 1, 2004 (file on merits, reparations, and costs, tome V, folios 1283 to 1287).

73(51) On August 16, 2004, the Fourth Criminal Court for terrorism declared the plea based on extinguishment filed by the alleged victim's lawyer inadmissible (supra para. 73(42)). [FN84] Mrs. De La Cruz Flores' lawyer filed an appeal against this decision on September 15, 2004. [FN85]

[FN84] Cf. decision issued by the Fourth Criminal Court for Terrorism on August 16, 2004 (file on merits, reparations, and costs, tome IV, folios 1264 to 1267).

[FN85] Cf. appeal filed by Jorge Olivera Vanini before the Fourth Criminal Court for Crimes of Terrorism on September 15, 2004 (file on merits, reparations, and costs, tome V, folios 1268 to 1270).

73(52) On September 24, 2004, the National Terrorism Chamber issued a decision confirming the decision of July 8, 2004, ordering the detention order to be changed to one of conditional appearance (supra para. 73(47)), considering that "it is evident that the evidence that led to the detention order against [Mrs. De La Cruz Flores] has decreased considerably." [FN86]

[FN86] Cf. decision issued by the National Terrorism Chamber on September 24, 2004 (file on merits, reparations, and costs, tome V, folios 1537 to 1540).

With regard to the detention of Mrs. De La Cruz Flores

73(53) María Teresa De La Cruz Flores was detained in the Chorrillos maximum security Women's Prison from 1996 until her release on July 9, 2004. [FN87]

[FN87] Cf. attestation on imprisonment issued on July 8, 2004, by the PNP Colonel, Director of the Chorrillos maximum security Women's Prison (file of appendixes to the final written arguments, appendix 2 to the final written arguments presented by the alleged victim's representative, folio 1115); certification of release from prison issued on July 9, 2004, by the PNP Colonel, Director of the Chorrillos maximum security Women's Prison (file of appendixes to the final written arguments, appendix 2 to the final written arguments presented by the alleged victim's representative, folio 1114); sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818); and testimony of Álvaro Eduardo Vidal Rivadeneyra before the Inter-American Court on July 2, 2004.

73(54) During her detention, Mrs. De La Cruz Flores suffered from various physical ailments for which she received inadequate medical care. For example, when she entered the prison she had diarrhea and fever, and was only treated two weeks after presenting the symptoms. [FN88] Currently, she has osteopenia, and her vision has decreased notably. Other ailments suffered during her detention included: gastric dyspepsia, anemia, menopause, rheumatoid arthritis, urinary tract infection, refractive defects, tonsillitis, pharyngo-tracheitis, neuritis, dysfunctional uterine hemorrhage, endometrial polyp, endometrial hyperplasia, bilateral mastoiditis, allergic rhinitis, and chronic arterial hypotension. [FN89]

[FN88] Cf. sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818).

[FN89] Cf. Medical report No. 011-03/INPE-232-ASP prepared by the Assistant Physician of the Prison Health Unit of the Chorrillos maximum security Women's Prison (file on merits, reparations, and costs, tome III, folio 953).

73(55) For the first month, the alleged victim was incommunicado, could not see her lawyer or her family and could not change her clothes. Also, for the first year of her detention, she was in continuous solitary confinement, the visits she could receive were extremely restricted (for example, her children could only visit her every three months and in the locutorio), and she could only go out into the exercise yard for half and hour each day. [FN90]

[FN90] Cf. sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818); and testimony of Álvaro Eduardo Vidal Rivadeneyra before the Inter-American Court on July 2, 2004.

With regard to the next of kin of María Teresa De La Cruz Flores

73(56) The next of kin of María Teresa De La Cruz Flores are: Ana Teresa and Danilo Blanco De La Cruz, her children; [FN91] Alcira Domitila Flores Rosas widow of De La Cruz, her mother; [FN92] Alcira Isabel, Celso Fernando and Jorge Alfonso De La Cruz Flores, her siblings. [FN93]

[FN91] Cf. birth certificate of Ana Teresa Blanco De la Cruz (file of appendixes to the brief with requests and arguments, appendix 22, folios 579 and 580); and birth certificate of Danilo Alfredo Blanco De la Cruz (file of appendixes to the brief with requests and arguments, appendix 22, folios 581 and 582).

[FN92] Cf. identity document of Alcira Domitila Flores Rosas, widow of De la Cruz (file of appendixes to the brief with requests and arguments, appendix 23, folio 584); and sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818).

[FN93] Cf. identity document of Alcira Isabel De la Cruz Flores (file of appendixes to the brief with requests and arguments, appendix 23, folio 585); sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818); identity document of Celso Fernando De la Cruz Flores (file of appendixes to the brief with requests and arguments, appendix 24, folios 587 and 588); and identity document of Jorge Alfonso De la Cruz Flores (file of appendixes to the brief with requests and arguments, folios 589 and 590).

73(57) The next of kin of Mrs. De La Cruz Flores suffered emotional and financial difficulties owing to her detention, as a result of the charges of terrorism against their mother, daughter and sibling. These included: [FN94]

a) Her mother, who was 80 years of age when María Teresa De La Cruz Flores was detained, had to take charge of her grandchildren at first and, to a great extent, has assumed the efforts and sacrifices arising from her daughter's situation;
b) Her sister, Alcira, had to interrupt her studies in Brazil to assume a more active role in her defense, and to share the work of rearing and educating her children with her mother;
c) Her next of kin, who visited her in the prison, were subjected to humiliations and difficulties to be able to see her and communicate with her;
d) Her family have suffered severe financial difficulties: her mother has had to maintain her children on a retirement pension, and her siblings, Alcira Isabel, Jorge Alfonso and Celso Fernando, have collaborated financially insofar as possible to pay the family's expenses, including many relating to the education of the alleged victim's children;
e) Her brother, Jorge Alfonso De La Cruz Flores, who worked in the same institution as Mrs. De La Cruz Flores, was prevented from working in Lima near his family;
f) Her children could not visit her during the first year of her detention; they grew up without their mother, and are currently estranged from her and their grandmother, owing to the financial situation which makes their education unsustainable; and
g) Her mother suffers from various physical ailments, including deafness and blindness.

[FN94] Cf. sworn written statement made by María Teresa De la Cruz Flores on May 28, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 808 to 818); sworn statement made by Jorge Alfonso De la Cruz on August 1, 2004 (file of appendixes to the final written arguments, appendix 10 to the final written arguments of the alleged victim's representatives, folio 1135).

Regarding the alleged victim's representation before the national authorities and before the inter-American system for the protection of human rights and the expenses relating to this representation.

73(58) Several lawyers acted on behalf of the alleged victim before the national authorities, while the lawyers, Javier Ríos Castillo and Carolina Loayza Tamayo represented her before the Inter-American Commission and the Inter-American Court; they incurred different expenses, which were partly assumed by the Medical Association of the Peruvian Social Security Institute, the Physician's Professional Association of Peru and the Peruvian Medical Federation and, in part, by Carolina Loayza Tamayo. [FN95]

[FN95] Cf. power of attorney granted by María Teresa De la Cruz Flores to Carolina Loayza Tamayo and Javier Ríos Castillo on April 6, 2003 (file of appendixes to the application, appendix 35, folio 360), proposal regarding the professional honoraria of Physician María Teresa De la Cruz Flores prepared by the lawyer, Jorge A. Olivera Vanini on November 24, 2003, addressed to physician Patricio Wagner, Dean of the Physicians' Professional Association (file of appendixes to the final written arguments, appendix 8 to the final written arguments presented by the alleged victim's representatives, folios 112 to 1127); table entitled "Profesionales que

participaron en la defensa de María Teresa De la Cruz Flores en las instancias nacionales e internacionales" (file of appendixes to the brief with requests and arguments, appendix 30, folio 622) and other documents of appendix 30; sworn written statement made by Abdón Segundo Salazar Morán of June 3, 2004, before notary public (file of appendixes to the brief answering the application and affidavits, folios 822 to 827); and testimony of Álvaro Eduardo Vidal Rivadeneyra before the Inter-American Court on July 2, 2004.

VII. ARTICLES 9, 7, 8 AND 24 OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) THEREOF (FREEDOM FROM EX POST FACTO LAWS, RIGHT TO PERSONAL LIBERTY, RIGHT TO A FAIR TRIAL AND RIGHT TO EQUAL PROTECTION)

Arguments of the Commission

74. In relation to Articles 9, 7, 8 and 24 of the American Convention, the Inter-American Commission indicated that:

a) The alleged victim's professional activity as a physician was a determining factor in establishing her criminal liability;
b) During the trial, there was no clarity or certainty about the criminal dimension of a professional activity such as medicine, added to the fact that, in this case, the evidence of responsibility is not transparent;
c) This situation violates and disregards Article 9 of the American Convention, because the State penalized a lawful act, a medical activity performed by the alleged victim, by considering that her behavior constituted acts of collaboration with terrorism. The breadth with which the criminal category of terrorism was defined opened the door to the possibility of making "such an arbitrary interpretation";
d) Both the Court and the Commission have concluded that the trials resulting from Peru's anti-terrorist legislation led to the violation of different rights embodied in the American Convention;
e) The definition of the crime of terrorism established in article 2 of Decree Law No. 25,475 is incompatible with the principle of legality embodied in the American Convention, because the acts that constitute the crime were formulated abstractly and ambiguously, which means that it is impossible to know the specific behavior that constitutes the respective category of crime;
f) The principle of legality has a specific role in the definition of crimes; on the one hand, it guarantees individual liberty and safety by pre-establishing the behavior that is penalized clearly and unambiguously and, on the other hand, it protects legal certainty;
g) The judgment of the Constitutional Court of January 3, 2003, declared that the definition of the crime of terrorism contained in Decree Law No. 25,475 was compatible with the Constitution, and abstained from assessing the criminal category of acts of collaboration with terrorism;
h) The new interpretation made by the Constitutional Court does not resolve the serious defects and imperfections that have afflicted the definition of the crime of terrorism since it was established;

i) When she was detained, the alleged victim was not informed of the reason for her detention, and she was not shown any detention order; rather, she was notified of the arrest warrant against her when she was taken before the panel of judges;
j) Although the alleged victim's detention was the result of a judicial order, this order was issued under the anti-terrorist legislation (Decree Laws Nos. 25,475, 25,659, 25,499 and 26,508) previously examined by the Court and declared incompatible with the American Convention;
k) Even though the remedy of habeas corpus had already been re-established when the alleged victim was detained, in the practice this fundamental remedy was severely restricted so that it was ineffective;
l) Legislative Decree No. 926 of February 19, 2003, established that, within 60 days of its coming into force, orders must be issued for the criminal trials and the judgment to be annulled in trials for the crime of terrorism held in civil courts with unidentified judges or prosecutors. "Under the rationale of respect for the rights protected by the Convention, especially personal liberty and the presumption of innocence," the alleged victim should have obtained her immediate release since a final judgment had not been delivered in her case. However, Legislative Decree No. 926 did not provide for this possibility;
m) The new legislation "did not include the time Mrs. De La Cruz Flores had been deprived of liberty owing to the anticipated proceeding under file 113-95, from March 27, 1996, to the day [the application was submitted], 7 years, 2 months and 15 days, [which] constitutes arbitrary detention." Even if this is considered preventive detention, it is excessive and unreasonable;
n) Although it is true that the State has given Mrs. De La Cruz Flores back her liberty by the decision of July 8, 2004, and the violation has ceased, it is also true that it occurred and caused very grave consequences that must be repaired;
o) The judges who tried María Teresa De La Cruz Flores formed part of a "faceless" court, established in accordance with Article 15(1) of Decree Law No. 25,475 and, when the identity of the judge is not known, it affects the possibility of knowing whether he is independent and impartial;
p) Even though the second-instance judgment (which confirmed the judgment convicting the alleged victim) was delivered by "identified judges," this fact does not, in itself, eradicate the violation of the right to an impartial judge and to due process;
q) Legislative Decree No. 926 ordered the annulment of the trials held and the judgments issued by unidentified judges and prosecutors in case of crimes of terrorism, and also that new trials should be held. When the application was submitted, the new trial regime to which the alleged victim would have had a right, within the non-extendible period of two months indicated in the law, had not been applied to her case;
r) The principle of presumption of innocence has been threatened from the onset of the proceedings, given the broad investigative authority granted to DINCOTE to prepare its report or deposition. This report became a fundamental element in the prosecutor's opinion and the input for the charge, that determined the possibility of the defendant's release and, ultimately, her sentence;
s) Months before her detention, two DINCOTE depositions, of September and October 1995, already defined the alleged victim's behavior as acts of collaboration with terrorism, and the police had assigned jurisdiction for prosecuting the case to a "faceless" civilian court. The prosecutor "merely transcribed the evidence and the conclusions of the police [officers] to request the opening of the pre-trial investigation";

t) The alleged victim was unable to learn what she had been charged with beforehand, or take part in the pre-trial investigation or offer evidence or explanations;

u) The judicial official appointed to hear the case was committed to opening the pre-trial investigation and ordering preventive detention as a safety measure, without being able to consider that the probative evidence was insufficient, and thus abstaining from opening the pre-trial investigation;

v) The Constitutional Court's decision of January 3, 2003, did not remedy this situation in the instant case, owing to its "automatic association" with the criminal proceeding and the related preventive detention;

w) In its brief answering the report of Article 50 of the Convention, the State indicated that "in compliance with the domestic legal system, the petitioner shall have the right to a fair, impartial and prompt proceeding, in which she must prove her alleged innocence";

x) Neither the alleged victim nor her lawyer were able to request clarification of the police depositions on which the charges against her were based because, by law, the officials who prepared them were excluded from appearing before the court. Furthermore, they were not allowed to question a key witness, who testified unidentified, during the trial;

y) In its judgment of January 3, 2003, the Constitutional Court found that the legal provision that prevented the questioning of investigating officials who had taken part in preparing the police deposition, so as to protect their right to life, was compatible with the Constitution;

z) Legislative Decree No. 922 of February 19, 2003, established rules regarding evidence for the new criminal trials. Nevertheless, it only established new assessment criteria for the new trials in relation to evidence used by the military courts in crimes of treason;

aa) The alleged victim's trial was held in a private hearing to which the public did not have access, as noted in the respective record;

bb) The absence of evidence and the inappropriate grounds for the facts, which characterize the judgment convicting the alleged victim and the judgment that confirmed this conviction, constitute a violation of the right to judicial guarantees embodied in Articles 8 and 9 of the American Convention;

cc) The requirement that the actual grounds for a judgment should be stated relates to the rationale for the decision, using the criteria that the body of evidence should be assessed with sound criticism and logic;

dd) In this case, the first-instance judgment is the only one that contains any conclusions allowing the alleged victim's responsibility to be declared;

ee) The second-instance judgment did not drawn any conclusions about the rationale of the first-instance judgment when confirming it, also with an "absolute lack of grounds," which, in practice, removed the alleged victim from judicial protection;

ff) The judgment of June 8, 1998, confirming the judgment convicting María Teresa De La Cruz Flores, also considered the behavior of other defendants under the same charges and with similar evidence, and acquitted them;

gg) In January 1999, the National Corporative Chamber for Cases of Terrorism acquitted two physicians charged with the crime of terrorism, because it concluded that the mere testimony of one or more "arrepentidos" was insufficient grounds for a conviction. It acknowledged that the behavior of these physicians was in keeping with the ethics and legality of their professional activities; and

hh) The law has been interpreted differently in similar cases. The decision adopted in the alleged victim's case is not consistent with the decision of the same judges who acquitted other defendants in similar conditions.

Arguments of the alleged victim's representatives

75. The alleged victim's representatives endorsed the arguments of the Inter-American Commission in relation to the alleged violation of Articles 9, 7, 8 and 24 of the American Convention, and also stated that:

a) Both the Court and the Commission have already ruled on the incompatibility of Peru's anti-terrorist legislation with the American Convention;
b) The breadth of the definition of the crime terrorism allows the medical activity carried out by the alleged victim to be considered within this criminal definition;
c) When exercising his profession, the physician is obliged to apply the fundamental ethical and moral principles that must regulate every medical activity;
d) The principles of medical ethics established in the Hippocratic Oath also regulate the mission of physicians in time of armed conflict in relation, for example, to the Geneva Conventions;
e) The alleged victim continued to be deprived of her liberty, even though Legislative Decree No. 926 of February 19, 2003, established that an order should be issue for the judgment and the criminal trial held against her before secret courts to be annulled within 60 days. The same decree excluded the possibility of release from prison;
f) A decision of June 20, 2003, of the National Terrorism Chamber annulled the oral proceeding; however, at the date the brief with requests and arguments was submitted, the new trial had not taken place and the alleged victim continued to be deprived of her liberty "without having been convicted, without having been charged by the prosecutor, and subject to a proceeding opened for a crime that she ha[d] not committed";
g) When the brief with requests and arguments was submitted, a reasonable length of time had elapsed for a new proceeding to have been initiated. This had not happened, "making [the] detention [of the alleged victim] arbitrary";
h) On July 8, 2004, when the release of María Teresa De La Cruz Flores was ordered, by changing the detention order for one of conditional appearance, the violation of the alleged victim's right to personal liberty ceased;
i) Owing to the broad investigative powers granted to the police in cases of crimes of terrorism, based on article 12 of Decree Law No. 25,475, the police became the trial judge, conducting the whole preliminary investigation. In this regard, the judgment convicting the alleged victim was based on the police procedures and on the contents of the police deposition, all of which affected the independence of the judge;
j) In any new proceeding against the alleged victim, the police deposition would retain its legal effects under article 2 of Legislative Decree No. 926;
k) Even though the "faceless" Lima Superior Prosecutor declared that "there were no grounds for continuing on to an oral proceeding," in his opinion of June 7, 1996, the Special Terrorism Chamber of the Lima Supreme Court considered that there was sufficient evidence to go to trial. And although, at first, the Superior Prosecutor had preferred not to bring charges, he was subsequently obliged to do so under article 13(d) of Decree Law No. 25,475;

l) The State violated and continues to violate Article 8(1) of the Convention to the detriment of María Teresa De La Cruz Flores by having investigated, detained and prosecuted her under Decree Law No. 25,475, in the absence of an independent and impartial administration of justice, and by deciding that the police deposition should retain its effects in a possible oral proceeding under Legislative Decree No. 926;
m) The statements in answer to the charge, made in favor of the alleged victim during the oral proceeding, were rejected, and the initial statements made by the witnesses to the police authorities were accepted as the truth;
n) Article 13 of Decree Law No. 25,475 inverts the burden of proof and, in practice, creates a presumption of guilt that imposes on the defendant the onus probandi of his innocence. This norm establishes that the trial judge must open a criminal proceeding with an order to detain the defendant, and that, once the pre-trial investigation has been concluded, the file must be submitted to the President of the respective Superior Court, who must appoint the prosecutor who must formulate the charge;
o) The alleged victim should not have to assume the defects of the Peruvian legal system. Peru had all the necessary means to exercise jurisdictio against her, while Mrs. De La Cruz Flores endured every kind of restriction to her right to defense and to the judicial guarantees that underpin due process; the State itself has acknowledged that "the legislation under which she was processed was being modified to adapt it to the standards of the American Convention";
p) Given the declarations of Peru and also the legislative framework within which the new trial would be held, the State would not provide the alleged victim with a fair trial respecting the standards of due process;
q) If it is accepted that the State has the right to prosecute the alleged victim without the guarantees of due process, this would imply granting it authorization to "prosecute her continually [...], over and over again, for the same category of crime that the Court has considered violates the principle of legality"; and
r) The State has lost the right to prosecute the alleged victim and, consequently, if it tries her a second time for the same facts, it would violated Article 8(4) of the Convention.

Arguments of the State

76. With regard to the alleged violation of Articles 9, 7 and 8 of the American Convention, the State declared as follows:

a) The anti-terrorist legislation has been modified extensively, because the "faceless" tribunals have been eradicated as well as the trial of civilians by military judges, giving place to new trials with all the guarantees of due process and a democracy;b) In relation to the category of the crime of terrorism, following the judgment of the Constitutional Court of January 3, 2003, judges must use the criteria it established to interpret the crime in relation to the behavior of the defendant. A trial cannot be classified as irregular merely because the category of the crime is very open or contains very severe penalties, because the norm provides the framework of legality, and the judiciary establishes "the framework of justice";
c) By exercising a diffuse control, judges must cease to apply those provisions of the laws in force that have lost their rationale based on their social legitimacy and their support in the Constitution;

d) The grounds for the judgment have been duly explained and "it can be seen clearly that the defendant has been convicted for BELONGING TO SENDERO LUMINOSO";
e) If someone has been legally sentenced in a judgment delivered by a competent court, or has been placed in preventive detention for disobeying a court order or to oblige them to appear before the competent judicial authority when there are reasonable indications that they have committed an offence, this implies that the requirements of rationality and need are being complied with, and allows abuse of authority to be avoided or controlled;
f) According to the State's criminal procedural legislation, the period of preventive detention for crimes processed under the special procedure, such as the crime of terrorism, is 15 months; however, this period may be doubled. The time is calculated until the first-instance judgment has been handed down;
g) In the instant case, the judgment was delivered 7 months and 24 days after Mrs. De La Cruz Flores had been detained, so that the alleged victim's right to liberty was not violated due to the excess duration of her detention;
h) Based on Legislative Decree No. 926 and the case law of the Inter-American Court itself, the State has declared that the alleged victim should be given a new trial, although this does not imply that she will be released;
i) Mrs. De La Cruz Flores has obtained her liberty in the new criminal proceeding by using the pertinent legal instrument currently in force in Peru;
j) The judges responsible for the trial had been judges long before their appointment as "faceless" judges in any specific case. Their appointment is not based on the criteria of the individual who will be tried, but on "sub-specialization within the courts";
k) Law No. 26,671 tacitly annulled article 15 of Decree Law No. 25,475, as well as all those provisions that, similarly, prevented defendants from knowing the identity of those who were participating in their trial;
l) Legislative Decree No. 926 ordered the annulment of oral proceedings and judgments in which the prohibition to challenge judges, established in article 13(h) of Decree Law No. 25,475, declared unconstitutional by the judgment of the Constitutional Court of January 3, 2003, had been applied;
m) Article 13(a) of Decree Law No. 25,475 does not make "a statement of criminal liability" by making it obligatory to open a pre-trial investigation with a detention order. The detention order, or preventive detention, is not a punishment, because it is an exceptional precautionary measure;
n) The restriction of the right to question witnesses who took part in the preparation of the police deposition established in article 13(c)) of Decree Law No. 25,475 is designed to protect the lives and safety of members of the Peruvian National Police and their families; and
o) The Peruvian Constitution establishes, as do the principal international instruments for the protection of human rights, that criminal trials must essentially be of a public nature, with the exceptions established by law in the interests of justice. In this regard, interpretatively, trials that affect State security should not be public.

Considerations of the Court

77. Article 9 of the American Convention establishes that:

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

78. First, it should be noted that the Inter-American Commission and the representatives have alleged that the definition of the crime of terrorism in article 2 of Decree Law No. 25,475 violates the principle of legality embodied in Article 9 of the American Convention (supra paras. 74(e), (g) and (h), and 75(b)). In this regard, the Court observes that article 2 of Decree Law No. 25,475 (crime of terrorism) was not applied in the proceeding against the alleged victim; consequently, this Court will not examine it and will proceed to consider the arguments presented by the parties in relation to article 4 of this Decree Law (crime of acts of collaboration with terrorism).

79. Concerning the principle of legality in the penal sphere, the Court has indicated that the elaboration of criminal categories involves a clear definition of the criminalized conduct, establishing its elements, and the factors that distinguish it from behaviors that are either not punishable or punishable but not with imprisonment. [FN96]

[FN96] Cf. Case of Ricardo Canese, supra note 1, para. 174; Case of Cantoral Benavides, supra note 29, para. 157; and Case of Castillo Petruzzi et al., supra note 29, para. 121.

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80. Under the rule of law, the principles of legality and non-retroactivity govern the actions of all the State's bodies in their respective fields, particularly when the exercise of its punitive power is at issue. [FN97]

[FN97] Cf. Case of Ricardo Canese, supra note 1, para. 177; and Case of Baena Ricardo et al. Judgment of February 2, 2001. Series C No. 72, para. 107.

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81. In a democratic system, precautions must be strengthened to ensure that punitive measures are adopted with absolute respect for the basic rights of the individual, and subject to careful verification of whether or not unlawful behavior exists. [FN98]

[FN98] Cf. Case of Baena Ricardo et al., supra note 97, para. 106; and, inter alia, Eur. Court H.R. Ezelin judgment of 26 April 1991, Series A no. 202, para. 45; and Eur. Court H.R. Müller and Others, judgment of 24 May 1988, Series A no. 133, para. 29.

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82. In this regard, when applying criminal legislation, the judge of the criminal court is obliged to adhere strictly to its provisions and observe the greatest rigor to ensure that the

behavior of the defendant corresponds to a specific category of crime, so that he does not punish acts that are not punishable by law.

83. María Teresa De La Cruz Flores was prosecuted and convicted for acts of collaboration with terrorism, under article 4 of Decree Law No. 25,475 in a judgment of November 21, 1996. Even though, in this judgment, the judge declared that María Teresa de La Cruz Flores was convicted as perpetrator of the "crime of terrorism against the State," the Court observes that the article on which the domestic court based itself to deliver this sentence is article 4 of Decree Law No. 25,475, which defines the crime of acts of collaboration with terrorism. This sentence and the trial that produced it were declared null on June 20, 2003 (supra para. 73(39)); however, the Court observes that this judgment had effects that violated the human rights of Mrs. De La Cruz Flores, which were not repaired by its mere annulment, and fall within the competence of the Court.

84. In relation to the principle of legality, the Court will now refer to the following issues: a) the relationship between the behavior that Mrs. De La Cruz Flores was charged with in the judgment of November 21, 1996, and article 4 of Decree Law No. 25,475; b) the failure to specify which of the acts defined in the said article 4 encompassed the behavior of Mrs. De La Cruz Flores; c) the penalization of a medical activity; and d) the obligation to report possible criminal acts by physicians.

85. The said article 4 of Decree Law No. 25,475 establishes that:

Anyone who voluntarily obtains, gathers, collects or facilitates any type of goods or instruments or carries out acts of collaboration that in any way facilitate the perpetration of the crimes included in Decree Law [No. 25,475] or the achievement of the goals of a terrorist group, shall be punished by no less than 20 years' imprisonment.

The following are acts of collaboration:

a. The provision of documents and information on individuals and property, facilities, public and private buildings and any other that specifically contributes to or facilitates the activities of terrorist elements or groups.
b. The ceding or use of any type of accommodation or other means which could be used to hide individuals or serve as a deposit for weapons, explosives, propaganda, provisions, medicines, and other belongings related to terrorist groups or their victims.
c. The intentional transfer of individuals belonging to terrorist groups or linked to their criminal activities, and also the provision of any kind of assistance that helps them escape.
d. The organization of courses or the management of centers of indoctrination and training for terrorist groups, operating under any cover.
e. The manufacture, acquisition, possession, theft, storage or supply of weapons, ammunition, explosive, asphyxiant, inflammable, toxic or other substances or objects that could cause death or injury. An aggravating circumstance is the possession and hiding of weapons, ammunition or explosives belonging to the Armed Forces and the Peruvian National Police.
f. Any form of financial activity, help or mediation carried out voluntarily in order to finance the activities of terrorist elements or groups.

a) Relationship between the behavior that Mrs. De La Cruz Flores was charged with in the judgment of November 21, 1996, and article 4 of Decree Law No. 25,475

86. In the instant case, the judgment of November 21, 1996 (supra para. 73(27)) established the following:

"[…] regarding physicians whose liability has been proved: even though, as health professionals, they are obliged to use their knowledge in favor of those who need it, without any discrimination, caring for human life and disregarding political and religious beliefs, the charges against them are not merely for having provided their medical expertise to terrorists, because, if this was so, it would not be a crime, but because when a physician presumes or knows the unlawful origin of the injuries caused to an individual, he is obliged to report the fact or advise the authorities so that the latter may conduct the respective investigation; and, in the case of the defendants Guerrero Caballero, María Teresa De la Cruz Flores and Paula Veliz Terry, they are not only charged with having acted as physicians, but that, as such, they were members of the terrorist organization; in other words, their intentional acts were not only guided by compliance with the Hippocratic Oath, because, in addition to treating patients, they were aware that they thereby assisted the organization, performing the tasks with which, as physicians, they had been entrusted, and it is their membership in a subversive group that is punished by the law […]".

87. The judgment of November 21, 1996, considered that María Teresa De La Cruz Flores had not been charged because she was a physician, "but that, as a physician[...] she was a member of the terrorist organization"; nevertheless, she was only convicted under article 4 of Decree Law No. 25,475. Moreover, during the processing of the case before the Inter-American Court, the State indicated:

What is on trial at this time and what [Mrs. De La Cruz Flores] is being investigated for is […] her membership, or that she belongs to, or that as [a physician] she belonged to the terrorist organization, and was aware that she thereby assisted the organization; this is what is being investigated currently by our Judiciary, by its judges specialized in terrorism issues, and for which she may be convicted or […] acquitted, or [it is possible that] the physician could be granted unconditional release; that is the basic issue, not the issue of the medical activity.

88. The Court observes that Article 4 of Decree Law No. 25,475, under which Mrs. De La Cruz Flores was convicted, defines acts of collaboration with terrorism as a crime and not membership in an organization that may be considered a terrorist group, nor does it establish the obligation to report possible terrorist acts. Membership in a terrorist organization is defined as a crime in Article 5 of Decree Law No. 25,475, and the reporting obligation is established in Article 407 of the 1991 Penal Code. The Court will refer to the issue of the reporting obligation below (infra paras. 96 and ff.). However, membership in an organization and failure to report are the specific elements that the domestic court considers have given rise to the criminal liability of the alleged victim in the judgment of November 21, 1996. These behaviors are not included in Article 4 of Decree Law No. 25,475, which is the only substantive article on which the judgment against Mrs. De La Cruz Flores was based.

b) Failure to specify which of the acts defined in article 4 of Decree Law No. 25,475 included Mrs. De La Cruz Flores' behavior

89. Article 4 of Decree Law No. 25,475 describes numerous different criminal behaviors that constitute the crime of collaboration with terrorism. The domestic tribunal failed to specify in its judgment which of these behaviors had been committed by the alleged victim to make her guilty of the crime.

c) Penalization of medical activities

90. On September 16, 1995, during the trial against the alleged victim, the Lima Fourteenth Criminal Court issued an order to open the pre-trial investigation against María Teresa De La Cruz Flores and others, because they "were members of the Peruvian Communist Party (Sendero Luminoso), and had provided medical care, treatment and operations, and supplied medication and medical equipment for the treatment of terrorist criminals[;] acts [which] constitute the crime established and penalized in article 4 of [D]ecree [L]aw [No.] 25,475."

91. On April 1, 1996, the Prosecutor of the Lima Fourteenth Provincial Prosecutor's office indicated in his report (supra para. 73(22)) that María Teresa De La Cruz Flores had "used her professional activities in the field of medicine [… and] that her actions were designed to save rights [...] such as life."

92. On June 7, 1996, the Lima Superior Prosecutor issued his report (supra para. 73(23)), in which he indicated, with regard to María Teresa de La Cruz Flores, that "her participation had consisted in providing medical care to militants."

93. In relation to María Teresa De la Cruz Flores, the judgment of November 21, 1996 (supra para. 73(27)), considered that:

[the case file] describes the documentation found in 1992 on Víctor Zavala Castaño, Francisco Morales Zapata, Eduviges Crisóstomo Huayanay, Felipe Crisóstomo Huayanay, Rosa Esther Malo Vilca and Miriam Rosa Juárez Cruzatt, which implicates the defendant, and in which she appears under the alias "Elíana"; one of these documents refers not only to meetings with the defendant, but also, examines her doctrinal and ideological evolution within the organization, there are descriptions of talks that she has given, as a physician; that she has taken part in an operation as the assistant surgeon, and of problems within the health sector, all of which has been corroborated [...] by the defendant, Elisa Mabel Mantilla Moreno, who, in the presence of the Prosecutor states that, on one occasion, she met with María Teresa De la Cruz on the orders of her 'handler,' to coordinate several matters; […] the same defendant […] accuses her of being one of the supportive elements responsible for providing treatment and performing operations; [...] accuses her of participating in an operation on 'Mario' whose hand had been burned, which corroborates the foregoing; namely, that she took part as assistant surgeon in a skin-grafting operation; and it is evident that the defendant has denied this during the proceeding so as to elude her criminal liability, which has been adequately proved[.]

94. The Court observes that the medical act is acknowledged in numerous normative and declarative documents relating to the medical profession. [FN99] For example, article 12 of the Code of Ethics and Deontology of the Physician's Professional Association states that "[the] medical act is any activity or procedure performed by a physician in the exercise of the medical profession. It includes the following: acts of diagnosis, therapeutics and prognosis carried out by a physician when providing comprehensive care to patients, and also acts deriving directly therefrom. Such medical acts may only be exercised by members of the medical profession."

[FN99] Cf. International Code of Medical Ethics, World Medical Association; Regulations in time of armed conflict, World Medical Association; European Principles of Medical Ethics; Code of Ethics and Deontology of the Peruvian Physicians' Professional Association (file on merits, reparations, and costs, tome IV, folios 846 to 857); and Law, Statute and Rules of Procedure of the Peruvian Physicians' Professional Association (file on merits, reparations, and costs, tome IV, folios 858 to 941)

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95. For information only, the Court recalls that Article 18 of the First Geneva Convention of 1949 states that: "[n]o one may ever be molested or convicted for having nursed the wounded or sick." Also, Article 16 of Protocol I and Article 10 of Protocol II, both Protocols to the 1949 Geneva Conventions, establish that "Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom." At the time of the facts of this case, Peru was a party to those international instruments.

d) A physician's reporting obligation concerning possible criminal acts

96. The judgment of November 21, 1996 (supra para. 73(27)), also considered "that when the physician merely presumes or knows the unlawful origin of the injuries caused to an individual, he is obliged to report the fact or advise the authorities so that they may conduct the respective investigation."

97. In this regard, the Court considers that the information a physician obtains in the exercise of his profession is privileged by professional confidentiality. For example, the International Code of Medical Ethics of the World Medical Association establishes that "a physician must keep absolutely secret everything that has been confided in him, even after the death of the patient."

98. In this regard, Article 2(18) of the 1993 Constitution of Peru, which has precedence over any other domestic norm in Peruvian legislation, establishes that everyone has the right:

Not to make known his political, philosophical, religious or any other kind of beliefs, and also to respect professional confidentiality.

99. Moreover, Article 141 of the Code of Criminal Procedure establishes that: "the following shall not be obliged to testify: 1. members of religious orders, lawyers, physicians, notaries and midwives, with regard to the secrets confided to them in the exercise of their profession.

100. The Human Rights Committee has already recommended that domestic legislation be modified to protect the confidentiality of medical information. [FN100]

[FN100] Cf. Final observations of the Human Rights Committee, Chile, U.N.Doc.CCPR/C/79/Add.104 (1999).

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101. The Court considers that physicians have a right and an obligation to protect the confidentiality of the information to which, as physicians, they have access.

102. Consequently, in light of the above considerations, the Court believes that, when delivering the judgment of November 21, 1996, the State violated the principle of legality: by taking into account as elements that gave rise to criminal liability, membership in a terrorist organization and failure to comply with the reporting obligation, but only applying an article that did not define these behaviors; by not specifying which of the behaviors established in article 4 of Decree Law No. 25,475 had been committed by the alleged victim in order to be found guilty of the crime; for penalizing a medical activity, which is not only an essential lawful act, but which it is also the physician's obligation to provide; and for imposing on physicians the obligation to report the possible criminal behavior of their patients, based on information obtained in the exercise of their profession.

103. In view of the above, the Court considers that the State violated the principle of legality established in Article 9 of the American Convention, to the detriment of Mrs. De La Cruz Flores.

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104. Likewise, for the sake of legal certainty, the punitive norm must exist and be known, or could be known before the occurrence of the act or omission that violates it, and which it is intended to penalize. The definition of an act as an unlawful act and the determination of its legal effects must precede the conduct of the individual who is alleged to have violated it; because, before a behavior is defined as a crime, it is not unlawful for penal effects. If this were not so, individuals would not be able to adjust their behavior according to the laws in force, which express social reproach and its consequences. These are the grounds for the principle of the non-retroactivity of an unfavorable punitive norm. [FN101]

[FN101] Cf. Case of Baena Ricardo et al., supra note 97, para. 106; and, inter alia, Eur. Court H.R. Ezelin judgment of 26 April 1991, Series A no. 202, para. 45; and Eur. Court H.R. Müller and Others, judgment of 24 May 1988, Series A no. 133, para. 29.

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105. According to the principle of freedom from ex post facto laws, the State may not exercise its punitive power by applying penal laws retroactively that increase sanctions, establish aggravating circumstances or create aggravated types of offenses. The principle is also designed to prevent a person being penalized for an act that, when committed, was not an offense or could not be punished or prosecuted. [FN102]

[FN102] Cf. Case of Ricardo Canese, supra note 1, para. 175; and Case of Baena Ricardo et al., supra note 97, para. 106.

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106. In relation to the principle of freedom from ex post facto laws, the Court observes that, in her statement of September 7, 1995, before DINCOTE, Elisa Mabel Mantilla Moreno indicated that "at the end of 1988 [her] 'handler' told [them] that he [would] be traveling for a few days and gave [them] a meeting point to meet with 'Elíana' (María Teresa DE LA CRUZ […]) [;] DIANA […] pointed out the house and indicated that the patient was an individual called 'MARIO', whose right hand had been injured[; in that house] [she] saw 'ELIANA' (DE LA CRUZ) again, and it appears she operated on him."

107. Consequently, the Court considers that it is relevant to underscore that in the judgment of November 21, 1996 (supra para. 73(27)), which convicted María Teresa De La Cruz Flores, the only testimony cited in support of the judgment is the foregoing statement, which refers to acts she allegedly committed in 1988 and for which the provisions of Decree Law No. 25,475, which entered into force on May 5, 1992, were applied.

108. Moreover, in the new trial against the alleged victim (supra paras. 73(39) and ff.), an order was issued on June 9, 2004 (supra para. 73(45)), which referred to facts attributed to María Teresa De La Cruz Flores that occurred between 1989 and 1992; in other words, before the entry into force of Decree Law No. 25,475 (supra para. 73(2)). The said order modified the orders to open the pre-trial investigation of September 15 and 16, and October 1, 1995 (supra para. 73(20)), by applying the norms contained in the 1924 and 1991 Penal Codes to the facts that occurred prior to May 5, 1992, in the new trial. This was the first time that those norms were cited in the proceedings against Mrs. De La Cruz Flores.

109. In view of the above, the Court considers that the State violated the right to freedom from ex post facto laws embodied in Article 9 of the American Convention, in relation to Article 1(1) thereof, to the detriment of María Teresa De La Cruz Flores.

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110. Article 7 of the American Convention establishes that:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.

3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.
[…]

111. While, Article 8 of the American Convention establishes:

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.
2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:
   a) the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court;
   b) prior notification in detail to the accused of the charges against him;
   c) adequate time and means for the preparation of his defense;
   d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;
   e) the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law;
   f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;
   g) the right not to be compelled to be a witness against himself or to plead guilty; and
   h) the right to appeal the judgment to a higher court.
3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind.
4. An accused person acquitted by a non-appealable judgment shall not be subjected to a new trial for the same cause.
5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

112. The alleged victim was detained on March 27, 1996 (supra para. 73(12)), as a result of the investigation corresponding to the proceedings under file No. 113-95 for acts that allegedly constituted the crime of acts of collaboration with terrorism.

113. The Court has already indicated that the judgment convicting Mrs. De La Cruz Flores was imposed in violation of the principle of legality (supra para. 103 and 109). Consequently, the Court considers that none of the acts carried out within the proceedings that led to the delivery of this criminal conviction can be considered compatible with the provisions of the American Convention; accordingly, in the instant case, they entail the violation of other provisions of this international treaty.

114. Consequently, the detention of María Teresa De La Cruz Flores, arising from a trial that culminated in a conviction that violated the principle of legality was unlawful and arbitrary, and the respective proceedings were contrary to the right to a fair trial. Accordingly, the Court considers that the State violated the rights to personal liberty and to a fair trial embodied in Articles 7 and 8, respectively, of the American Convention, in relation to Articles 9 and 1(1) thereof.

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115. The Court observes that the arguments of the Inter-American Commission and of the alleged victim's representatives in relation to Article 24 of the American Convention are related to the failure to apply the figure of in dubio pro reo to the case of Mrs. De La Cruz Flores, when it was applied in the case of four other physicians, whose circumstances were similar to hers. In this regard, the Court considers that it does not have competence to replace the domestic judge to decide whether the circumstances in which some individuals were acquitted and others convicted were exactly the same and merited the same treatment and, therefore, that the existence of a violation of Article 24 of the Convention has not been sufficiently proved.

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116. The Court observes that a new trial against the alleged victim is currently underway, under the provisions of Legislative Decree No. 926, based on the opinion issued by the Superior Prosecutor of the Office of the Second Special Superior Prosecutor for Terrorism on September 2, 2003 (supra para. 73(40)).

117. The Court has stated that "[in accordance with the general obligation to respect rights and adopt provisions under domestic law (Arts. 1(1) and 2 of the Convention), the State is obliged to adopt such measures as may be necessary to ensure that violations such as those established in the instant case never again occur in its jurisdiction." [FN103]

[FN103] Case of Suárez Rosero. Judgment of November 12, 1997. Series C No. 35, para. 106; Cf. Case of Castillo Petruzzi et al., supra note 29, para. 222.

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118. In this regard, it is the State's responsibility to ensure that the new trial against María Teresa De La Cruz Flores observes the right to freedom from ex post facto laws embodied in Article 9 of the American Convention, including a strict correlation between the behavior and the category of crime. It must also ensure compliance with the requirements of due process of law, with full guarantees of a hearing and a defense for the defendant.

VIII. ARTICLE 5 OF THE AMERICAN CONVENTION IN RELATION TO ARTICLE 1(1) THEREOF (RIGHT TO HUMANE TREATMENT)

Arguments of the alleged victim's representatives

119. The alleged victim's representatives requested the Court to declare that the State had violated the right to humane treatment embodied in Article 5 of the American Convention, because:

a) The detention conditions to which the alleged victim was subjected (similar to those in the Loayza Tamayo and Cantoral Benavides cases) constituted cruel and inhuman treatment, which caused suffering and mental anxiety: pain, humiliation, impotence, uncertainty and frustration, owing to the unlawfulness of her conviction and her detention;
b) The alleged victim's conditions improved in 1997, after the adoption of Supreme Decree 005-97, which adopted the "Regulation of the Daily Regime and Progressivism of the Treatment of Prisoners Processed and Sentenced for the Crime of Terrorism and/or Treason." However, this has not meant that it meets international standards;
c) As of March 1996, the alleged victim is in the same prison where María Elena Loayza Tamayo was confined. Only, after 2000, when the democratic transition Government took office, did her situation change and improve;
d) The new trial against the alleged victim does not meet the minimum conditions of due process and constitutes cruel and inhuman treatment "by increasing [her] state [of] uncertainty, and also that of [her] family owing to acts attributable to the State";
e) Even thought penalties may not transcend the offender, the "faceless" judges inferred that the alleged victim's was guilty of collaboration with terrorism, because she was the wife of someone whom the State presumed or presumes to be a member of a terrorist organization; and
f) The next of kin of Mrs. De La Cruz Flores (her mother, her children and her siblings) constitute "secondary victims" given the detention, trial, conviction and re-opening of the proceeding against the alleged victim, owing to their impotence in the face of injustice, the humiliating treatment they have endured, and the deterioration in their finances.

Arguments of the Commission

120. The Inter-American Commission did not refer to the alleged violation of Article 5 of the American Convention argued by the representatives.

Arguments of the State

121. The State did not refer to the alleged violation of the right to humane treatment contained in Article 5 of the American Convention.

Considerations of the Court

122. First, the Court will refer to the possibility of incorporating rights other than those included in the application. This Court has already accepted that the alleged victims' representatives and/or their next of kin may invoke different rights from those invoked by the Commission in its application. [FN104] In this regard, the Court has considered that alleged victims are "holders of all the rights embodied in the American Convention and, if this were not admissible, [... that they could invoke new rights] it would be an undue restriction of their condition of subjects of international human rights law." [FN105] With regard to the rights invoked for the first time by the alleged victims' representatives and/or their next of kin, the Court has stipulated that, "they [should] refer to facts that are already included in the application." [FN106]

[FN104] Cf. Case of the "Juvenile Reeducation Institute", supra note 1, para. 125; Case of the Gómez Paquiyauri brothers, supra note 27, para. 179; Case of Maritza Urrutia. Judgment of November 27, 2003. Series C No. 103, para. 134.
[FN105] Case of the "Five Pensioners". Judgment of February 28, 2003. Series C No. 98, para. 155; and Cf. Case of the Gómez Paquiyauri brothers, supra note 27, para. 179; Case of Maritza Urrutia, supra note 104, paras. 134; and Case of Myrna Mack Chang. Judgment of November 25, 2003. Series C No. 101, para. 224.
[FN106] Case of the "Five Pensioners", supra note 105, para. 155; and Cf. Case of the Gómez Paquiyauri brothers, supra note 27; Case of Maritza Urrutia, supra note 104, paras. 134; and Case of Myrna Mack Chang, supra note 105, para. 224.

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123. Article 5 of the American Convention establishes that:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated in regards for the inherent dignity of the human person.
[…]
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.
[…]
6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

124. According to the provisions of Article 5 of the Convention, all persons deprived of their liberty shall be treated in regards for the inherent dignity of the human person. [FN107] Moreover, the State, which is responsible for detention establishments, must ensure that prisoners are confined in conditions that respect their rights. [FN108]

[FN107] Cf. Case of Tibi, supra note 1, para. 150; Case of the "Juvenile Reeducation Institute", supra note 1, para. 151; and Case of Bulacio. Judgment of September 18, 2003. Series C No. 100, para. 126.
[FN108] Cf. Case of Tibi, supra note 1, para. 150; Case of the "Juvenile Reeducation Institute", supra note 1, para. 152; and Case of Bulacio, supra note 107, para. 126.

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125. This Court has indicated that torture and cruel, inhuman, or degrading treatment, or punishment, are strictly prohibited by international human rights law. [FN109] The prohibition of torture and cruel, inhuman or degrading treatment is absolute and non-derogable, even in the most difficult circumstances, such as war, threat of war, the fight against terrorism and any other crime, martial law or state of emergency, civil war or commotion, suspension of constitutional guarantees, internal political instability or any other public disaster or emergency. [FN110]

[FN109] Cf. Case of Tibi, supra note 1, para. 143; Case of the Gómez Paquiyauri brothers, supra note 27, para. 111; and Case of Maritza Urrutia, supra note 104, para. 89.
[FN110] Cf. Case of Tibi, supra note 1, para. 143; Case of the Gómez Paquiyauri brothers, supra note 27, para. 111; and Case of Maritza Urrutia, supra note 104, para. 89.

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126. The Court has considered that it has been proved that Mrs. De La Cruz Flores was incommunicado during the first month of her detention, and in continuous solitary confinement for the first year, and that the visits she could receive were extremely restricted (supra para. 73(55)).

127. This Court has already stated that "[i]nternational human rights law has established that incommunicado must be exceptional and its use during detention may constitute an act against human dignity," [FN111] since it may produce a situation of extreme psychological and moral suffering for the detainee. [FN112]

[FN111] Cf. Case of Cantoral Benavides, supra note 29, para. 82.
[FN112] Cf. Case of Maritza Urrutia, supra note 104, para. 87; Case of Bámaca Velásquez. Judgment of November 25, 2000. Series C No. 70, para. 150; and Case of Cantoral Benavides, supra note 29, para. 84.

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128. Similarly, as of its first judgments, the Inter-American Court has considered that "the prolonged isolation and compulsory incommunicado to which the victim is subjected represent, in themselves, forms of cruel and inhuman treatment, harmful to the psychological and moral integrity of the individual and of the right of all those detained to respect for their inherent dignity as human beings." [FN113]

[FN113] Cf. Case of Maritza Urrutia, supra note 104, para. 87; Case of Bámaca Velásquez, supra note 112, para. 150; Case of Cantoral Benavides, supra note 29, para. 83; Case of Fairén Garbi and Solís Corrales. Judgment of March 15, 1989. Series C No. 6, para. 149; Case of Godínez Cruz. Judgment of January 20, 1989. Series C No. 5, para. 164; and Case of Velásquez Rodríguez. Judgment of July 29, 1988. Series C No. 4, para. 156.

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129. In this regard, the Court has indicated that:

One of the reasons why incommunicado is conceived as an exceptional instrument is because of the grave effects it has on the person detained. Indeed, isolation from the exterior world produces moral and psychological suffering in the person detained, placing him in a particularly vulnerable situation and increasing the risk of aggression and abuse of power in prisons. [FN114]

[FN114] Case of Suárez Rosero, supra note 103, para. 90; and Cf. Case of Maritza Urrutia, supra note 104, para. 87; Case of Bámaca Velásquez, supra note 112, para. 150, and Case of Cantoral Benavides, supra note 29, para. 84.

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130. The mere confirmation that the alleged victim was deprived of all communication with the external world for a month allows the Court to conclude that María Teresa De La Cruz Flores was subjected to cruel, inhuman and degrading treatment. During her incommunicado, she was confined in unhealthy conditions and could not change her clothes for a month (supra para. 73(55)). Moreover, under article 20 of Decree Law No. 25,475, during the year she was in isolation, she could only go out into the exercise yard for 30 minutes a day, had very limited possibilities of reading, and had an extremely restricted visiting regime. All these facts denote that the treatment to which Mrs. De La Cruz Flores was subjected was cruel, inhuman and degrading.

131. Added to the above, in the instant case, it has been proved that Mrs. De La Cruz Flores suffered from various physical ailments during her detention, for which she received inadequate medical care (supra para. 73(54)); this does not satisfy the minimum material requirements of dignified treatment appropriate to her status as a human being, as established in Article 5 of the American Convention.

132. The Inter-American Court understands that, pursuant to Article 5 of the American Convention, the State has the obligation to provide regular medical examinations and care to prisoners, and also adequate treatment when this is required. The State must also allow and facilitate prisoners being treated by the physician chosen by themselves or by those who exercise their legal representation or guardianship. [FN115]

[FN115] Cf. Case of Tibi, supra note 1, para. 157; and Case of Bulacio, supra note 107, para. 131.

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133. It is also pertinent to recall Principle 24 of the Principles for the Protection of All Persons Subject to Any Form of Detention or Prison, which establishes that: "[a] proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge." [FN116]

[FN116] Cf. UN. Series of Principles for the Protection of All Persons Subject to Any Form of Detention or Prison, adopted by the General Assembly in its resolution 43/173, of 9 December 1988, Principle 24.

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134. Furthermore, the European Court has stated that:

According to [Article 3 of the Convention], the State must ensure that a person is detained in conditions that are compatible in regards for human dignity, that the manner and way of exercising the measure do not subject him to anguish or difficulty over and above the inevitable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and welfare are ensured adequately, providing him, inter alia, with the necessary medical care. [FN117]

[FN117] Cf. Kudla v. Poland, No. 30210/96, para. 93-94, ECHR 2000-XI.

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135. This Court also considers that it has been proved that the detention of Mrs. De La Cruz Flores, and the conditions in which this occurred, resulted in the rupture of her family structure, so that her children grew up without their mother and had to abandon their personal plans (supra para. 73(57)). The Court recalls that Mrs. De La Cruz Flores indicated in the statement made before notary public (supra para. 50) that her next of kin "suffered as if they had been in prison with me." Moreover, the detention conditions caused her next of kin severe mental anguish.

136. In view of the above, the Court considers that the State violated the right to humane treatment embodied in Article 5 of the American Convention, in relation to Article 1(1) thereof, to the detriment of María Teresa De La Cruz Flores, and also that of her next of kin: Ana Teresa and Danilo Blanco De La Cruz, her children; Alcira Domitila Flores Rosas widow of De La Cruz, her mother; and Alcira Isabel, Celso Fernando and Jorge Alfonso De La Cruz Flores, her siblings.

IX. REPARATIONS APPLICATION OF ARTICLE 63(1) OF THE AMERICAN CONVENTION

Obligation to Repair

137. In accordance with the content of the preceding chapters, the Court has found that, in this case, the rights established in Articles 9 and 5 of the American Convention, in relation to Article 1(1) thereof, and in Articles 7 and 8 of the Convention, in relation to Articles 9 and 1(1) thereof, have been violated to the detriment of María Teresa De La Cruz Flores, and Article 5 of the Convention, in relation to Article 1(1) thereof, has been violated to the detriment of Danilo and Ana Teresa Blanco De La Cruz, the victim's children; Alcira Domitila Flores Rosas widow of De La Cruz, the victim's mother; and Alcira Isabel, Celso Fernando and Jorge Alfonso De La Cruz Flores, the victim's siblings.

138. On many occasions this Court has stated that it is a principle of international law that any violation of an international obligation that has caused harm, gives rise to an obligation to provide adequate reparation for this harm. [FN118] To this end, the Court has based itself on Article 63(1) of the American Convention, according to which:

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

[FN118] Cf. Case of the "Juvenile Reeducation Institute", supra note 1, para. 257; Case of Ricardo Canese, supra note 1, para. 192; and Case of the Gómez Paquiyauri brothers, supra note 27, para. 187.

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139. As the Court has indicated, Article 63(1) of the American Convention contains a norm of customary law that is one of the fundamental principles of contemporary international law on State responsibility. When an unlawful act occurs, which can be attributed to a State, this gives rise immediately to its international responsibility for violating the international norm, with the consequent obligation to cause the consequences of the violation to cease and to repair the damage caused. [FN119]

[FN119] Cf. Case of Tibi, supra note 27, para. 223; Case of the "Juvenile Reeducation Institute", supra note 1, para. 258; and Case of Ricardo Canese, supra note 1, para. 193.

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140. Whenever possible, reparation of the damage caused by the violation of an international obligation requires full restitution (restitutio in integrum), which consists in the re-establishment of the previous situation. If this is not possible, as in the instant case, the international Court must determine a series of measures to ensure that, in addition to guaranteeing respect for the violated rights, the consequences of the violations are remedied and compensation paid for the damage caused. [FN120] It is also necessary to add any positive measures the Stat must adopt to ensure

that harmful acts, such as that occurred in the instant case, are not repeated. [FN121] The responsible State may not invoke provisions of domestic law to modify or fail to comply with its obligation to provide reparation, all aspects of which (scope, nature, methods and determination of the beneficiaries) are regulated by international law. [FN122]

[FN120] Cf. Case of Tibi, supra note 1, para. 224; Case of the "Juvenile Reeducation Institute", supra note 1, para. 259; and Case of Ricardo Canese, supra note 1, para. 194.
[FN121] Cf. Case of the "Juvenile Reeducation Institute", supra note 1, para. 260; Case of Ricardo Canese, supra note 1, para. 195; and Case of the Gómez Paquiyauri brothers, supra note 27, para. 189.
[FN122] Cf. Case of Tibi, supra note 1, para. 224; Case of the "Juvenile Reeducation Institute", supra note 1, para. 259; and Case of Ricardo Canese, supra note 1, para. 194.
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141. As the term implies, reparations are measures intended to erase the effects of the violations committed. Their nature and amount depend on the damage caused at both the pecuniary and the non-pecuniary levels. [FN123] In this regard, the reparations established should be in relation to the violations that have been declared in the preceding chapters of this judgment.

[FN123] Cf. Case of Tibi, supra note 1, para. 225; Case of the "Juvenile Reeducation Institute", supra note 1, para. 261; and Case of Ricardo Canese, supra note 1, para. 196.

A) BENEFICIARIES

142. The Court now summarizes the argument of the Inter-American Commission, the representative of the victim and her next of kin, and the State regarding who should be considered the beneficiaries of the reparations ordered by the Court.

Arguments of the Commission

143. The Commission indicated that María Teresa De La Cruz Flores is the injured party in the instant case and, therefore the beneficiary of the reparations ordered by the Court.

Arguments of the victim's representatives

144. The victim's representatives indicated that the beneficiaries of the reparations ordered by the Court are: María Teresa De La Cruz Flores, victim; Danilo and Ana Teresa Blanco De La Cruz, the victim's children; Alcira Domitila Flores Rosas widow of De La Cruz, the victim's mother; and Alcira Isabel, Celso Fernando and Jorge Alfonso De La Cruz Flores, the victim's siblings.

Arguments of the State

145. The State did not refer to the issue of the beneficiaries of any reparations the Court might order in this case.

Considerations of the Court

146. Under Article 63(1) of the American Convention, the Court considers that María Teresa De La Cruz Flores is the injured party, because she is the victim of the violations of the rights established in Articles 9 and 5 of the American Convention, in relation to Article 1(1) thereof, and in Articles 7 and 8 of the Convention, in relation to Articles 9 and 1(1) thereof. It also considers that the following are beneficiaries: Danilo and Ana Teresa Blanco De La Cruz, the victim's children; Alcira Domitila Flores Rosas widow of De La Cruz, the victim's mother; and Alcira Isabel, Celso Fernando and Jorge Alfonso De La Cruz Flores, the victim's siblings, as victims of the violation of Article 5 of the American Convention, in relation to Article 1(1) thereof.

B) PECUNIARY DAMAGE

Arguments of the Commission

147. The Commission indicated that the victim would specify her claims regarding compensation for pecuniary damage.

Arguments of the victim's representatives

148. The victim's representatives asked for the following elements to be taken into account when determining compensation for pecuniary damage:

a) In relation to the loss of earnings: when she was detained the victim worked as a pediatrician. She earned US$500.00 (five hundred United States dollars) a month, which has increased over time to an amount equivalent to $550.00 (five hundred and fifty United States dollars). This remuneration, which she failed to received during the seven years she was deprived of her liberty, amounts to US$39,050.00 (thirty-nine thousand and fifty United States dollars), calculated on the basis of 12 salaries a year, in accordance with Peruvian legislation; and
b) In relation to indirect damage, the monthly expenses of the victim during her imprisonment for the acquisition of food and other personal expenses should be included, as well as the transport expenses incurred by her next of kin when they visited her in prison. In particular, Alcira Isabel De La Cruz Flores had to assume the role of mother to the victim's children together with her own mother, and also assume the responsibility for the alleged victim's defense, and she had to give up the possibility of continuing her academic professional training.

Arguments of the State

149. The State did not refer to the claims of the victim's representatives regarding possible reparations for pecuniary damage.

Considerations of the Court

150. The Court will determine the pecuniary damage arising from the loss of or deterioration in the victim's income and the expenditure incurred by the next of kin as a result of the facts, [FN124] and will establish a compensatory amount that seeks to repair the patrimonial consequences of the violations committed. To decide this, the Court will take into account the body of evidence in this case, its own case law, and the arguments of the victim's representatives.

[FN124] Cf. Case of Tibi, supra note 1, para. 234; Case of the "Juvenile Reeducation Institute", supra note 1, para. 283; and Case of Ricardo Canese, supra note 1, para. 201.

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a) Loss of income

151. The Court considers it has been proved that María Teresa De La Cruz Flores was a physician by profession and, at the time of her detention, she worked as a pediatrician in the Chincha Polyclinic in Lima (supra para. 73(6)).

152. The Court observes that, in the case file, there are no appropriate vouchers to determine the victim's exact earnings for her professional activities at the time of her detention. In this regard, considering the professional activity that the victim carried out to earn her living and the particularities of the instant case, the Court establishes, in fairness, the sum of US$39,050.00 (thirty-nine thousand and fifty United States dollars) as compensation for loss of earnings in favor of María Teresa De La Cruz Flores; the amount requested by the victim, which was not contested by the State.

b) Indirect damage

153. Bearing in mind the information it has received, the Court's case law, and the facts of the case, the Court considers that the compensation for indirect damage should also include the victim's monthly expenditure during her imprisonment for the acquisition of food and other personal expenses, and also the transport expenses incurred by the next of kin when visiting her in prison. In this regard, the Court considers it pertinent to establish, in fairness, the amount of US$5,000.00 (five thousand United States dollars) as compensation for indirect damage in favor of Alcira Domitila Flores Rosas widow of De La Cruz.

154. The Court also considers that it has been proved that Alcira Isabel De La Cruz Flores had to assume the role of mother of the victim's children together with her own mother, assume responsibility for the alleged victim's defense, and give up her studies in Brazil. On this point, the Court considers it pertinent to establish, in fairness, the amount of US$5,000.00 (five thousand United States dollars) as compensation for indirect damage in favor of Alcira Isabel De La Cruz Flores.

C) NON-PECUNIARY DAMAGE

155. The Court will now consider those harmful effects of the facts of the case that are not of a financial or patrimonial nature. Non-pecuniary damage can include the suffering and hardship caused to the direct victim and to his next of kin, the harm of objects of value that are very significant to the individual, and also changes, of a non-pecuniary nature, in the living conditions of the victim or his family. Since it is not possible to allocate a precise monetary equivalent to non-pecuniary damage, it can only be compensated in two ways in order to make integral reparation to the victims. First, by the payment of a sum of money or the provision of goods or services with a monetary value, which the Court decides by the reasonable exercise of judicial discretion and in terms of fairness. Second, by the implementation of acts or projects that achieve public recognition or repercussion, such as broadcasting a message that officially condemns the human rights violations in question and making a commitment to efforts designed to ensure that they do not happen again; such acts have the effect of restoring the reputation of the victims, recognizing their dignity and consoling their next of kin. [FN125] The first aspect of reparation for non-pecuniary damage will be considered in this section and the second in the following section.

[FN125] Cf. Case of Tibi, supra note 1, para. 242; Case of the "Juvenile Reeducation Institute" , supra note 1, para. 295; and Case of Ricardo Canese, supra note 1, para. 204.

Arguments of the Commission

156. The Commission indicated that the alleged victim would specify her claims regarding compensation for non-pecuniary damage.

Arguments of the victim's representatives

157. The victim's representatives requested the Court to determine reparation for the non-pecuniary damage inflicted, bearing in mind the following aspects:

a) With regard to "non-pecuniary damage," during her detention, the alleged victim was subjected to cruel, inhuman and degrading treatment; and the lives of her next of kin have been affected owing to the violations she suffered. It is not necessary to prove "non-pecuniary damage" in relation to the children or the parents of victims; in the case of siblings, the closeness of the relationship and the affection among them should be taken into account, so that the victim's sister, Alcira Isabel De La Cruz Flores, who personally assumed the responsibility for trying to obtain her release merits special attention;

b) Consequently, compensation for "non-pecuniary damage" is justified, in the amount of US$110,000.00 (one hundred and ten thousand United States dollars), distributed as follows US$15,000.00 (fifteen thousand United States dollars) for the victim's children, Danilo and Ana Teresa Blanco De La Cruz; US$10,000.00 (ten thousand United States dollars) for the victim's mother, Alcira Domitila Flores Rosas widow of De La Cruz and for the victim's sister, Alcira Isabel De La Cruz Flores; US$5,000.00 (five thousand United States dollars) for the siblings

Celso Fernando and Jorge Alfonso De La Cruz Flores; and US$50,000.00 (fifty thousand United States dollars) for the victim, María Teresa De La Cruz Flores;

c) Regarding damage to health, due to the deterioration in the victim's health as a result of the violations that have been decided, the State must grant adequate reparation for the damage to her physical and psychological health that will allow the victim to rehabilitate herself; consequently, it must provide medical treatment, and also medical and psychological treatment for the victim's next of kin; and

d) Regarding damage to her life plan, the victim's detention resulted in the impairment of personal and professional opportunities. The reconstruction of her life plan is closely tied to her reincorporation into her place of work and her professional updating. Given that immediately after obtaining her liberty, the victim will not be able to return to work, she should be granted a paid leave of absence for one year, and also updating courses in her field of specialization that will allow her to reincorporate her work in acceptable competitive conditions.

Arguments of the State

158. The State did not refer to the claims of the Commission and the victim's representatives regarding non-pecuniary damage, or any reparations the Court might order for this concept.

Considerations of the Court

159. International case law has established repeatedly that the judgment constitutes, per se, a form of reparation. However, owing to the circumstances of the instant case, the sufferings that the facts caused to the victim and her next of kin, the change in the living conditions of her next of kin and the other consequences of a non-pecuniary nature that they suffered, the Court considers that, in fairness, payment of compensation is pertinent for non-pecuniary damage. [FN126]

[FN126] Cf. Case of Tibi, supra note 1, para. 243; Case of the "Juvenile Reeducation Institute" , supra note 1, para. 299; and Case of Ricardo Canese, supra note 1, para. 205.

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160. When establishing compensation for non-pecuniary damage in the instant case, it must be taken into account that María Teresa De La Cruz Flores was subjected to cruel, inhuman and degrading treatment during her detention (supra para. 73(55)), she was deprived of her personal liberty for a long period, she suffered by being subjected to an improper proceeding, and she was unable to exercise her profession, even inside the prison, which affected her self-esteem significantly. This Court considers that it can be presumed that violations of this nature produce non-pecuniary damage in the individual who suffers them. [FN127]

[FN127] Cf. Case of Tibi, supra note 1, para. 244; Case of the "Juvenile Reeducation Institute" , supra note 1, para. 300; and Case of the Gómez Paquiyauri brothers, supra note 1, para. 217.

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161. In view of the above, the Court considers it pertinent to establish, in fairness, the sum of US$80,000.00 (eighty thousand United States dollars) as compensation for non-pecuniary damage in favor of Mrs. De La Cruz Flores.

162. In relation to the other victims, the detention and trial of Mrs. De La Cruz Flores caused suffering, anxiety and pain to her mother, Alcira Domitila Flores widow of De La Cruz; her children, Danilo and Ana Teresa Blanco De La Cruz; and her siblings, Alcira Isabel, Jorge Alfonso and Celso Fernando De La Cruz Flores, which has severely affected their living conditions and impaired their way of life (supra para. 73(57)). In particular, María Teresa De la Cruz Flores' mother and sister were very involved in efforts to secure her release (supra para. 73(57(b)); and her children were deprived of the opportunity of growing up under the direction and care of their mother (supra para. 73(57(a) and (f)).

163. Based on the above, this Court considers that the next of kin of Mrs. De La Cruz Flores must be compensated. Accordingly, it establishes the sum of US$40,000.00 (forty thousand United States dollars) in favor of Alcira Domitila Flores widow of De La Cruz; US$30,000.00 (thirty thousand United States dollars) in favor of Alcira Isabel De La Cruz Flores; US$15,000.00 (fifteen thousand United States dollars) in favor of Jorge Alfonso De La Cruz Flores; US$ 15,000.00 (fifteen thousand United States dollars) in favor of Celso Fernando De La Cruz Flores; US$30,000.00 (thirty thousand United States dollars) in favor of the minor, Danilo Blanco De La Cruz; and US$30,000.00 (thirty thousand United States dollars) in favor of Ana Teresa Blanco De La Cruz.

D) OTHER FORMS OF REPARATION (MEASURES OF SATISFACTION AND GUARANTEES OF NON-REPETITION)

164. In this section, the Court will determine those measures of satisfaction, which seek to repair the non-pecuniary damage that does not have a pecuniary dimension, and also establish measures with a public dimension or repercussion. These measures seek, inter alia, to acknowledge the dignity of the victims or to transmit a message of official reproof for the human rights violations in question, and also to avoid the repetition of violations such as those in the instant case. [FN128]

[FN128] Cf. Case of the "Juvenile Reeducation Institute", supra note 1, para. 310; Case of Ricardo Canese, supra note 1, para. 208; and Case of the Gómez Paquiyauri brothers, supra note 27, para. 223.

Arguments of the Commission

165. The Inter-American Commission requested the Court to order a series of measures as other forms of reparation. They include the following measures of satisfaction and guarantees of non-repetition:

a) As part of the reparation, the victim must be reincorporated into her work as a physician with at least the level and responsibilities she had when she was detained, and with recognition of the corresponding benefits; and
b) The State must organize a public act with an impact on the victim's professional activities, as a measure of moral satisfaction, given that, during the trial in which she was prosecuted and convicted, the medical act was criminalized, which "seriously affected her relations with her professional association."

Arguments of the victim's representatives

166. The victim's representatives requested the following measures of satisfaction and guarantees of non-repetition;

a) The victim's reincorporation into her employment and the recognition of the years of unlawful detention for the effects of her seniority and other work-related rights;
b) The guarantee of a fair trial for the victim;
c) Since the deprivation of the victim's liberty was the result of a series of unlawful acts, the reparation should include her release;
d) The State should vindicate the alleged victim publicly before Peruvian society and before the medical profession, and the judgment delivered by the Court should be published in an official newspaper of the State, and also in a daily newspaper with national circulation; and
e) An investigation should be conducted and those responsible for the violations declared by the Court should be punished, because the investigation of the facts and the punishment of those responsible is a State obligation whenever human rights have been violated. In this regard, a State that leaves human rights violations unpunished would also be failing to comply with the general obligation to guarantee the free and full exercise of the rights to all persons subject to its jurisdiction.

Arguments of the State

167. In this regard, the State indicated that the alleged victim's reincorporation into her employment would result from the judgment delivered in the trial underway for the crime of terrorism, in which she could be convicted or acquitted.

Considerations of the Court

Medical and psychological treatment for María Teresa De La Cruz Flores

168. Having examined the arguments of the victim's representatives and also the body of evidence in the instant case, it is clear that Mrs. De La Cruz Flores' physical and psychological problems still persist (supra para. 73(54)). Consequently, this Court considers, as it has on other occasions, [FN129] that reparations must also include psychological and medical treatment for the victim. In this regard, the Court considers that the State must provide medical and psychological care to the victim through its health services, including the provision of medication without charge.

[FN129] Cf. Case of Tibi, supra note 1, para. 249; Case of Molina Theissen. Reparations (art. 63(1) American Convention on Human Rights). Judgment of July 3, 2004. Series C No. 108, para. 71; Case of Myrna Mack Chang, supra note 105, para. 266; and Case of Bulacio, supra note 107, para. 100

Reincorporation of María Teresa De la Cruz Flores into her employment and professional updating

169. The Court considers that the State must reincorporate the victim into the activities that, as a physician, she had been performing in public institutions at the time of her detention. She must be reincorporated, at least, at the level she had attained when she was detained.

170. The Court also considers that the State must prove the victim with the possibility of receiving professional training and updating, by awarding her a grant that allows her to take the professional training and updating courses of her choice.

171. The State is also obliged to re-enter the victim on the respective retirement register, with effect retroactive to the date on which she was taken off it, and ensure her the full enjoyment of her right to retirement, in the conditions she had before her detention.

Release of María Teresa De la Cruz Flores

172. In relation to the claim of the victim's representatives that she should be released, the Court observes that the request made by the victim's defense lawyers during the trial at the domestic level that the detention order be modified was declared admissible on July 8, 2004, by the Fourth Criminal Court for Terrorism (supra para. 73(47)), a decision that was confirmed by the National Terrorism Chamber on September 24, 2004 (supra para. 73(52)). The victim's current legal status, including the order on conditional appearance issued against her by the Fourth Criminal Court for Terrorism, is a result of the new trial being held before that Court, which is the authority that the defendant's legal status depends on in this regard. Consequently, on this point, the Court refers to the contents of paragraphs 116 to 118 of this judgment.

Publication of the pertinent part of the Court's judgment

173. As it has on other occasions, [FN130] the Court considers that, as a measure of satisfaction, the State must publish within one year from the notification of this judgment, at least once in the official gazette and in another daily newspaper with national circulation in Peru, the section entitled "Proven Facts," without the corresponding footnotes, and operative paragraphs 1 to 3 of this judgment (infra paras. 188(1), 188(2) and 188(3)).

[FN130] Cf. Case of Tibi, supra note 1, para. 260; Case of the "Juvenile Reeducation Institute", supra note 1, para. 315; and Case of Ricardo Canese, supra note 1, para. 209.

X. COSTS AND EXPENSES

Arguments of the Commission

174. The Commission requested the Court that, after hearing the victim's representatives, it order the State to pay the costs incurred at the national level and at the international level by processing the case before the Commission, and those incurred as a result of processing the application before the Court.

Arguments of the victim's representatives

175. The victim's representatives requested the Court to order the State to pay US$10,000.00 (ten thousand United States dollars) to the Medical Association of the Peruvian Social Security Institute, the Physician's Professional Association of Peru and the Peruvian Medical Federation for the expenditure they incurred for the victim's defense; also, a reasonable amount for professional fees for the representatives' professional advice before the Commission, and the costs arising from processing the application before the Court.

Arguments of the State

176. The State did not refer to the claims relating to costs and expenses formulated by the Inter-American Commission and the victims' representatives.

Considerations of the Court

177. As the Court has indicated on previous occasions, [FN131] costs and expenses are included in the concept of reparation embodied in Article 63(1) of the American Convention, because the measures taken by the victim to obtain justice, at the domestic and the international level imply expenditure that must be compensated when the State's international responsibility has been declared in a judgment against it. Regarding reimbursement, the Court must prudently assess their scope, and they include the expenses incurred before the authorities of the domestic jurisdiction, and also those incurred during the proceedings before the inter-American system, taking into account the circumstances of the specific case and the nature of the international jurisdiction for the protection of human rights. This assessment should be based on the principle of fairness and by evaluating the expenses indicated by the parties, providing the quantum is reasonable.

[FN131] Cf. Case of Tibi, supra note 1, para. 268; Case of the "Juvenile Reeducation Institute", supra note 1, para. 328; and Case of Ricardo Canese, supra note 1, para. 212.

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178. The Court takes into account that the victim acted through representatives before both the Commission and the Court. Accordingly, the Court considers it fair to order the payment of the total sum of US$30,000.00 (thirty thousand United States dollars), to be delivered to María

Teresa De La Cruz Flores to cover the costs and expenses incurred by her representative, the lawyer, Carolina Loayza Tamayo, in the domestic proceedings and in the international proceeding before the inter-American system for the protection of human rights.

XI. MEANS OF COMPLIANCE

179. To comply with the judgment, the State shall pay the compensation (supra paras. 152 to 154, 161 and 163), reimburse the costs and expenses (supra para. 178) and adopt the measures ordered in paragraphs 168 to 171 and 173, within one year of the notification of this judgment.

180. The payment of the compensation established in favor of the victim or her next of kin, as applicable, shall be made directly to them. If any of them have died, the payment shall be made to their heirs.

181. The payments to reimburse the costs and expenses arising from the measures taken by the victim's representatives in the domestic proceedings and in the international proceedings before the inter-American system for the protection of human rights, shall be made in favor of the victim, María Teresa De La Cruz Flores (supra para. 178).

182. If, due to causes that can be attributed to the beneficiaries of the compensation, they are unable to receive it within the said period of one year, the State shall deposit such amounts in their favor in an account or a deposit certificate in a reputable Peruvian banking institution, in United States dollars or the equivalent in Peruvian currency and in the most favorable financial conditions allowed by legislation and banking practice. If, after ten years, the compensation has not been claimed, the sums shall be returned to the State, with the interest earned.

183. In the case of the compensation ordered in favor of the minor, Danilo Alfredo Blanco De La Cruz, the State shall deposit it in a reputable Peruvian institution, in United States dollars or in the national currency, at the choice of the minor's legal representative. The investment shall be made within one year, in the most favorable financial conditions allowed by legislation and banking practice, while he remains a minor. The beneficiary may only withdraw it when he attains his majority, or when, in the best interests of the child and at the decision of a competent judicial authority, it is so ordered. If, ten years after the minor has attained his majority, this compensation has not been claimed, the sum shall be returned to the State, with the interest earned.

184. The State may comply with its obligations by payment in United States dollars or the equivalent amount in Peruvian currency, using the rate of exchange between the two currencies in force on the market in New York, United States, the day before the payment, to make the respective calculation.

185. The payments ordered in this judgment may not be affected, reduced or conditioned by any current or future taxes or charges.

186. If the State should fall in arrears, it shall pay interest on the amount owed, corresponding to bank interest on arrears in Peru.

187. In accordance with its consistent practice, the Court retains the authority, inherent in its terms of reference, to monitor full compliance with this judgment. The instant case shall be filed when the State has fully implemented all its provisions. Within one year of notification of this judgment, the State shall provide the Court with a first report on the measures taken to comply with this judgment.

XII. OPERATIVE PARAGRAPHS

188. Therefore,

THE COURT,

DECLARES:

Unanimously, that:

1. The State violated the right to freedom from ex post facto laws embodied in Article 9 of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of María Teresa De La Cruz Flores, in the terms of paragraphs 78, 83, 87 to 93, 102, 103 and 106 to 109 of this judgment.
2. The State violated the rights to personal liberty and to a fair trial embodied in Articles 7 and 8, respectively, of the American Convention on Human Rights, in relation to Articles 9 and 1(1) thereof, to the detriment of María Teresa De La Cruz Flores, in the terms of paragraphs 112 to 114 of this judgment.
3. The State violated the right to humane treatment embodied in Article 5 of the American Convention on Human Rights, in relation to Article 1(1) thereof, to the detriment of María Teresa De La Cruz Flores, Alcira Domitila Flores Rosas de De La Cruz, Alcira Isabel De La Cruz Flores, Celso Fernando De La Cruz Flores, Jorge Alfonso De La Cruz Flores, Ana Teresa Blanco De La Cruz and Danilo Alfredo Blanco De La Cruz, in the terms of paragraphs 126, 130, 131, 135 and 136 of this judgment.

AND DECIDES:

Unanimously that:

1. The State shall observe the right to freedom from ex post facto laws embodied in Article 9 of the American Convention and the requirements of due process in the new trial of María Teresa De La Cruz Flores, in the terms of paragraph 118 of this judgment.
2. This judgment constitutes per se a form of reparation, in the terms of paragraph 159 of this judgment.
3. The State shall pay the amounts established in paragraphs 152 to 154 of this judgment to María Teresa De La Cruz Flores, Alcira Domitila Flores Rosas widow of De La Cruz and Alcira Isabel De La Cruz Flores for pecuniary damage, in the terms of those paragraphs.
4. The State shall pay the amounts established in paragraphs 161 and 163 of this judgment to María Teresa De La Cruz Flores, Alcira Domitila Flores Rosas widow of De La Cruz, Alcira

Isabel De La Cruz Flores, Celso Fernando De La Cruz Flores, Jorge Alfonso De La Cruz Flores, Ana Teresa Blanco De La Cruz and Danilo Alfredo Blanco De La Cruz for non-pecuniary damage, in the terms of those paragraphs.

5. The State shall provide medical and psychological treatment to the victim through the State's health services, including the provision of free medication, in the terms of paragraph 168 of this judgment.

6. The State shall reincorporate María Teresa De La Cruz Flores into the activities that she had been performing as a medical professional in public institutions at the time of her detention, in the terms of paragraph 169 of this judgment.

7. The State shall provide María Teresa De La Cruz Flores with a grant that allows her to receive professional training and updating, in the terms of paragraph 170 of this judgment.

8. The State shall re-enter María Teresa De La Cruz Flores on the respective retirement register, in the terms of paragraph 171 of this judgment.

9. The State shall publish in the official gazette and in another daily newspaper with national circulation the section entitled "Proven Facts" and operative paragraphs 1-3 of the declaratory part of this judgment, in the terms of paragraph 173 of the judgment.

10. The State shall pay the amount established in paragraph 178 of this judgment to María Teresa De La Cruz Flores for costs and expenses, in the terms of this paragraph.

11. The State shall pay the compensation, reimburse the costs and expenses, and adopt the measures ordered in paragraphs 168 to 171 and 173 of this judgment, within one year from its notification, as indicated in paragraph 179 hereof.

12. The State shall deposit the compensation ordered in favor of the minor, Danilo Alfredo Blanco De La Cruz, in a banking investment in his name in a reputable Peruvian institution, in United States dollars or in the national currency, at the choice of the minor's legal representative, within one year, and in the most favorable financial conditions allowed by legislation and banking practice, while he remains a minor, in the terms of paragraph 183 of this judgment.

13. The State may comply with its pecuniary obligations by payment in United States dollars or the equivalent amount in national currency, using the rate of exchange between the two currencies in force on the market in New York, United States, the day before payment, to make the respective calculation, in the terms of paragraph 184 of this judgment.

14. The payments for pecuniary and non-pecuniary damage, and costs and expenses established in this judgment may not be affected, reduced or conditioned by any current or future taxes or charges, in the terms of paragraph 185 of this judgment.

15. Should the State fall in arrears, it shall pay interest on the amount owed corresponding to bank interest on arrears in Peru, in the terms of paragraph 186 of this judgment.

16. If, due to causes that can be attributed to the beneficiaries of the compensation, they are unable to receive it within the said period of one year, the State shall deposit such amounts in their favor in an account or a deposit certificate in a reputable Peruvian banking institution, in the terms of paragraph 182 of this judgment.

17. It shall monitor full compliance with this judgment and shall file the instant case when the State has fully implemented all its provisions. Within one year of notification of this judgment, the State shall provide the Court with a report on the measures taken to comply with it, in the terms of paragraph 187 of this judgment.

Judge Sergio García Ramírez advised the Court of his Separate Opinion, which accompanies this judgment.

Sergio García-Ramírez
President

Alirio Abreu-Burelli
Oliver Jackman
Antônio A. Cançado Trindade
Cecilia Medina-Quiroga
Manuel E. Ventura-Robles

Pablo Saavedra-Alessandri
Secretary

So ordered,

Sergio García-Ramírez
President

Pablo Saavedra-Alessandri
Secretary

SEPARATE OPINION OF JUDGE SERGIO GARCIA RAMIREZ IN THE JUDGMENT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS IN THE CASE OF DE LA CRUZ FLORES OF NOVEMBER 18, 2004.

1. In this separate opinion I refer to only one issue examined in the judgment delivered by the Inter-American Court of Human Rights on November 18, 2004, in the Case of De La Cruz Flores: the medical act and criminal legislation, from the perspective of human rights and in the circumstances ratified in this case. I refer to the expression 'medical act' as it is used in the judgment, which borrows the definition from article 12 of the Code of Ethics and Deontology of the Doctors' Professional Association of Peru (the State referred to in the matter sub judice), which includes generally accepted concepts: "a medical act is any activity or procedure carried out by a doctor in the exercise of the medical profession. It includes the following: acts of diagnosis, therapeutics and prognosis performed by a doctor when providing comprehensive care to patients, and also acts deriving directly therefrom. Such medical acts may only be exercised by the members of the medical profession."

2. A clear distinction should be established between this activity (which falls within the framework of the exercise of a profession and responds the corresponding purposes and methods), from any other activity that is penally typical or atypical, and that is subject to its own type of regulation and to the legal consequences established by law, including those of a penal nature. It should not be forgotten that, at times, it may be difficult to make a distinction and that some situations may suggest the existence of a criminal violation behind an alleged medical procedure. However, these practical problems do not invalidate the significance of the affirmation contained in this opinion, which supports the judgment delivered by the Court. On the one hand, there are the characteristics of each fact, act or conduct, which must be assessed in

their own terms, and on the other hand, the problems involved in the investigation and identification of the facts. The former is a matter for the legislator and the judge, and the latter for the investigator. The Court must avoid a flawed investigation, with uncertain or erroneous results, contaminating its assessment of the nature of the conduct and the appropriate legal response.

3. It is obviously possible that someone exercising the medical profession may, independent of this, perform acts that might be established in criminal legislation and therefore merit different types of penalties. This leads us to insist on the need to trace a borderline, as precisely as possible – at the threefold level of legal classification, investigation and prosecution – between such punishable conducts and others that are performed exclusively within the framework of the medical act; that is, within the framework of the activities of a professional in the field of medicine, using his knowledge and expertise in this discipline to safeguard the lives and health of others. In brief, this is the purpose of the medical act, which contributes to its legal classification.

4. For the purpose of establishing penalties, criminal legislation must include certain behaviors that gravely affect the most relevant juridical rights. The idea of a minimum criminal law, associated with guaranteeism which today faces attacks from different sources, supposes the incrimination of such unlawful behaviors, in view of their gravity and the harm they produce, when there are no alternate social or legal means to avoid them or punish them. According to this concept, criminal legislation should be used as a last resort for social control, and focus on those behaviors of extreme gravity. Even when classifying certain behaviors as crimes is justified, this must be done objectively and prudently – which could be called "Beccarian prudence" – fitting the penalties to the gravity of the offence and to the guilt of the perpetrator, without losing sight of the possible differences within the same category – murder and culpable homicide, for example - which call for a different sanction. This matter has been examined in the Inter-American Court's case law, with regard to Article 4(2) of the American Convention – concerning protection of the right to life – in the judgment delivered in Hilaire, Constantine y Benjamin et al. v. Trinidad and Tobago, on June 21, 2002. I refer to what I said in my separate opinion accompanying that judgment.

5. If, when incriminating unlawful conducts, the penal legislator must distinguish between the different possible hypotheses and deal with each one appropriately, rationally and specifically, with all the more reason must he avoid incriminating conducts that are not unlawful. The fact that a conduct is objectively established in a category of crime included in the relevant legislation does not imply that this automatically satisfies the requirement of the legitimacy of criminal laws. Otherwise, one could justify accepting acts, which are materially admissible and even plausible, established by authoritarian regimes to combat dissent, differences and discrepancies, an occurrence that is well known throughout history and widely condemned. The Inter-American Court has ruled on this issue also when examining the characteristics of legislation that provides for limitations or restrictions to the exercise of rights. The rulings contained in Advisory Opinion OC-6/86 of May 9, 1986, on "The Word "Laws" in Article 30 of the American Convention of Human Rights," should be recalled, in this respect.

6. When a conduct is carried out with the intention of harming a juridical right, the application of a penalty to the author can be justified – with the abovementioned limitations. However, the situation is very different when the intention of the agent is to preserve a high-ranking juridical right whose protection also constitutes an immediate and direct obligation of the person executing the behavior. It must be borne in mind that the safeguard and development of the lives of the individual and the group have led to identifying, encouraging and regulating the performance of certain activities – scientific, technical, artistic, relating to public or social service, etc. – which are considered to be socially useful and even necessary, and which are generally surrounded by appropriate guarantees. The systematic recognition of these activities, at times converted into social functions, constitutes a point of reference to quality their lawfulness and establish the pertinent legal consequences.

7. One of the oldest and most noble activities is that designed to safeguard the life and health of the individual. In this case, what is involved is the protection of the highest-ranking rights, a condition for the enjoyment of all the others. Society as a whole has an interest in it and the State must protect it. This is precisely, the case of the medical profession, whose regulation includes an important ethical component, in addition to elements relating to the techniques to be applied in each case, in keeping with the duty to provide care inferred from the lex artis. The medical professional who takes care of the health of his fellow men and protects them from disease and death fulfills his natural obligation, and the law must protect this carefully. This task and this protection have their own meaning, totally independent of the political, religious or philosophical ideas of the doctor and his patient. If the State imposed on or authorized doctors to misuse their profession, as has occurred under totalitarian regimes, it would be just as censurable as if it prevented them from complying with their ethical and juridical duty, and even imposed penalties for such compliance. In both cases the State would be harming the right to life and health of the individual, both directly and by intimidation or restrictions imposed on those who, due to their profession, are regularly obliged to intervene in the protection of those rights.

8. In my opinion, the State cannot violate the protection of health and life for which doctors are responsible, by norms or interpretations of norms that dissuade a doctor from complying with his duty, either because they threaten him with the application of a penalty (a threat that can prevent him from providing medical services), or because they induce him to make distinctions contrary to the principles of equality and non-discrimination, or because they oblige him to deviate from his proper functions and assume others that enter into conflict with the former, pose unacceptable dilemmas, or change the basis of the relationship between doctor and patient, as would happen if doctors were obliged to inform on the patients they treat. A similar situation would arise, if lawyers were forced to report the unlawful acts committed by their clients (which they learn about through their relationship of assistance and defense), or priests to reveal the secrets of the confessional.

9. This does not mean trying to prevent the legitimate prosecution of unlawful conducts, which must be combated with appropriate means, but rather maintaining each social relationship in its corresponding niche, not only for the benefit of the individual, but also for the benefit of society. Given their functions, the prosecutor and the investigator must ask the necessary questions. The doctor, the defense lawyer and the priest must do the same, fully protected by the State, in the exercise of their mission, and this is evidently not the investigation of offences and

the prosecution of perpetrators. It is not necessary to describe the crisis that would occur if the professional and social roles were disrupted and doctors, defense lawyers and priests were tacitly incorporated into the ranks of the police. If confidential communications between the lawyer and the accused are protected from interference, and it is accepted that the priest is not obliged to violate the secret of the confessional (an essential characteristic of this specific communication, which believers consider a sacrament), the relationship between doctor and patient should receive, at least, the same consideration.

10. The concept that a doctor is obliged to attend all individuals equally without entering into considerations on their moral or legal status, and that healthcare is an obligation for the doctor and also a right, and acceptance of the confidential nature of the doctor-patient relationship as regards what the patient reveals, has long been recognized and has been firmly established in several of this profession's best-known ethical-juridical instruments, which include, inter alia, the particularities of the doctor-patient relationship and the characteristics of the loyalty that the doctor owes to his patient. Aesculapius wrote to his son: "Your door shall remain open to all […] The evildoer shall have the same right to your help as the honorable man." The Hippocratic oath, which is still sworn by many young people when they receive their professional diploma in medicine, states: "What I may see or hear in the course of the treatment or even outside [...], which on no account must be spread abroad, I will keep to myself, holding such things secret."

11. The judgment, which this opinion accompanies, mentions the conclusive text of several principles of international humanitarian law. The reference to these texts is given merely for information because, as the Court's case law has indicated, it helps illustrate the interpretation given to the provisions that are directly applicable. Thus, Article 18 of the First Geneva Convention of 1949 indicates that, "No one may ever be molested or convicted for having nursed the wounded or sick." Article 16 of Protocol 1 and Article 10 of Protocol II, both to the 1949 Geneva Conventions, state that "Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom."

12. The Declaration of Geneva of the World Medical Association (WMA), 1948-1968-1983, proclaimed the physician's promise that "The health of my patient will be my first consideration"; "I will respect the secrets which are confided in me" and "I will not permit considerations of religion, nationality, race, party politics or social standing to intervene between my duty and my patient." The WMA International Code of Medical Ethics repeats that: "A physician shall preserve absolute confidentiality [...] about his patient even after the patient has died"; "A physician shall act only in the patient's interest when providing medical care which might have the effect of weakening the physical and mental condition of the patient."; "A physician shall owe his patients complete loyalty and all the resources of his science." The WMA Declaration of Lisbon on the rights of the patient of 1981-1995, states that: "All identifiable information about a patient's health status, medical condition, diagnosis, prognosis and treatment and all other information of a personal kind, must be kept confidential, even after death." The WMA Declaration of Helsinki, 1964-1975-1983-1989-1996-2000-2002, states that: "It is the duty of the physician to promote and safeguard the health of the people. The physician's knowledge and conscience are dedicated to the fulfillment of this duty."

13. In brief, I consider that it is inadmissible – a consideration that coincides with the opinion of the Inter-American Court, as stated in the judgment in this case – to criminally penalize the conduct of a doctor who provides care designed to protect the health and life of other individuals, notwithstanding their characteristics, activities and beliefs, and the origin of their injuries or illnesses. I also consider it necessary to prohibit incriminating the conduct of a doctor who abstains from providing information to the authorities about his patient's punishable conduct, which he is aware of through information provided to him by the patient in connection with the medical procedure. In that case, there could be an absolutory excuse similar to that which protects the next of kin of the defendant in cases of concealment owing to kinship.

14. Once again, it should be emphasized that the considerations and decisions of the inter-American jurisdiction in the cases it has heard have never justified, in any case and for any reason, the committing of crimes established in legislation enacted in accordance with the principles and postulates of a democratic society. It is clear that the State must protect individuals and society from attacks on their juridical rights, and also safeguard democratic institutions. It is also evident, from the perspective of human rights, that this protection must be exercised observing the conditions that characterize the rule of law.

Sergio García-Ramírez
Judge

Pablo Saavedra-Alessandri
Secretary