INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF ABRILL ALOSILLA ET AL. V. PERU

JUDGMENT OF MARCH 4, 2011
(Merits, Reparations and Costs)

In the *Case of Abrill Alosilla et al.*,

The Inter-American Court of Human Rights (hereinafter "the Inter-American Court," "the Court," or "the Tribunal"), comprising the following judges:[1]

Leonardo A. Franco, Acting President;
Manuel E. Ventura-Robles, Judge;
Margarette May Macaulay, Judge;
Rhadys Abreu Blondet, Judge;
Alberto Pérez Pérez, Judge, and
Eduardo Vio Grossi, Judge;

also present,

Pablo Saavedra-Alessandri, Secretary, and
Emilia Segares Rodríguez, Deputy Secretary;

in conformity with Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the Convention" or "the American Convention") and with Articles 32, 34, 41, and 68 of the Court Rules of Procedure[2] (hereinafter "the Rules of Procedure"), issues the following Judgment, structured as follows:

[1] The President of the Court, Judge Diego García-Sayán, of Peruvian nationality, did not participate in this case in keeping with Article 19(1) of the Rules of Procedure of the Court, to which "[i]n the cases referred to in Article 44 of the Convention, the Judges cannot participate in its being known and deliberation, when they are nationals of the State."

[2] Rules of Procedure passed in the LXXXV Regular Period of Sessions held from November 16 to 28, 2009. According to Article 79(2) of the Rules of Procedure, "In cases in which the Commission has adopted a report under Article 50 of the Convention before the these Rules of Procedure have come into force, the presentation of the case before the Court will be governed by Articles 33 and 34 of the Rules of Procedure previously in force. Statements shall be received with the aid of the Victim's Legal Assistance Fund, and the dispositions of these Rules of Procedure shall apply."

I
INTRODUCTION TO THE CASE AND THE PURPOSE OF THE CONTROVERSY

1. On January 16, 2010 and in keeping with Articles 51 and 61 of the Convention, the Inter-American Commission on Human Rights (hereinafter "the Commission" or "the Inter-American Commission") filed an application against the Republic of Peru (hereinafter "the State" or "Peru") with regard to case number 12.384, *Union of Lima Water and Sewer Service Functionaries, Professionals, and Technicians*, originated by a petition received by the Commission on April 14, 2000, and registered under No. 166/2000. On April 18, 2002, the State acknowledged its international responsibility before the Inter-American Commission in this case for the violation of Article 25 of the American Convention, upon which a friendly settlement process began in the case; said process concluded without the two parties reaching an agreement. On March 17, 2009, the Commission issued its Admissibility and Merits Report No. 8/09, in the terms of Articles 37(3) of its Rules of Procedure and 50 of

the Convention.[3] On April 16, 2009, the State was notified of the aforementioned report and granted a time period of two months to report on the measures taken to comply with the Commission's recommendations.[4] After finding that Peru "did not comply with the recommendation made" in the report, the Commission decided to submit this case to the jurisdiction of the Court. The Commission designated Mrs. Luz Patricia Mejía, Commissioner, and Mr. Santiago A. Canton, Executive Secretary, as Delegates, with Mrs. Elizabeth Abi-Mershed, Deputy Executive Secretary, and Mrs. Silvia Serrano Guzmán, Specialist of the Executive Secretariat, as legal advisors.

2. The application centers on an alleged "violation of the right to judicial protection to the detriment of 233 members of the Union of Lima Water and Sewer Service Functionaries, Professionals, and Technicians (hereinafter SIFUSE, [in the Spanish acronym]) due to the State's failure to provide an effective remedy with regard to the [alleged] retroactive application of decrees that, between 1991 and 1992, eliminated the salary scale system that was in effect [...] despite the fact that the applicable Political Constitution established a guarantee that laws would not be retroactive except in criminal issues where retroactivity would be favorable."

3. The Commission requested that the Court "give full weight to the State's acknowledgment of responsibility" and declare a violation of Article 25 (Judicial Protection) of the American Convention, with regard to Article 1(1) (Obligation to Respect Rights) of the American Convention, all to the detriment of the 233 alleged victims in this case. The Commission also requested that the Tribunal order the State to adopt measures of reparation, as well as to reimburse for costs and expenses.

4. On April 14, 2010, the representative of the alleged victims,[5] Mr. Juan José Tello Harster (hereinafter "the representative"), filed a brief of pleadings, motions, and evidence (hereinafter, "brief of pleadings and motions"), under the terms of Article 40 of the Rules of Procedure. In addition to the Commission's position in the application, the representative requested that the Court declare the State responsible for the violation of the rights acknowledged in Articles 21(1) and 21(2) (Right to Private Property) in relation to Article 1(1) of the American Convention and specified its request for reparations, costs, and expenses.

5. On June 22, 2010, the State filed a brief answering the application and providing

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[3] In that report, the Commission ruled that Article 25 of the American Convention had been violated and held that "the elements presented by the petitioners do not tend to be characterized by violations of the rights enshrined in Articles 8 [fair trial] and 24 [equal protection] of the American Convention." Report N° 8/09 of March 17, 2009. Case of 12.384. Admissibility and Merits. Union of Employees, Professionals, and Technicians of the Water Utility and Sewage Services Company of Lima (SEDAPAL). Perú (case file of annexes to the application, tome I, appendix 1, folio 13).

[4] In the report, the Commission recommended that the Peruvian State "[t]ake the measures necessary to give the victims access to a judicial or other remedy that is adequate and effective for providing reparations with regard to the violation of their rights caused by the retroactive application of Law Decree 25876, as well as for the lack of judicial protection in this situation." Report N° 8/09 of March 17, 2009, *supra* note 3, folio 21.

[5] On March 10, 2010, the SIFUSE board of directors granted power of attorney to litigate in this international proceeding as lead representative to Juan José Tello Harster. He was granted authority to represent the union and all two hundred and thirty-three workers who are the alleged victims. Moreover, Mr. Guillermo Darío Romero Quispe was designated as alternate representative. Power of attorney to litigate on March 10, 2010 (case file of annexes to the brief of pleadings and motions, tome VI, annex 7, folios 1832 to 1840).

comments on the brief of pleadings and motions (hereinafter, "answer to the application") under the terms of Article 41 of the Rules of Procedure. In that brief, the State indicated that it "only acknowledges its international responsibility with regard to the violation of Article 25 of the American Convention, in regard to its retroactive application of Law Decree No. 25876." In this sense, it specified that, "[t]his acknowledgment does not imply total acceptance of the arguments presented by the alleged victims with regard to the amount of the material damage." It also indicated that "the violation of Articles 21(1) and 21(2) of the Convention has not taken place," as the State "can legitimately limit or restrict the right to property, for not all restrictions necessarily imply violations." On February 25, 2010, the State designated Mrs. Delia Muñoz Muñoz as its Agent in this case**.**

6. On July 19 and 23, 2010, the representative and the Commission, respectively, presented their observations on the State's acknowledgment of international responsibility in this case, in keeping with Article 62 of the Rules of Procedure.

II
PROCEEDING BEFORE THE COURT

7. The State and the representative were notified of the application on February 17, 2010.

8. Through Order of September 8, 2010,[6] the Acting President of the Court for this case (hereinafter, "the President") ordered that statements be rendered before a public notary (affidavit) by two experts and called the parties to a public hearing to hear testimony of a witness proposed by the State, as well as the final comments and final oral arguments on the merits, reparations and costs in the case from the Commission, the representative and the State.

9. On September 27, 2010, the Commission and the State submitted statements given before a public notary. On September 28 and October 4, 2010, the representative and the Commission, respectively, filed their comments on the statements submitted. The State did not render any comments.

10. In a note made by the Secretariat on October 1, 2010, the parties were informed that due to the situation presented in Ecuador in that month, the Court decided to postpone the holding of the XLII Extraordinary Period of Sessions in that country.

11. On October 14 and 19, 2010, the State requested that the Court "reconsider the participation of expert witness Jorge Luis González Izquierdo in the case's hearing," since "his statement [would] serve to explain the context in which the facts of this case took place." On October 25, 2010, the representative filed comments on this request and the Commission stated that "it did not [have] any observations to make." On November 14, 2010, the plenary of the Court rejected the request for reconsideration filed by the State.[7]

12. The public hearing was held on November 16, 2010, during the 42nd Extraordinary

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[6] Order of the Acting President of the Inter-American Court of Human Rights for this case, September 8, 2010.

[7] Order of the Inter-American Court of Human Rights of November 14, 2010.

Period of Sessions of the Court[8], held in the city of Quito, Ecuador.

13. A note from the Secretariat of the Court dated December 1, 2010, based on the provisions of Article 58(b) of the Court Rules of Procedure required the parties to file arguments with backup documentation on various subjects regarding the case, along with their written final arguments. Also, on January 11 and February 7 2011, more information was requested of the parties in order to facilitate adjudication. That information was filed on January 24 and Februrary 2 and 3, 2011, respectively.

14. On December 4 and 6, 2010, the representative and the Inter-American Commission filed their final written pleadings and comments in this case. On December 6, 2010, the State submitted its final arguments, submitting their annexes on December 15, 2010. On December 21, 2010 and January 5, 2011, the State submitted "additional information" on the case. On January 21 and February 3, 2011, the representative and the Commission filed their comments on this information.

15. On January 21, 2011, specific information was requested from the representative with regard to arguments and evidence on costs and expenses. That information was not submitted. Moreover, on February 7, 2011, the Court required the representative and the State to present specific information on the alleged victims of the present case.[9] This information was submitted on February 14, 2011.

III
JURISDICTION

16. The Court has jurisdiction to hear this case in the terms of Article 62(3) of the American Convention, as Peru is a State Party to the Convention since July 28, 1978, and recognized the contentious jurisdiction of the Court on January 21, 1981.

IV
ACKNOWLEDGMENT OF INTERNATIONAL RESPONSIBILITY

1. Acknowledgment of the State and comments of the parties

17. The Tribunal observes that this case relates to the retroactive effects of the application

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[8] The following people attended the hearing: a) for the Inter-American Commission: María Silvia Guillén, Commissioner; Santiago A. Canton, Executive Secretary; Lilly Ching Soto, legal advisor, and Silvia Serrano Guzmán, advisor; b) for the representatives: Juan José Tello Harster, representative, and Guillermo Darío Romero Quispe, SEDAPAL Functionaries, Professionals and Technicians Union Legal Defense Secretary, and c) for the State: Delia Muñoz Muñoz, Special Supranational State's Attorney; José Pimentel Aliaga, Alternate Agent, SEDAPAL Legal Manager; Daisy Carmela Céspedes Ávila, Advisor, SEDAPAL Registry and Human Resources Control Team Chief, and Jimena Rodríguez Moscoso, Attorney for the Supranational State's Attorney's Office.

[9] Through the note of the Secretariat on February 7, 2011, the representative and the State were required to provide information regarding Mrs. Sonia Moraima Callirgos Benites's correct name, whom was identified as an alleged victim in the present case but was not inclused in the expert statements presented by the representatives and the State. In this regard, the representative reported that there was a confusion, given that in the expert report she was listed as Sonia Dupont Gallirgos. On its behalf, the State presented a copy of the identification from the National Idenfication and Civil Status Registry (RENIEC) as well as proof of the labor relation of Mrs. Callirgos Benites with SEDAPAL.

of a law (Law Decree 25876) to the detriment of the alleged victims. The State indicated that, "based on the provisions of Law Decree 25876, [the Water Utility and Sewage Services Company of Lima (hereinafter SEDAPAL, as per its Spanish acronym)] opted to:" i) lower the remunerations of the alleged victims, ii) "apply the reduction of remunerations [...] to [certain] remunerations that had already been paid," and ii) "as of July 1992, not apply the monthly increase of remunerations." The foregoing effects came about as a consequence of the derogation of a salary adjustment system called "salary scales."

18. Moreover, the Tribunal notes that in the context of the proceeding before the Inter-American Commission since April 18, 2002, the State has acknowledged its international responsibility in the following terms:

> In the analysis on constitutional norms [...], it is noted that it would only be possible for a law to stipulate its entrance into force a date after the day following the law's publication in the Official Gazette. A law shall never stipulate entrance into force on a date prior to the aforementioned document [...]
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> With regard to this, the Peruvian State acknowledges its international responsibility for affecting the right to judicial protection established in Article 25 of the American Convention on Human Rights, taking into account that the judicial authorities should have at that time ruled, through an effective remedy, in favor of the fundamental rights and principles recognized in the Political Constitution of Peru, which, according to the domestic law, takes precedence over any other subordinate laws.[10]

19. Before the Court, the State repeated its recognition of international responsibility "for the retroactive application of Law [Decree] No. 25876 and for the lack of judicial protection in this situation." It also indicated that "THERE IS NO DISPUTE between the facts alleged" by the alleged victims and "the facts recognized by Peru in the present case." Likewise, the State indicated that "[its] recognition does not imply acceptance of the totality of the arguments presented by the alleged victims with regard to the amount of pecuniary damage," and "therefore the [...] Court should rule exclusively and finally on the [aforementioned] amount of reparations [...] for the deduction of the raises granted through the application of the salary scales." In this way, the State highlighted that "THERE WAS ONLY A VIOLATION WITH REGARD TO THE 11 MONTHS (JANUARY TO NOVEMBER 1992) during which SEDAPAL deducted the raises granted through the application of the salary scales, given that from that time onward (as of 1993) [the National Development Corporation, (hereinafter CONADE, as per its Spanish acronym)] establish[ed] a new remunerative salary scale."

20. The Commission "positively viewed the reiteration of the acknowledgment of international responsibility on the part of the Peruvian State," noting that it "constitutes […] a positive step forward in this case." It added that it "understands the State's declaration to incorporate both the acceptance of the factual framework and total acquiescence to the claims put forward by the Commission in its application."

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[10] Report No. 34-2002-JUS/CNDH-SE filed by the Peruvian State before the IACHR on April 23, 2002 (case file of annexes to the application, tome I, appendix1, annex 16, folios 146 and 147).

21. The representative held that, "the [a]cknowledgment of total [i]nternational [r]esponsibility formulated by the State," "does not make any distinction with regard to the effects of retroactively applying the Law Decree No. 25876," and it cannot mean that it "only covers the deductions of the raises paid between January and November of 1992." Likewise, the representative indicated that "according to the *estoppel* principle," it is a contradiction for the State to acknowledge international responsibility but not accept the totality of the material and moral damages claimed by the alleged victims. The representative also indicated that the damages for the lack of raises in the salaries should be added up through the present and not through 1993, as the State has indicated. Finally, the representative argued that the dispute over the alleged violation of Article 21 of the American Convention remains.

2. Considerations of the Court regarding the State's acknowledgment

22. According to Articles 62 and 64 of the Rules of Procedure[11] and in exercise of its powers of international judicial protection of human rights, an issue of international public order that transcends the will of the parties, it is the Tribunal's responsibility to ensure that acts of acquiescence are acceptable for the goals sought by the Inter-American system. In this task, it is not limited to verifying, registering, or taking note of the acknowledgment made by the State, nor to verifying the formal conditions of those acts of acquiescence. Rather, it must examine them in keeping with the nature and seriousness of the alleged violations, the demands and interests of justice, the specific circumstances of the particular case, and the attitudes and positions of the parties,[12] in such a way that, where possible and within the exercise of its competence, it can specify the truth of what took place.

23. In the present case, the Court observes that there is no dispute between the parties with regard to the facts and the violation of Article 25(1) of the American Convention, in relation to the obligation established in Article 1(1) of the American Convention.

24. Also, the Tribunal notes that in its brief answering the application, the State emphasized that the acknowledgment of its responsibility does not imply the acceptance of the amount established by the representative for material and moral damages. Specifically, there is a dispute between the parties over reparations, as there is no agreement with regard to whether the amount of material damage should be added up through the salary restructuring

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11 The pertinent parts of Articles 62 and 64 of the Rules of Procedure of the Court establish the following:

Article 62. Acquiescence

> If the respondent informs the Court of its acceptance of the facts or its total or partial acquiescence to the claims stated in the presentation of the case or the brief submitted by the alleged victims or their representatives, the Court shall decide, having heard the opinions of all those participating in the proceedings and at the appropriate procedural moment, whether to accept that acquiescence, and shall rule upon its juridical effects.

Article 64. Continuation of a case

> Bearing in mind its responsibility to protect human rights, the Court may decide to continue the consideration of a case notwithstanding the existence of the conditions indicated in the preceding Articles.

12 *Cf. Case of Kimel v. Argentina. Merits, Reparations and Costs.* Judgment of May 2, 2008. Series C No. 177, para. 24; *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia. Merits, Reparations and Costs.* Judgment of September 1, 2010. Serie C No. 217, para. 34, and *Case of Vélez Loor v. Panamá. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2010. Serie C No. 218, para. 63

that took place at the company in 1993 or through the present day (*infra* paras. 105 to 115).

25. Separately, the Court notes that the State rejected its responsibility for the alleged violation of Article 21, in relation to the obligation established in Article 1(1) of the American Convention. For this reason, the Court finds that a legal dispute still exists over that alleged violation.

26. The Court finds that the admission of the facts and the acquiescence with regard to the violation of Article 25(1) of the American Convention constitutes a positive contribution to this process, to the effectiveness of the principles that inspire the American Convention,[13] and to the conduct to which States are obliged on this issue by virtue of the commitments that they assume as parties to international human rights instruments. Likewise and as in other cases,[14] the Court finds that the State's acknowledgment made in the proceeding before the Commission and repeated before the Court has full juridical effect in accordance with Articles 62 and 64 of the Court Rules of Procedure.

27. Nevertheless, the Court finds it necessary to specify the scope of the acknowledgment and to resolve the disputes that exist between the parties. Consequently, taking into account the attributes that are required to ensure the greatest protection of human rights, the Court finds it necessary to deliver a judgment in which it establishes the facts and determines the merits of the case, as well as their corresponding consequences.[15]

V
PRIOR CONSIDERATION REGARDING SOME VICTIMS' ALLEGED FAILURE TO EXHAUST DOMESTIC REMEDIES

28. In its answer to the application, the State indicated that it wished to "put on the record its disagreement and unease with a procedural aspect of the [Inter-American Commission's] ruling on the admissibility of this case. This is due to the fact that the State considers that in its report on admissibility, the [Commission] had to divide the 'petitioners' into two groups: a) the first group comprising 185 workers who exhausted domestic remedies; and b) the second comprising 48 workers who did not comply with that requirement, as they voluntarily abstained from requesting the corresponding remedies to challenge the ruling against their demands even when the option to do so was completely open to them." In this sense, the State "specif[ied] that when it presented its Admissibility and Merits Report No. 08/09, the [Commission] did not act with the diligence necessary to demand that the alleged victims comply with the admissibility requirements or to interpret and weigh the existence or lack of one of the exceptions to the general rule of prior exhaustion of domestic measures." Thus it indicated that:

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13 *Cf. Case of Trujillo Oroza v. Bolivia. Merits.* Judgment of January 26, 2000. Series C No. 64, para. 42; *Case of Rosendo Cantú and otra V. México. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 31, 2010 Serie C No. 216, para. 25, and *Case of Ibsen Cárdenas and Ibsen Peña*, *supra* note 12, para. 37

14 *Cf. Case of Acevedo-Jaramillo et al. v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of February 7, 2006. Series C No. 144, paras. 176 to 180; *Case of Tiu Tojín v. Guatemala. Merits, Reparations and Costs.* Judgment of November 26, 2008. Series C No. 190, para. 21, and *Case of Kimel v. Argentina, supra note* 15, paras. 23 to 25.

15 *Cf. Case of the "Mapiripán Massacre," supra note* 29, para. 69; *Case of Manuel Cepeda Vargas, supra note* 11, para. 18, *Case of Ibsen Cárdenas and Ibsen Peña*, *supra* 12, para. 30, and *Case of Vélez Loor*, *supra* note 12, para. 70.

> a) [...] the alleged victims at all times had access to the specialized jurisdiction courts, and domestic appeal remedies were freely available. At the time, they decided not to use those remedies. In contrast to the actions of these individuals, the petitioners in the case from the first group were able to access the remedies up to the final instance, which was exhausted upon the issuing of a final ruling with the character of *res judicata*. Thus the Peruvian State provided the guarantee of due process for the alleged victims in the framework of a regular judicial proceeding," and
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> b) "Even when the lower court judgment (which the petitioners did not challenge) came out against the petitioners, this in no [way] implied that the judicial process that was underway had not been carried out in the framework of a regular process and with respect for the guarantees of due process."

29. Therefore, the State "observ[ed] with concern the 'logical' standard used by the Inter-American Commission on assuming that orders that had not been issued by the Peruvian judicial authorities would be ineffective."

30. On this point, the Commission highlighted that in its initial communication with the State before the Commission, received on October 4, 2001, the State "expressly indicated that the requirements contemplated in Articles 46(1), clauses a) and b), had been complied with in this case, without making any distinction with regard to the two groups of [alleged] victims." The Commission added that "at that time, the State did not request [...] that any procedural consideration be granted with regard to the second group of workers' failure to apply for an appeal remedy" and that, on the contrary, "the State did not consider this fact to be a failure to comply with the requirement that domestic remedies be exhausted." Therefore, "the Commission consider[ed] that by virtue of the *estoppel* principle, the State was not authorized to change the position it held in its first response to the Commission, even less so when the petitioners could make certain procedural decisions - like the decision on whether to start a friendly settlement proceeding - based precisely on that position." The Commission also indicated that the State "did not submit specific arguments on the effectiveness of the remedy it indicates as not exhausted, neither before the Commission nor before the Court," and added that "the acknowledgment of the State's international responsibility for violating Article 25 of the Convention is based precisely on the lack of effective domestic judicial procedures available to the [alleged] victims."

31. According to the Commission, it declared the application admissible taking into consideration "the long period of time that had passed since the filing of the request for *amparo* and the lower court ruling, and [...] the slim chance that a remedy challenging the above-mentioned judgment could be effective given the case law upheld by the Constitutional and Social Law Chamber with regard to the constitutionality of the retroactive application of Decree 25876." Therefore, "the Commission consider[ed] that the [argument] submitted by the State [...] in its brief on the admissibility of the case is, in addition to being untimely, inadmissible on its substance."

32. For his part, the representative indicated that the second group of 48 petitioners took recourse "to the exception contained in Article 46(2)(c) of the American Convention for the non-exhaustion" of domestic remedies due to the "significant and unjustified delay of five (05) years and seven (07) months before the issuing of the [lower] court ruling, with obviously a much greater delay in store for the final judgment." The representative also

indicated that "under the [d]ictatorship of former President Fujimori [...] obtaining an impartial and independent judicial ruling or [o]rder - much less a [j]udicial [o]rder against the State - was not only highly improbable, but rather impossible." Finally, the representative indicated that the State's arguments with regard to this point "have not been submitted [...] as a [p]reliminary [o]bjection of lack of jurisdiction due to an alleged lack of exhaustion of domestic remedies."

33. With regard to this, even though the submission of a preliminary objection is not at issue, the Tribunal notes that in a separate case against Peru, it indicated that:

> each act of acknowledgment made by [that State, both domestically and] before the Commission created *estoppel*. Therefore, by admitting the legitimacy of the claim asserted in the proceeding before the Commission through a unilateral juridical act of acknowledgement, Peru is barred from adopting a contradictory position thereafter. The alleged victims [and] their representatives, as well as the Inter-American Commission, acted in the proceeding before the latter body on the basis of the position of acknowledgment taken up by the State.[16]

34. In this way, the acts of acknowledgment carried out by the State during the processing of an application before the Commission are by necessity relevant for determining the application of the *estoppel* principle with regard to contradictory positions alleged during the proceeding of the case before the Court. If the dispute submitted by the Commission before this Tribunal is by necessity based on certain acts of acknowledgment carried out by the State, then the State cannot later deny the juridical effect these statements have on the outcome of the dispute submitted by the Commission before the Court. Therefore, the Court finds that through its actions in the proceeding before the Commission, the Peruvian State did not object to the exhaustion of domestic remedies, which consequently had a juridical effect on which both the representative and the Commission acted.

VI
EVIDENCE

35. Based on the provisions of Articles 46, 49, and 50 of the Rules of Procedure, as well as on its case law relative to evidence and the examination thereof,[17] the Court will proceed to examine the evidentiary elements submitted by the parties on various occasions during the proceedings, the statements given via affidavit and the statements received during public hearings, as well as the evidence to facilitate adjudication of the case that was requested by the Tribunal. In doing so, the Court will follow the rules of sound judgment, within the applicable legal framework.[18]

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16 *Cf. Case of Acevedo-Jaramillo et al. supra* note 14, para. 177.

17 *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala.* Reparations and Costs. Judgment of May 25, 2001. Series C No. 76, para. 50; *Case of Gomes Lund et al "Guerrilha do Araguaia" v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2010. Serie C No. 219, para. 51, and *Case of Cabrera García and Montiel Flores v. México. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 26, 2010. Serie C No. 220, para. 24.

18 *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala.* Merits. Judgment of March 8, 1998. Series C No. 37, para. 76; *Case of Gomes Lund et al "Guerrilha do Araguaia", supra* note 17, para. 51, and *Case of Cabrera García and Montiel Flores, supra* note 17, para. 24.

1. Documentary, testimonial and expert evidence

36. The statements given before public notary (affidavits) by the following expert witnesses were received:

a) *Samuel Abad Yupanqui,* expert witness proposed by the Inter-American Commission, who gave an expert witness report on: i) "the relationship between domestic law and international human rights law with regard to access to an effective remedy in the terms of Article 25 of the American Convention," and ii) "the reasons for which arbitrariness in the judicial ruling given in this case constitutes a denial of justice under Article 25 thereof, among other issues addressed in this […] application." [19]

b) *Jorge González Izquierdo*, an expert witness proposed by the State, who provided an expert witness report on: i) "the economic-labor situation in Peru during the years 1991 and 1992"; ii) the implications of this situation "as far the suspension of salary indexing"; iii) "subsequent effects on methods of regulating salaries, regulating the labor market in Peru during the 90s, increasing salaries in Peru as of the 90s," and iv) the implications of all this for the resolution of the dispute between the parties over the situation of the 233 victims in this case.

37. In addition, during the public hearing, the Court heard the testimony of:

a) *Víctor Hugo de los Santos León*, a witness proposed by the State, who testified on: i) "the application of Law Decree No. 25876, specifying as of when it was applied and the implications it had for workers;" ii) "the way in which SEDAPAL gradually applied the salary scale adjustment for the workers;" iii) "the way in which CONADE authorized the salary regulation," and iv) how "SEDAPAL set up a new salary structure as of 1994 that included the modified scales."

2. Admission of documentary evidence

[19] In application of the provisions of the new Rules of Procedure, on September 13, 2010, the State prepared four questions to be answered by the expert witness Samuel Abad Yupanqui when giving his statement before the public notary. On September 10, 2010, the Inter-American Commission said it "[did] not have questions to ask expert witness Jorge González Izquierdo." A note from the Secretariat of the Court dated September 14, 2010, following the instructions of the Acting President in this case, specified that according to Article 50(5) of the Rules of Procedure, "leading questions and questions that do not refer to the subject at hand in an opportune fashion will not be admitted." Taking this into account, the Acting President found it pertinent to request that expert witness Abad Yupanqui respond in his statement to the following questions prepared by the Illustrious State: a) Under the protection of domestic law and international human rights law, what do you understand access to an effective remedy to mean?" and b) "In its admissibility report, the Inter-American Commission on Human Rights estimated that 185 workers had exhausted domestic remedies, and that with regard to the other 48, the Commission granted them the status of alleged victims without having to exhaust remedies in the domestic jurisdiction. To your understanding, can it be argued with regard to these 48 workers that the State did not provide effective judicial protection if they did not exhaust the domestic jurisdiction?" In the same note, the Secretariat noted that the representative did not submit questions for the expert witnesses Abad Yupanqui and González Izquierdo.

38. In this case, as in others,[20] the Court accepts the evidentiary value of the documents presented by the parties at the proper procedural opportunity that were not contested or opposed, and whose authenticity was not questioned.

39. On presenting his brief of pleadings and motions, the representative submitted as annexes the statements given before a public notary by 132 of the alleged victims. The representative also attached the expert testimony of Mrs. Lily Isabel Albornoz Castro on "the way in which the [r]eparation amounts for [m]aterial [d]amages of the [233 alleged v]ictims [in this case] have been calculated." Similarly, upon filing its answer to the application, the State attached as an annex "expert testimony on the size of monetary reparations" presented by Félix Aquije Soler. In accordance with the Order to convene a hearing in the present case, the Court reiterates that such statements only have the character of documentary evidence and, in that sense, will be assessed within the context of the existing evidence and according to the rules of sound judgment[21].

40. As far as the press releases presented by the parties, this Court has found that they can be admitted when they contain public and noteworthy facts or statements from State officials, or when they corroborate certain aspects of the case.[22] Consequently, the Court will weigh them, taking into account the whole of the body of evidence, the observations of the parties, and the rules of sound judgment.

41. During the course of the public hearing, expert witness De Los Santos León submitted a copy of a document identified as "Salary Scales," presented as a PowerPoint presentation when he gave his testimony. On finding these useful for the resolution of this case, in keeping with Article 58 of the Rules of Procedure, the Court decided to incorporate this evidence into this body of evidence of the case.

42. The representatives and the State also submitted various documents as evidence, documents that had been requested by the Court based on the provisions of Article 58(b) of the Court Rules of Procedure (*supra* paras. 13 and 15). For this reason, these documents are also incorporated and their pertinent parts will be weighed, taking into account the whole of the body of evidence, the observations of the parties, and the rules of sound judgment.

43. Finally, the Court observes that the State and the representative presented pleadings and evidence at times that did not correspond to the proper procedural moment granted by the Presidency. Thus in the brief of comments in regard to the acknowledgment of responsibility filed by the representative on July 19, 2010, pleadings were included that went beyond the requested comments and addressed various aspects of the cases. The representative was notified that the request for comments was not a new procedural opportunity for adding pleadings. Rather, it was only for commenting on the acknowledgment of responsibility made by the State. On this particular point, the Court notes that the arguments included in those comments were presented in the representative's final arguments brief. It is therefore unnecessary to rule on the admissibility of the pleadings filed outside the proper moment in

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20 *Cf. Case of Velásquez Rodríguez v. Honduras.* Merits. Judgment of July 29, 1988. Series C No. 4, para. 140; *Case of Gomes Lund et al "Guerrilha do Araguaia", supra* note 17, para. 51, and *Case of Cabrera García and Montiel Flores, supra* note 17, para. 27.

21 Order of the Acting President in this case, *supra* note 6, folios 363 to 374.

22 *Cf. Case of Velásquez Rodríguez supra* note 20, para. 146; *Case of Vélez Loor*, *supra* note 12, para. 76, and *Case of Gomes Lund et al "Guerrilha do Araguaia", supra* note 17, para. 56.

the procedure.

3. Admission of testimonial and expert evidence

44. The Court will weigh the statements given before a public notary by the expert witnesses Samuel Abad Yupanqui and Jorge González Izquierdo and the testimony given by the witness Víctor Hugo De Los Santos León during the public hearing. The Court admits this testimony and finds it pertinent only insofar as it meets the purpose defined by the President in his Order to admit them (*supra* para. 8) and the purpose of this case, taking into account the observations of the parties.

45. The Court observes that the representative and the Commission presented their comments on the affidavits on September 28 and October 4, respectively. For its part, the State did not submit observations on the sworn statements given. (*supra* para. 9)

46. The representative requested that the Court "rule without taking into account" the expert testimony given by Mr. González Izquierdo. The representative argued, *inter alia*, that "none of the points it addresses [...] [was] strictly related to the dispute between the parties in this case," and that the expert testimony had been given on a subject on "which there is no dispute," as all the parties in this case shared with the expert witness "an understanding of the economic and labor context" in which the law decrees affecting the rights of the alleged victims where issued. In addition, the representative indicated that the expert witness report would have the result of "inducing an error from the Judges of this Court" by making them think that this case "focused on the form and policy of salary regulation," while the position of the alleged victims accepts explicitly the suspension and elimination of the salary scale system and focuses only "on questioning the retroactive application of the Law Decree No. 25876 and on requesting the corresponding reparation."

47. With regard to this, the Court takes note of the objections and comments presented by the representative. However, it finds that the expert statement given by Mr. González Izquierdo refers to questions of evidentiary value and not admissibility of evidence.[23] Consequently, the Court admits the aforementioned report, without prejudice that its evidentiary value be considered only with regard to issues that effectively meet the purpose set forth and the opportune procedural moment by the President of the Court (*supra* para. 8), taking into account the full body of evidence, the comments of the parties, and the rules of sound judgment. The comments of the representative will be considered, where pertinent, in the analysis of the merits of the dispute.

48. With regard to the expert testimony from Mr. Aquije Solier, during the course of the public hearing, the representative submitted a document that, according to his allegations, should discredit the expert statement. The representative filed a copy of the document identified as a "Selective Direct Adjudication" related to consultation work on this case.[24]

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[23] *Cf. Case of Reverón Trujillo V. Venezuela. Preliminary Objection, Merits, Reparations and Costs. Judgment of June 30, 2009. Serie C No. 197,* para. 43; *Case of Manuel Cepeda Vargas. Preliminary Objections, Merits, Reparations and Costs.* Judgment of May 26, 2010. Serie C No. 213, para. 57, and *Case of Vélez Loor, supra* note 12, para. 86.

[24] According to the document, the purpose of the tender is to "contract consulting services related to IACHR case No. 12.384-SIFUSE for expert accountant court testimony on salary scales in order to determine the amount owed to each of the plaintiffs, including the corresponding legal interest, to a complaint filed by the

The representative stated that "it is completely contradictory" for SEDAPAL to present its proposal for reparations supported by Mr. Aquije Solier's expert statement on June 15, 2010, when "one month later" it was holding a "[t]ender for [c]ontracting [c]onsulting [s]ervices in order to prepare an expert accountancy report to determine the amount owed" to each of the victims in this case.

49. In this regard, the State reported that the indicated direct award process "was declared null and void" because it "did not receive any offers." According to the State, "the representative's statements are false [...] given [that] they attempt to incorrectly maintain that the expert testimony" of Mr. Aquije Solier "was the result of the [aforementioned] selective award process." The Tribunal observes that the tender process begun by the State does not affect the admissibility of the evidence. In addition, the State's clarifications in the sense that the tender was declared null and void have the effect of eliminating the basis for the dispute. The section on the merits of the case will examine whether the evidence on the record on the aforementioned tender proceeding contains elements affecting the conclusions of the expert testimony presented by the State (*infra* para. 114).

VII
RIGHT TO JUDICIAL PROTECTION AND TO PRIVATE PROPERTY WITH REGARD TO OBLIGATIONS TO RESPECT AND GUARANTEE RIGHTS

50. In this case, the Court has accepted the State's acknowledgment of international responsibility related to the lack of judicial protection with regard to the retroactive application of laws to the salary scales system (*supra* paras. 23 and 26). To determine the scope of this violation of Article 25(1)[25] related to Article 1(1)[26] of the American Convention and to resolve the dispute regarding the violation of Articles 21(1) and 21(2)[27] of the American Convention, as well as the other disputes that persist, the Court will address: 1) the proven facts, for later analysis of 2) the scope of the violation of the right to judicial protection in this case and 3) the alleged violation of the right to private property.

SIFUSE, and to support the criteria for the calculation." Requirements of the Selective Direct Adjudication No 0043-2010-SEDAPAL for "CONSULTING SERVICES RELATED TO IACHR CASE No. 12.384-SIFUSE," which have been published on SEDAPAL's website. (case file on the Merits, tome II, folio 561).

[25] Article 25(1) of the Convention indicates that, "Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties."

[26] Article 1(1) (Obligation to Respect Rights) of the Convention states:

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

[27] Articles 21(1) and 21(2) (Right to Private Property) of the Convention stipulate that:

> [...] Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> [...] No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
>
> […]

1. Established facts

51. The facts in this case cover: 1.1) the administrative and judicial rulings that implemented the system of salary scales; 1.2) the revocation of that system through the retroactive application of laws; 1.3) deductions and lack of raises applied to victims' remunerations and 1.4) judicial remedies applied regarding the aforementioned.

1.1. The system of salary scales and the judicial and administrative rulings that implemented it

52. In 1989, the public company SEDAPAL classified the positions of its personnel into three groups: "1) laborers and employees whose legal procedure for establishing remuneration [was] govern[ed] by the process of collective bargaining; 2) Functionaries[,] and 3) [S]enior Management."[28]

53. In June of 1989, SEDAPAL established a salary adjustment system known as "Salary Scales." This system was not subject to collective bargaining and consisted of the automatic adjustment of monthly remuneration for the personnel at that time denominated as Functionaries and Senior Management of the company, taking as its basis i) the remuneration of the unskilled laborer or lowest position at the company and ii) the Salary Scales or Indexes, or Variation Coefficients previously established and assigned to each position. The goal of this system was to maintain the salary distribution in the aforementioned personnel structure.[29] The system functioned automatically. In effect, each time the company increased the salary of the lowest positions as a consequence of a collective bargaining process, by necessity it also resulted in increases for the other positions in the company that could not benefit from that process.[30]

54. The salary scale system was established by the company's Board of Directors prior to authorization from the National Development Corporation (CONADE in its Spanish acronym), which was granted on June 12, 1990.[31] CONADE also "authorized the recovery of the ones that had not been put into effect since June 1989."[32]

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[28] "[The] policy on salaries and remunerative raises for functionaries is regulated by the National Development Corporation [(CONADE in its Spanish acronym)], as they are not subject to collective bargaining." Brief from the Supreme Office of the Public Prosecutor for adversarial administrative law, November 12, 1991 (case file of annexes to the answer to the application, tome IX, annex 10, folio 2513).

[29] Expert witness report presented by Felix Daniel Aquije Soler on May 24, 2010, (case file of annexes to the answer to the application, tome IX, annex 19, folio 2571).

[30] In this respect, the witness Victor Hugo de los Santos León stated during the public hearing that, "The scale [was] an automatic adjustment [...] for all personnel not subject to collective bargaining - which at that time included the functionaries - [taking] as a baseline the lowest level of the company's employment structure, which was the position occupied by the unskilled laborer."*Cf.* Statement rendered by expert witness Víctor Hugo De Los Santos in the public hearing in the present case.

[31] On May 16, 1990, SEDAPAL requested a new salary scale from CONADE for a "gradual improvement in salary indicators" in expert witness report presented by Felix Daniel Aquije Soler, *supra* note 29, folio 2572.

[32] Official Letter No. CND-1546-GECS/GGA-90 of CONADE dated June 12, 1990, en Report No. 678-91 of the Supreme Public Prosecutor for adversarial administrative law, dated November 12, 1991 (case file of annexes to the brief on arguments and evidence, tome VI, annex 12, folio 1858).

55. However, the increase in the salary ratios was not executed. For this reason, in October of 1990, a group of workers filed a request of *amparo* before the 16th Civil Court of Lima, requesting that the system be applied. On December 3, 1990, said court issued a judgment accepting the petitioner's request in its entirety and ordering SEDAPAL:[33] i) "to grant the personnel employed as Functionaries and Senior Management the recovery in their monthly remuneration of the salary scales that were in effect in SEDAPAL during the month of June [1989] based on the corresponding remuneration at the bottom level or category of the Employment and Remuneration Structure (Unskilled Laborer) in effect during the month of October [1990]," and ii) "to pay the unpaid remunerations derived from the application of the aforementioned salary scales."[34]

56. In response to this judicial ruling, SEDAPAL filed a cassation appeal. However, on May 29, 1991, the favorable judgment was upheld by the Fifth Civil Chamber of the Superior Court of Lima[35] and later by the Civil Chamber of the Supreme Court of Justice on February 12, 1992.[36] The Supreme Court ruled, "in conformity with the decision of the [Supreme] Prosecution," that a "violation, through the omission of an administrative act, of express labor rights that have been expressly recognized by the company against which the complaint has been brought" had been proven.[37]

57. That judgment was not immediately executed, for which reason SEDAPAL and the representatives of the functionaries began an extra-judicial negotiation process to resolve the dispute over the execution of the judgment.[38] That process resulted in a legal document determining how the payments would be made.[39] The Commission, the representative, and the State agree that as of that moment, the orders of the judicial rulings upholding payment

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[33] Judgment of the 16th Civil Court of Lima of December 3, 1990 (case file of annexes to the brief on arguments and evidence, tome VI, annex 9, folios 1845 to 1851).

[34] Judgment of the 16th Civil Court of Lima, *supra* note 33, folio 1850.

[35] Judgment of the Fifth Civil Chamber of the Superior Court of Lima of May 29, 1991 (case file of annexes to the application, tome I, annex 3, folio 36).

[36] Judgment of the Supreme Court of February 12, 1992 (case file of annexes to the application, tome I, annex 5, folio 40).

[37] Report No. 678-91 of the Supreme Public Prosecutor for Adversarial Administrative Law, *supra* note 32, folio 1859.

[38] The purpose of the negotiation was "to put a complete and final end to the dispute [...] over the judicial processing of execution of the judgment on the Writ of Amparo [... requested] before the 16th Civil Court of Lima." Agreement act of extrajudicial transations of June 23, 1992 (case file of annexes to the application, tome I, annex 6, folio 43).

[39] On June 23, 1992, the "Certification of Agreements in the Extrajudicial negotiation" was signed. In that document, SEDAPAL committed to the following payments: i) to pay functionaries and senior management the full amount of the legal interest through the month of February 1992; ii) to pay the functionaries in accordance with the result of an agreed-upon accounting report on the remunerations due though the month of February 1992; iii) to pay those functionaries in accordance with the result of a complimentary accounting report on the legal interest accrued through June 23, 1992, and iv) to proceed with the payment of the remuneration accrued though the month of February 1992 - plus the interest through June 1992 - that had ceased in October 1990 to the functionaries covered in the accounting report, proportional to the dates of their corresponding dismissals., June 23, *Cf.* Certification of extrajudicial negotiation agreement, *supra* note 38, folios 43 to 45.

according to the salary scale system had been complied with.[40] Additionally, the Court observes that these judicial rulings and the negotiated agreement between the parties determined that the salary scale should be applied as of June 12, 1989. These judicial rulings and the aforementioned agreement were executed up until the salary scale system was repealed on November 26, 1992, the details of which will be examined next.

1.2. Repeal of the salary scale system though a law applied retroactively

58. The repeal of the salary scale system involves three decrees. The first decree was issued by the Executive Branch on November 8, 1991, and published on December 12, 1991, and came into force the day after publication, that is, on December 13, of said year. The law was titled Legislative Decree No. 757, or the "Framework Law for Growth of Private Investment." Among other things implemented through this law were rules on the establishment of "remuneration improvements."[41] In the part relevant to this case, the Decree established the following:

> "The increases in prices and fees or remunerative improvements will be subject to the following rules:
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> […]
>
> b) Collective labor pacts or agreements shall not contain automatic fixed remuneration adjustment systems linked to changes in price indexes; nor shall they be agreed upon in or linked to foreign currency. In keeping with Article 1355 of the Civil Code, private sector companies and workers governed fully or partially by laws, agreements or clauses to that effect shall substitute them for a system of fixed remuneration according to the increase in production and productivity of each company."

59. The second decree was issued by the Executive Branch on June 5, 1992 (Law Decree No. 25541) and published on June 11, 1992.[42] Article 1 of that decree established the following:

> "Let it be clear that laws, agreements or clauses establishing automatic adjustment of remuneration according to changes in prices, the value of foreign currency and other elements of a similar nature concluded in their application on December 13, 1991, the date on which Legislative Decree No. 757, the Framework Law for Growth of Private Investment, went into effect."

60. The third decree was issued on November 10, 1992, by the "Emergency and National

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[40] The experts presented by the State and and the representative agree in that "there is no objection regarding the application of the system of salary scales for the period before January 1992." Expert report of Mr. Félix Daniel Aquije Soler, *supra* note 29, folio 2573, and Expert report of March 29, of 2010, drafted by Mrs. Lily Isabel Albornoz Castro (case file of annexes to the brief of pleadings and motions, tome VI, annex 2, folios 1625).

[41] Legislative Decree No. 757, 1992 (case file of annexes to the application, tome I, annex 7, folio 63).

[42] Law Decree No. 25541, 1992 (case file of annexes to the application, tome I, annex 8, folio 70).

Reconstruction Government" (Law Decree No. 25876) and published on November 25, 1992, and therefore came into effect on November 26, 1992.[43] This decree modified Article I of Decree Law No. 25541 by adding the following: "Let it be specified and clarified that [...] negotiations or judicial or administrative rulings establishing automatic readjustment systems were [also] definitively concluded in their application and execution on December 13, 1991, the date on which Legislative Decree No. 757 took effect." Decree 25876 "enter[ed] into force on the day following its publication in the Official Gazette," that is, on November 26, 1992.

61. With regard to the foregoing, the Court observes that the second and third decrees broadened the conditions on which the suppression of the salary adjustment systems was based. Effectively, the purpose of the first decree was, among others, to put an end to the salary scale system. To do so, it established that "pacts or collective bargaining agreements can not contain "automatic remuneration adjustment systems linked to changes in price indexes" were not allowed. However, the second legal decree, No. 25541, established: i) that the prior prohibition would extend to automatic adjustment systems that had been set up through "norms"; ii) that salary systems of a "similar nature" would not be permitted; and iii) that those additions would take effect as of the date of Legislative Decree No. 757, that is, December 13, 1991. The Court also observes that the purpose of Law Decree No. 25876, the third decree, was to add the provision that the law was also applicable to systems originating in "judicial or administrative rulings," as well as to reiterate that these kinds of systems were banned from the date on which the first decree entered into force, that is, December 13, 1991.

62. The representative and the State indicated that the salary scale system in SEDAPAL could be repealed only as of the entry into force of the last rule (Decree No. 25876), which is to say on November 26, 1992. Various pieces of evidence found in the case file establish that the decree cannot have taken effect as of a date prior to its publication.[44] Taking into account the coinciding positions of the parties and the available evidence, the Tribunal views as established fact that the date as of which the repeal of the scale system with regard to the alleged victims had to have taken effect was November 26, 1992, the date on which Decree Law No. 25876 entered into force (*supra* para. 60).

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[43] Decree Law No. 25876 (case file of annexes to the application, tome I, annex 8, folios 72 and 73).

[44] Pursuant to the Report of a technical advisor of the Ministry of Labor who analyzed the present case in the framework of the friendly settlment attempted by the parties, "Article III of the Preliminary Title of the Civil Code, of supplementary application to the code, picks up on the theory of the carried out facts, on establishing that the law applies to the consequences of existing juridical relations and situations, and Article 187 of the 1979 Constitution indicated that no law has retroactive authority except in criminal, labor or tax law when it is beneficial to the prisoner, worker or tax payer, respectively. This was not the case, for which reason this decree could not have any effect on a date prior to its publication."Official Letter No. 1-2005-MTPE-ATAD of January 7, 2005, addressed to the Vice-minister of the Ministry of Labor and and Work Promotions (case file of annexes to the answer to the application, tome I, annex 5, folios 2480 to 2481). Moreover, the expert witness of the representative noted that "[t]he fact of the increase offered during its time in force, stopped forming part of the remuneration of the workers; the elimination of the system only meant that the updating of the remunerations stopped from that moment on." Expert report of Mrs. Lily Isabel Albornoz Castro, *supra* note 40, folio 1625. In the same sense, the expert witness presented by the State establizhed that "the system of salary scalres was eliminated by [the Decree Law 25876] as of the after its publication; that is, since [November] 26, [1992.] Therefore, the system of salary scales established by SEDAPAL was in force until [November] 24, [1992.] Expert Opinion of Mr. Félix Daniel Aquije Soler, *supra* note 29, folio 2574.

1.3. Deductions and lack of increased remunerations as a result of the retroactive application of the law that repealed the salary scale system

63. SEDAPAL used December 13, 1991, as the date for abolishing the salary scales, not November 26, 1992. SEDAPAL's application of the above-cited decrees had the following effects:

> a) as of the month of December 1992[45] SEDAPAL lowered the monthly remuneration of the functionaries, deducting the portion that they had been receiving due to the raises;[46]
>
> b) a reduction was applied for the workers' monthly remunerations already paid between January and November of 1992 based on the system of salary scales, as according to the company's reasoning, that system had ceased to exist as of December of 1991. These attempted claw-backs took place starting in March of 1993[47] through deductions of 20% of the monthly salary until the return of the totality of the amounts that according to the company had been paid in error were returned; and
>
> c) starting in July 1992, monthly remunerations received by the workers were not increased in accordance with the system of salary scales. The result of this was that the last benefit derived from the scale system - related to a collective bargaining agreement - was not complied with.[48] The agreement ordered an increase in the unskilled laborer salary as of July 1992.

64. The Court concludes that the effects of the implementation of the Law Decrees can be summarized as follows: i) a reduction in salaries as of December 1992; ii) retroactive collection of the payments made between January and November 1992 including the raise under the salary scales, and iii) no increase in salaries between July and November of 1992 as

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45 In this respect, the Commission, the representative and the State agreed that this date was the moment when the Legislative Decrees were implemented (case file on the merits, tome I, folios 12, 106 and 154). Likewise, the two expert reports presented by the representative and the State agreed on this date. Expert witness report presented by Felix Daniel Aquije Soler, *supra* note 29, folios 2568 to 2668 and Expert report of Mrs. Lily Isabel Albornoz Castro, *supra* note 40, folios 1622 to 1627.

46 In this way the company applied "the 'salary scale' system with the base remuneration applying to December 1991 at S/. 190.00[, and] not to January 1992 at S/. 220.00, based on the fact that in keeping with the pertinent legal provisions, application and execution of the Salary Scale System concluded [on December] 13, 1991." Expert Opinion of Mr. Félix Daniel Aquije Soler (case file on the Merits, tome II, folio 825).

47 Likewise the parties agreed both on this effect and on the date on which the salary deductions started to take place for the collection of what had been received previously (case file on the merits, tome I, folios 12, 106 and 154). Similarly, Report No. 023-2006-GRH established that "SEDAPAL opted to: [...] b) apply the deduction of the monthly remunerations paid to the functionaries from the months of January to November 1992, making monthly deductions starting in the month of March 1993 equivalent to 20% of remuneration until the paid amount considered to have been extra was made whole" (case file of the annexes of the answer to the application, tome I, annex 15, folio 2545).

48 Report No. 023-206-GRH determined that "SEDAPAL opted to: [...] c) not grant an increase in monthly remunerations to the functionaries under the salary scale system, obviating the increase of S/. 70.00 in the wages of employees and laborers (including unskilled laborers) agreed upon in the Collective Bargaining Agreement signed on November 30, 1992. It is worth noting that the aforementioned Collective Bargaining Agreement is applicable as of July 1992." Report No. 023-2006-GRH, *supra* note 47, folio 2545.

a consequence of the last applicable salary scale adjustment.

1.4. Judicial remedies requested against the retroactive application of the law that repealed the salary scale system

65. On May 14, 1993, an initial group of 225 workers - among them 185 of the alleged victims in this case - filed a request of *amparo* before the 18th Labor Court of Lima "against [SEDAPAL] for the violation of and failure to comply with constitutional labor provisions due to the consequences of the undue application of Law Decree 25876."[49] In the context of that proceeding it was stated that "the individuals requesting the remedy do not seek a declaration that Law Decree 25876 is inapplicable; rather, that this law is applicable as of the date it took effect without contradicting the spirit of the labor rights guaranteed by the Political Constitution."[50]

66. On July 26, 1995, the 18th Labor Court of Lima issued the Judgment No. 227-95[51] that declared the petition founded and concluded that,

> "Law Decree 25876 was applied retroactively, and although the application of this public and necessary law oriented toward stabilizing the socio-economic situation of the State and eliminating the inflationary distortions that the automatic adjustment systems could cause was imperative, its effects cannot be allowed to damage the juridical structure of the Nation; therefore, as law that reiterates and clarifies Legislative Decree No. 757, a clarifying disposition's validity cannot be retroactive to the date in which the law being clarified entered into force. This is because laws are valid only as of their material existence, that is, as of their publication, and not before."[52]

Consequently, the Labor Court ordered SEDAPAL:

> "first, [...] to restore to the functionaries bringing the complaint [...] the amount by which their monthly remunerations were reduced starting in the month of December 1992; second, [...] to restore the fraction of the remunerations that was deducted and subtracted for the period of January to November 1992, and third, [...] to grant the functionaries bringing the complaint a raise in remaining remunerations on applying the salary scale to the increase of S/. 70.00 *nuevos soles* in the base salary in the scale structure - the unskilled laborer - as of the month of July 1992." [53]

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[49] Judgment No. 227-95 of the 18th Labor Court of Lima, July 26, 1995 (Case file No. 546-93) (case file of annexes to the application, tome I, annex 10, folio 77).

[50] Judgment No. 227-95 of the 18th Labor Court of Lima, *supra* note 49, folio 77.

[51] Judgment No. 227-95 of the 18th Labor Court of Lima, *supra* note 49, folios 77 to 85.

[52] Judgment No. 227-95 of the 18th Labor Court of Lima, *supra* note 49, folio 81.

[53] Thus SEDAPAL had to pay out the sum total of S/. 2,840,318.67 to the 185 functionaries bringing the complaint, plus the corresponding legal interest on executing the judgment. Judgment No. 227-95 of the 18th Labor Court of Lima, *supra* note 49, folio 82).

67. That lower court judgment was appealed by the company, but on September 30, 1996, the Second Labor Chamber of the Superior Court of Lima upheld it.[54] Given this, on January 31, 1997, SEDAPAL submitted a cassation appeal that was resolved on July 21, 1999, by the Constitutional and Social Law Chamber of the Supreme Court of Justice. The ruling granted the remedy and overturned the second instance order in the petitioners' favor, taking into account the following reasoning:

> [It shall be] determined if Law Decree [25876] is applicable with regard to the clarifications it introduces to Legislative Decree [757] only as of its publication or if, on the contrary, at issue is an interpretive law that places conditions on the interpretation and application of [Decree 757] from the moment in which that decree was itself published.
>
> [In this regard,] the second of the two criteria mentioned "Has already been established by the Supreme Chamber repeatedly in its case law, which finds that the abolishment established by the Executive of all automatic systems for increasing remunerations established though collective bargaining agreements, as happens with the claimants through, in succession, Legislative Decree [757] and the Law Decrees [25541] and [25876], is found to be Constitutional and in keeping with the law. It has effect as of the entrance into force of the first of the laws cited."[55]

68. Likewise, the Chamber of Constitutional and Social Law "[found] that the judgment [in favor of the alleged victims] erroneously interprets Law Decree [25876], restricting its effects despite its explicit text, leading to the granting of the [writ of] cassation."

69. The second group of the remaining 48 alleged victims began another proceeding in which the reasoning expressed previously by the Supreme Court was used by a Lima Labor Court to deny them the *amparo*.[56] This second group also requested that the Decree 25876 "be duly applied as of the date of its entering into force without causing harm to the labor rights" guaranteed in the Constitution.[57] This complaint was initially deemed as founded.[58]

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[54] That Chamber found that it was only necessary to modify "the amount established for payment. Therefore [it] order[ed the company] to pay the 185 individuals bringing the complaint [...] the sum total of S/. 1,204,051.85 (one million, two hundred and four thousand, fifty one and 85/100 nuevos soles). In this respect, the Chamber found that the final amount had not been calculated correctly because it did not take into account "the CONADE directive No. 004-93 issued on February 17, 1993, providing for the implementation of a new remuneration structure for State companies [...] which raises the remunerations of personnel not subject to collective bargaining [...] for which reason the right protected cannot extend beyond that date." Judgment of the Second Labor Chamber of Lima dated September 30, 1996 (Case file No. 3926-95-ID (S)) (case file of annexes to the application, tome I, annex 12, folios 109 to 113).

[55] Judgment of the Chamber of Constitutional and Social Law of the Supreme Court of Justice of July 21, 1999 (case file of annexes to the application, tome I, annex 13, folio 117).

[56] The request for a writ of *amparo* was filed against SEDAPAL before the 13th Labor Court of Lima "for the violation of and non-compliance with express constitutional precepts on labor issues" and sought "an immediate cessation of those violations and the immediate restitution of the labor rights that have been violated." *Cf.* Judgment No. 189-96-13 of the 13th Specialized Labor Court of Lima dated July 26, 1996 (Case file No. 987-94) (case file of annexes to the application, tome I, annex 14, folios 119 to 132).

[57] Judgment No. 189-96-13 of the 13th Specialized Labor Court of Lima, *supra* note 56, folio 120).

However, the ruling in question was struck down[59] and a new ruling was ordered. In the new ruling, the 13th Labor Court of Lima issued a judgment declaring the complaint without merit based on the judgment issued previously by the aforementioned Chamber of Constitutional and Social Law in response to the complaint filed by the first group of workers.[60]

2. Scope of the violation of the right to judicial protection in this case

70. The Commission argued that "the judicial authorities concluded that the application of the decrees was not retroactive without taking into consideration the difference in the scope of each decree." It stated that the judicial authorities "did not limit themselves to making a reasonable interpretation of applicable law." On the contrary, they issued judgments that were manifestly arbitrary, i) in open disagreement with the guarantee of non-retroactivity provided in the Political Constitution of Peru and ii) in open disregard for the facts of the situation brought before them." Thus, "The judicial authorities [...] did not examine the difference between the three decrees with regard to their scope, nor did they offer reasoning allowing for a reasonable understanding of the motives under which the evidently retroactive application of Decree 25876 was not incompatible with the constitutional guarantee of non-retroactivity of laws." According to the Commission, "this arbitrariness is explained in that the Chamber of Constitutional and Social Law of the Supreme Court of Justice did not even make a decision on the facts based on the contents of the case file. Thus in its July 21, 1999, ruling, it stated that the automatic system for increasing remunerations that applied to the [alleged] victims had been established through Collective Bargaining Agreements. This situation was contrary to reality, as the SEDAPAL functionaries, employees and technicians were not authorized to bargain or reach agreements collectively." Finally, the Commission indicated that "the different scope and content of the decrees [is clear], for which reason one cannot make an argument based solely on the interpretive character of the latter two."

71. The representative added that Decree Law No. 25876 "constituted an express act of

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[58] On July 26, 1996, the 13th Special Labor Court ruled to "[a]dmit the suit on the grounds that Law Decree 25876 had been retroactively applied in violation of express constitutional guarantees." Likewise, it "[o]rdered the restitution of the remuneration decreases and deductions." It ordered the payment of S/. 738,129.60 (seven hundred and thirty-eight thousand, one hundred and twenty-nine nuevo soles and sixty cents) to the benefit of the 49 plaintiff functionaries paid through [July] 30." *Cf.* Judgment No. 189-96-13 of the 13th Specialized Labor Court of Lima, *supra* note 56, folios 128 and 132.

[59] This judgment was declared null and voice on February 17, 1997, by part of the Second Labor Chamber of the Superior Court of Lima, and "order[ed] that the Judge [of the 13th Court of Lima] issue a new ruling that considered the specifications of [said judgment]." The Labor Chamber considered that "the A-quo founded its order in the structure of the salary scales […] applying it for individual liquidations […] until the moment of the expedition of the judgment" and, in this sense, ordered "the forwarding of the acts to the Office of Judicial Investigations in order for it to determine the debt to each one of the petitioners until the time they were provided for in August 1993." Judgment No. 5603-96 IDL of the Second Labor Chamber of the Superior Court of Lima (Case File No. 987-94) (case file of annexes to the application, tome I, appendix 2, folio 385).

[60] In effect, the Court indicated that, "In a case similar to the one being heard, the Chamber of Constitutional and Social Law of the Supreme Court of the Republic dated July 21, 1999, established in a specific and final ruling on the facts and law that were the subject of the proceeding in case file No. 619-97, in which it examined exactly the same issues in dispute in this proceeding. Judgment No. 234-2000-13 JTL of the 13th Specialized Labor Court of Lima dated December 12, 2000 (case file of annexes to the application, tome I, annex 14, folios 134 to 137). It should also be emphasized that this judgment was not appealed by the workers, for which reason on January 8, 2001, the 13th Labor Court of Lima issued an order that "declared the judgment consented to."

retaliation in response to the [c]ourt [a]ction of [*a*]*mparo* requested by the [f]unctionaries," given that, according to the representative, the company "drafted" the decree and "got it issued by the government [...of] former President Fujimori." The representative alleged that the judgment of the Supreme Court that "rules the retroactive application of Law Decree no. 25876 constitutional" constitutes "fraudulent *res judicata*" as it "acts against express constitutional guarantees" and "the judges signing it were acting neither independently nor impartially." Based on this, the representative pointed to the political context in Peru during that time, indicating that the judgment "was issued by [a] false [j]udicial [p]ower, established outside constitutional rule that could not raise the flags of independence and impartiality, that was not only harshly questioned for the arbitrariness and unconstitutionality of its rulings, but also for its obvious subjugation to the [e]xecutive [b]ranch of the dictatorship in power at that time." The representative added that the judgment "was issued in the context of a dictatorship [...] where it was not possible for the workers to obtain a judgment in their favor and against the State."

72. For its part, the State indicated that the legislative decree and the subsequent regulations it contained were valid legal regulations that have been ratified by the domestic juridical system. They were applied to all State business activity and not designed specifically for the SEDAPAL workers, nor for those later affiliated with the SIFUSE union." The State added that "the judgment of the Supreme Court [was] handed down as part of a labor proceeding, [which] resulted in a ruling on the merits [...] that for Peru has the status of *res judicata*[. Since it was] handed down within a proceeding whose validity has not been questioned," "it has the status of *res judicata* on labor issues. Even then had it been fraudulent *res judicata*, the statute of limitations for contesting the ruling of the highest body in Peruvian jurisdiction would have expired." The State also argued "that it is false that during the rule of former President Alberto Fujimori (1995 - 2000) the Judicial Branch and/or the Constitutional Tribunal had denied access to proper and effective [j]udicial [p]rotection - that is, had failed to apply Peruvian law justly and with respect for the procedural guarantees of the plaintiffs. In this sense, [it is] demonstrated that although there were judgments in favor of the Peruvian State, there were also rulings in favor of workers, especially at the level of the Constitutional Tribunal."

73. The Tribunal observes that the Peruvian Political Constitution in force at the time of the facts established the guarantee of non-retroactivity of laws. Specifically, Article 187 established among its provisions that, "[n]o law has retroactive force or effect except in criminal, labor or tax issues when it is beneficial to the prisoner, worker or tax payer, respectively."[61] The case law of the Supreme Court of Justice and the Constitional Tribunal of Peru has indicated that the principle of non-retroactivity implies that "a Law may not be applied to facts or situations that took place before its promulgation and publication."[62]

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[61] It should be noted that the 1979 Peruvian Constitution was changed in 1993. In the new Constitution, Article 103 establishes that, "No law has retroactive force or effect except in criminal law when it is beneficial to the prisoner."

[62] Judgment of the Supreme Court of Justice of the Republic of Peru, Chamber of constitutional and social law, December 12, 2002, (case file on the Merits, tome III, annex 4, folio 1205). Also see Judgment of the Supreme Court of Justice of the Republic of Peru, Chamber of constitutional and social law, March 18, 2010, (case file on the Merits, tome III, annex 2, folio 1196). However, that case law establishes two exceptions to this rule, to wit: i) when so-called "benign" retroactivity is applied, which by virtue of Article 187 means that the regulation can have retroactive effects in labor or criminal law if they are beneficial, which is to say it "provides for the application of the principle of retroactivity of laws in labor issues when the law to be applied has beneficial effects." Judgment of the Supreme Court of Justice of the Republic of Peru, Chamber of constitutional and social law, November 18, 2003 (case file on the Merits, tome III, annex 4, folio 1211), and ii)

74. In this case, the Chamber of Constitutional and Social Law of the Supreme Court in the judgment of July 21, 1999, taking into account "repeated jurisprudence," indicated that Law Decree 25876 was an interpretive law, for which reason it could enter into force on a prior date despite having been issued on a later date. The Court observes that the Supreme Court's ruling does not explain why the law was an interpretive one, nor does it point to the "repeated case law" that the high court took as grounds at that time.[63] Following that ruling, the State acknowledged before the Commission and before this Court that there was no judicial protection with regard to the retroactive application of the laws eliminating the salary scale system, in disregard of the "rights and principles recognized in the Constitution." (*supra* para. 17, 18, and 19) For his part, expert witness Abad Yupanqui, whose comments were not contested by the State, stated that "the repeated case law of the Judicial Branch recognizing the constitutional validity of Law Decrees No. 25541 and 25876 constitutes a clear denial of justice, as it does not provide effective judicial protection under the principles of non-retroactivity of laws and *res judicata*." [64]

75. In this respect, the Court has indicated that Article 25(1) of the Convention includes an obligation for States Party to guarantee all persons under its jurisdiction access to an effective judicial remedy against acts that violate their fundamental rights.[65] This effectiveness supposes that in addition to the formal existence of the remedies, they get results or responses to the violations of the rights contemplated in the Convention, in the Constitution or in laws.[66] In this sense, remedies that because of the country's general conditions or even because of specific conditions related to the case in question are illusory cannot be considered effective. This can be the case, for example, when their uselessness has

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when the regulation is interpretive, since "the interpretation made by Congress is understood to be valid from the moment in which the law being interpreted entered into force. That is to say that the Law that interprets a prior law takes effect as of the moment the latter entered into force, not from the moment it itself enters [into force]." Judgment of the Supreme Court of Justice of the Republic of Peru, Chamber of constitutional and social law, June 20, 2006, (case file on the Merits, tome III, annex 6, folio 1223). According to case law precedence, the Court observes that the requirements for a law to be deemed interpretive are the following: "First, it must refer expressly to the prior law. Second, it must establish the sense of that prior law, enunciating one of the many plausible meanings of the law being interpreted, which, by choice of the legislator, becomes the authentic meaning to the exclusion of the other interpretations of the prior law. Third, it shall not add content to the law being interpreted that was not included within its material scope." Judgment of the Constitutional Tribunal of Peru dated May 16, 2007, (case file on the Merits, tome III, annex 7, folio 1239).

63 Also, the Tribunal observes that on denying the request of the victims, the Chamber of Constitutional and Social Law indicated that the automatic salary readjustment systems established through collective bargaining were abolished. *Cf.* Judgment of the Chamber of Constitutional and Social Law of the Supreme Court of Justice, *supra* note 55, folio 117. However, the victims were not subject to collective bargaining, for which reason this consideration was not applicable to them. (*supra* para. 53).

64 Dictamen del perito Samuel B. Abad Yupanqui rendido ante fedatario público de 27 de septiembre de 2010 (case file on the Merits, tome II, folio 441).

65 *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections.* Judgment of June 26, 1987. Serie C No. 1, para. 91; *Case of Rosendo Cantú*, *supra* note 13, para. 164, and *Case of Cabrera García and Montiel Flores*, *supra* note 17, para. 141.

66 *Cf. Case of the Constitutional Court v. Peru. Merits, Reparations and Costs.* Judgment of January 31, 2001. Series C No. 71, para. *90. Preliminary Objection, Merits, Reparations and Costs.* Judgment of October 30, 2008. Serie C No. 187, para. 102; *Case of Reverón Trujillo*, *supra* note 23, para. 59, and see also, *Judicial Guarantees in States of Emergency (Arts. 27(2), 25 and (8) American Convention on Human Rights)*. Advisory Opinion OC-9/87 of October 6, 1987. Series A No. 9, para. 23.

been demonstrated in practice, due to a lack of means for executing rulings, or due to any other situation giving rise to a context of denial of justice.[67] Thus the proceeding must tend toward the materialization of the protection of the right recognized in the judicial ruling through the suitable application of that ruling.[68]

76. Taking all this into account, the Court accepts the State's acknowledgment of responsibility in the sense that there was no judicial protection from the retroactive application of law, in a failure to honor domestic law. This implies that the ruling of the Chamber of Constitutional and Social Law of the Supreme Court had the effect of making the judicial remedy sought by the victims ineffective for protecting the aforementioned domestic law guarantees. As a consequence, the Court finds that the State violated the right to judicial protection recognized in Article 25(1), with regard to Article 1(1) of the American Convention, to the detriment of the 233 individuals indicated in the annex to this Judgment.

3. Alleged violation of the right to property

77. The Commission did not allege a violation of the right to property.

78. The representative alleged that, based on the decrees issued by the Executive Branch, SEDAPAL took measures that "had consequences for the remunerations received by the victims." Likewise, the representative alleged that the effect produced implies a "removal and/or appropriation of those goods being used and enjoyed" by the victims "without payment of a just compensation." In addition, he indicated that the State could have "suspended or eliminated the [s]alary [s]cale [a]djustment [s]ystem" after the date of publication of Law Decree No. 25876, "but not retroactively." Therefore, he indicated that "the retroactive application of the aforementioned Law Decree [...] presupposes an excess of State power [...] to subordinate the specific interest of [the victims] in accessing enjoyment of the [s]alary [s]cale [s]ystem as contrasted to the general interest [... in the framework of] an economic [c]risis and that specified [n]ational r[]eactivation measures, as the suspension of the [a]djustment [s]ystem as of the date of the law's existence. that is, as of its publication, was a more than sufficient measure for the goals indicated."

79. For its part, the State argued that "the right to property is not absolute and allows for certain limitations on use and enjoyment for the public interest." It added that the decrees "were issued in a specific economic-labor context [...] in which the public interest took precedence, and it was necessary to consolidate the Program of Structural Reforms to the national economy; it was not, as the applicants try to argue, an arbitrary act of the State to their detriment." The State explained that "the decisions made [during the nineties] to control hyperinflation were based on the serious economic crisis that led to the suspension of salary regulations - whether contained or not in collective bargaining agreements - as long as they were linked to changes in price indexes, as they were elements that created higher inflation. Although it was a drastic decision, it was a measure that was used to guarantee the stability of the economy in general and in no way did it violate the right to property, as it played the

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[67] *Cf. Case of Ivcher Bronstein v. Peru. Merits, Reparations and Costs.* Judgment of February 6, 2001. Series C No. 74, para. 137; *Case of Acevedo-Jaramillo et al., supra* note 14, para. 213; and *Case of Acevedo Buendía et al ("Discharged and Retired Employees of the Office of the Comptroller") v. Perú. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 1, 2009. Serie C No. 198, para. 69.

[68] *Cf. Case of Baena Ricardo et al V. Panamá. Competencia.* Judgment of November 28, 2003. Serie C No. 104, para. 73; *Case of Acevedo Jaramillo et al, supra* note 14, para. 217, and *Case of Acevedo Buendía et al ("Discharged and Retired Employees of the Office of the Comptroller"), supra* note 68, para. 69.

social role of preserving Peruvian society in general."

80. In this case, the Commission, the representative and the State agree that elimination of the salary scale system was proper (*supra* para. 62). The Court observes that the decrees issued between the years 1991 and 1992 related to the facts of this case took place within the economic context of Peru in July of 1990. Effectively, the State was "in a process of hyperinflation that had already lasted 24 months," which produced "a drastic drop in real remunerations."[69] To this was added, among other things, a high budget deficit, a decline in gross domestic product, a "precarious situation with regard to the trade deficit," a high rate of underemployment and a fall in tax receipts.[70] Because of this, "on August 8, 1990, the [...] government applied a stabilization program that prioritized cleaning up the public finances and liberalizing the exchange rate."[71] Among the anti-inflationary measures dictated as of August 1990 were, for example, a measure for adjustments in remuneration to be "done in accordance with expected inflation rates that were lower and more in line with the effort to stabilize the economy."[72] and the freezing of the "main remunerative elements during the rest of the year."[73]

81. Taking this into account, the Court highlights that the representative does not object to the elimination of the salary scale system, but rather to the application of a law that retroactively nullified that remuneration adjustment system. The consequence of the retroactive application of this law was that the victims ceased to receive the full amount of their remuneration, suffering as they did both deductions and the lack of raises that were due to them (*supra* paras. 63 and 64). These facts had negative effects on the workers' rights with regard to the remuneration that they had already been paid.

82. In this respect, this Tribunal has in its case law developed a broad concept of property that covers, among other things, the use and enjoyment of goods, defined as both material, appropriable things and as intangible objects,[74] as well as all rights that could form part of a person's wealth.[75] Likewise, the Court has, through Article 21 of the Convention, protected

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69 Expert witness report presented by Jorge Domingo Gonzalez Izquierdo on September 27, 2010 (case file on the merits, tome II, folio 479).

70 Expert witness report presented by Jorge Domingo Gonzalez Izquierdo, *supra* note 70, folios 479 and 482).

71 Expert witness report presented by Jorge Domingo Gonzalez Izquierdo, *supra* note 70, folio 481.

72 Expert witness report presented by Jorge Domingo Gonzalez Izquierdo, *supra* note 70, folio 426.

73 Expert witness report presented by Jorge Domingo Gonzalez Izquierdo, *supra* note 70, folio 427.

74 Under customary international law, the type of foreign property protected against expropriation is not limited to movable and immovable property. Intangible rights, including contractual rights, have been protected as 'acquired' or 'vested rights' in a number of arbitral decisions. International Centre for Settlement of Investment Disputes (ICSIIP), *Case of Wena Hotels Ltd. v. Egyp*. No. ARB/98/4. Award of 8 December of 2000, para. 98, and *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt*, No. ARB/84/3, Review 328,375 of 1993. Likewise, the International Court of Justice, *Case concerning certain German interests in Polish Upper Silesia*. Merits. Judgment of 25 of may 1926. Serie A. No. 7.

75 *Cf. Case of Ivcher Bronstein v. Perú. Reparations and Costs.* Judgment of February 6, 2001. Serie C No. 74, paras. 120-122; *Case of Salvador Chiriboga v. Ecuador. Preliminary Objection and Merits.* Judgment of May 6, 2008. Serie C No. 179, para. 55, and *Case of Acevedo Buendía et al ("Discharged and Retired Employees of the Office of the Comptroller), supra* note 68, para. 84.

vested rights, which are understood as rights that have become part of an individual's wealth.[76] With regard to vested rights, it should be noted that they constitute part of the basis of the "principle of non-retroactivity of the law, which is to say that the new law does not have the authority to regulate or effect juridical situations from the past that have been duly consolidated. Juridical situations are untouchable and unaffected by new law when, with regard to a particular situation of fact, they have had full juridical effect under the laws in force at that time."[77] Finally, it is necessary to reiterate that the right to property is not absolute, and that in that sense it can be subject to restrictions and limitations[78] as long as those restrictions are established using the appropriate legal channel and in keeping with the parameters established in Article 21.[79]

83. In addition, in another case[80] this Court declared a violation of the right to property after personal wealth was affected through a failure to comply with judgments that were intended to protect the right to a pension. The Tribunal indicated that from the moment in which a pensioner meets the requirements for accessing the retirement regimen provided for by law, the pensioner is vested with the right to a pension. The Court also ruled that the right to a pension with which that individual is vested has "wealth effects,"[81] which are protected under Article 21 of the Convention.[82] With respect to this, the Court considers that just as pensions that have complied with all legal requirements are part of the wealth of a worker, the salary, benefits and raises earned by that worker are also protected by the right to property enshrined in the Convention.[83]

84. In this case, the Court observes that the system of salary adjustments that the victims had before the application of Decree Law No. 25876 had generated an increase in remunerations that became part of the wealth of the victims. This means that it became vested right of the victims. It should be clarified that the issue is not a vested right to the salary scale system. The vested right in question refers to the sums that had already become part of the workers' wealth, as well as the salary increases that had been established under the scale

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76 *Cf. Case of "Cinco Pensionistas" V. Perú. Merits, Reparations and Costs.* Judgment of February 28, 2003. Serie C No. 98, para. 102; *Case of Salvador Chiriboga, supra* note 76, para. 55, and *Case of Acevedo Buendía et al ("Discharged and Retired Employees of the Office of the Comptroller"), supra* note 68, para. 84.

77 Judgment of C-147/97 of the Constitutional Court of Colombia of March 19, 1997.

78 *Cf. Case of Ivcher Bronstein v. Perú. Reparations and Costs, supra* note 76, para. 128; *Case of Salvador Chiriboga, supra* note 76, paras. 60 and 61, and *Case of Perozo et al v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Serie C No. 195, para. 399.

79 *Cf. Case of Salvador Chiriboga, supra note* 67, para. 54. *Case of Acevedo Buendía et al ("Discharged and Retired Employees of the Office of the Comptroller"), supra* note 68, para. 84.

80 *Cf. Case of the "Five Pensioners," supra note* 77.

81 *Cf. Case of the "Five Pensioners," supra note* 77, para. 103, *Case of Acevedo Buendía et al ("Discharged and Retired Employees of the Office of the Comptroller"), supra* note 68, para. 85.

82 With regard to this, in the case cited, the Tribunal ruled that as the amount of the victims' pension payments had been arbitrarily changed and the judicial judgments issued in response to the motions for guarantee submitted by the victims had not been complied with, the State violated the right to property recognized in Article 21 of the Convention. *Case of the "Five Pensioners," supra* note 77, paras. 115 and 121.

83 In this sense, the European Court has established that: "the Convention organs have consistently held that income that has been earned does constitute a "possession" within the meaning of Article 1 of Protocol No. 1 to the Convention." ECHR, Case of *Lelas v. Croatia*, Judgment of 20 may 2010, para. 58, Case of *Bahçeyaka v. Turkey*, Judgment of 13 July 2006 para. 34 and Case of *Schettini and others v. Italy* (dec.), Judgment of 9 November 2000, para. 1.

system before it was eliminated. The Court finds that this vested right was affected by the retroactive application of the aforementioned legal decree, which, according to the acquiescence of the State, was issued against domestic law and without the victims having access to judicial protection (*supra* paras. 17, 18, and 19). The effects visited on personal wealth were also manifested in the deduction imposed on the victims of a percentage of their monthly remuneration (*supra* paras. 63 and 64). In conclusion, the victims could not fully enjoy their right to property with regard to the remunerations.

85. Taking into account that the lack of judicial protection affected vested rights to remuneration that had become part of the victims' personal wealth, the Court finds that the State violated the right to private property recognized in Articles 21(1) and 21(2), with regard to Articles 25(1) and 1(1) of the American Convention, to the detriment of the two hundred and thirty-three individuals indicated in paragraph 233 of this Judgment.

VIII
REPARATIONS
(Application of Article 63(1) of the American Convention)

86. Based on the provisions of Article 63(1) of the American Convention,[84] the Court has established that any violation of an international obligation which has caused harm carries with it the duty to provide adequate reparations.[85] This provision "reflects a common-law norm that is one of the fundamental principles of contemporary international law regarding the responsibility of the States."[86]

87. This Tribunal has established that reparations must have a causal link to the facts of the case, the violations declared and the damage attributed to those violations, as well as to the measures requested in reparation of the corresponding damages. Therefore, the Court must examine that concurrence in order to duly rule in keeping with the law.[87]

88. In consideration of the violations of the American Convention declared in prior chapters, the Tribunal will proceed to examine the requests presented by the Commission and the representative, as well as the arguments of the State. It will do so according to the

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[84] Article 63(1) holds that, "If the Court finds that there has been a violation of a right or freedom protected by [the] 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."

[85] *Cf. Case of Velásquez Rodríguez v. Honduras.* Reparations and Costs. Judgment of July 21, 1989. Series C No. 7, para. 25; *Case of Gomes Lund et al (Guerrilha do Araguaia), supra* note 17, para. 245, and *Case of Cabrera García and Montiel Flores, supra* note 17, para. 208.

[86] *Cf. Case of the "Street Children" (Villagrán Morales et al) V. Guatemala. Reparations* and *Costs.* Judgment of May 26, 2001. Serie C No. 77, para. 62; *Case of Gomes Lund et al (Guerrilha do Araguaia), supra* note 17, para. 245, and *Case of Cabrera García and Montiel Flores, supra* note 17, para. 208.

[87] *Cf. Case of Ticona Estrada et al. v. Bolivia. Merits, Reparations and Costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, *Case of Gomes Lund et al (Guerrilha do Araguaia)*, supra note 17, para. 246, and *Case of Cabrera García and Montiel Flores, supra* note 17, para. 209.

standards set in the Court's case law with regard to the nature and scope of the obligation to provide reparations,[88] with the purpose of stipulating measures aimed at providing reparations for the damages caused to the victims.

A. Injured Party

89. Under the terms of Article 63(1) of the American Convention, those who have been declared victims of a violation of a right enshrined in the Convention are considered injured parties. The victims in this case are the 233 members of SEDAPAL indicated in the Commission's application, as well as those listed in the annex to this Judgment. They will be considered beneficiaries of the reparations ordered by this Tribunal.

90. On the other hand, although the representative presented some evidence with regard to alleged damages suffered by some of the relatives of the 233 victims, supposedly as a consequence of the violations found, the Court observes that neither the Commission nor the representative argued that those individuals were victims of a violation of a right enshrined in the American Convention (*supra* para. 39). Because of this, and taking into account the Tribunal's case law,[89] the Court does not consider the relatives of the victims in this case to be "injured parties" and specifies that they will be recipients of reparations only in their capacity as heirs - that is, when the victim has passed away - and pursuant to the provisions of domestic law.

B. Measures of satisfaction

b.1) Publication of the Judgment

91. Neither the Commission nor the representative requested that the Court order this measure of reparation.

92. However, as the Tribunal has ordered in other cases,[90] the State shall publish this Judgment one time in the Official Gazette, including all the corresponding headings and subheadings, as well as the operative part of the Judgment, though without the footnotes. A time period of six months is granted for carrying out this publication, counted as of the notification of this Judgment.

C. Compensation

c.1. Pecuniary damages

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88 *Cf. Case of Velásquez Rodríguez v. Honduras.* Reparations and Costs, *supra note* 242, paras. 25 to 27; *Case of Vélez Loor*, *supra* note 12, para. 257, and *Case of Cabrera García and Montiel Flores*, *supra* note 17, para. 210.

89 *Cf. 25; Case of Acevedo Buendía et al. ("Discharged and Retired Employees of the Office of the Comptroller") supra* note 68, *Case of Usón Ramírez v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 20, 2009. Serie C No. 207, para. 163, and *Case of Cabrera García and Montiel Flores*, *supra* note 17, para. 212.

90 *Cf. Case of Barrios Altos v. Peru.* Reparations and Costs. Judgment of November 30, 2001. Series C No. 87; Operative Paragraph 5 d); *Case of Gomes Lund et al (Guerrilha do Araguaia)*, *supra* note 17, para. 273, and *Case of Cabrera García and Montiel Flores*, *supra* note 17, para. 217.

93. In its jurisprudence, the Court has developed the concept of pecuniary damages and the standards indicating when compensation is due.[91]

c.1.1 Arguments of the parties

94. The Commission did not request a specific amount from the Court for these reparations to the benefit of the victims. However, it did request that the establishing of material damages not be left to domestic authorities. In this respect, the Commission indicated that, "remitting the determination of damages to personal wealth to the domestic system could end up not being effective and causing further delays to justice and reparations for the victims," especially because "various extrajudicial alternatives have already been explored and demonstrated to be ineffective." The Commission emphasized "that the processing of the case before the Commission did not focus on establishing a precise definition of damage to personal wealth [and that] during that process before the Court, the parties have provided more information" with regard to the issue.

95. For his part, the representative held that reparations for material damages would rise to more than 30,334,725.87 (thirty million, three hundred and thirty-four thousand, seven hundred and twenty-five Nuevos Soles), updated as of the presentation of the brief of pleadings and motions. According to the representative, the expert accounting report submitted before this Tribunal "accurately quantified [r]emunerations and [c]ompensation for time of service provided, plus interest," that the State has improperly appropriated as a consequence of the retroactive application of law "from July 1, 1992, until April 15, 2010," to the periods during which the salary scale system was in force, that is, "from October 23, 1992, until October 31, 1992, and from November 27, 1992, until April 15, 2010." On this point, the representative "reserv[ed the possibility of] continuing updating [that] settlement [...] until the date on which the […] State complies with its [corresponding] payment. In order to make the calculation through the present day, the representative argues that a report from a Labor Ministry consultant indicating that the calculation must be made through the present day is binding. Also, the representative argued that in 17 years, the victims have not received raises, among other reasons in order to avoid taking the calculation of material damages from the 1993 salary restructuring into account.

96. The State argued that because the judgment of the Supreme Court ruling against the victims constitutes *res judicata*, the damage was not reparable. However, it submitted an expert accountant report "on the payment of the reimbursements (including applicable interest calculated through April 25, 2010) that SEDAPAL should pay, [equaling] nine million, three hundred and one thousand, five hundred and twenty-eight and 68/100 nuevo soles." "The amount in American dollars equals approximately US$ 3,260,000 United States dollars." The State argued that "there is only a violation with regard to the 11 months during which it requested the deduction [from the victims, since] after that point, in 1993 when it establish[ed] the new salary system, not only did it subsume the scales but [also] a series of categories and a new harmonic and complementary form of regulating remuneration [was]

[91] This Tribunal has established that pecuniary damage assumes "the loss of or detriment to the victims income, the expenses incurred as a result of the facts, and the monetary consequences that have a causal nexus with the facts of the *sub judice* case." *Case of Bámaca Velásquez v. Guatemala*. Reparations and Costs, *supra note* 243, paras. 43; *Case of Gomes Lund et al (Guerrilha do Araguaia)*, *supra* note 17, para. 298, and *Case of Cabrera García and Montiel Flores*, *supra* note 17, para. 248.

design[ed].”

97. The State specified that the salary restructuring "was not the result of any kind of absorption of the repealed salary ratios given [that] they ceased to be in force with the issuing of law decree No. 25876." In this sense, the State insisted that "Law Decree 25876 eliminat[ed] the salary ratios as of December 1991, [the date on which] the State left companies free to unilaterally grant raises to workers not subject to collective bargaining agreements. That is what SEDAPAL did as of August 1993." With regard to the representative's argument that salary adjustments had never been made, the State argued that in 2002 "raises were given and the remunerative policy was restructured, for which reason they received a significant raise." According to the State, the report from a Labor Ministry consultant used by the representative "[is] not an opinion with the status of expert testimony" and is not binding because "the body with binding authority to issue the kinds of reports obligating the rest of the government agency to apply its standards" was "the directorship [of] productivity and labor competitiveness" of that Ministry.

c.1.2. Considerations of the Court

98. For eight years, the parties have been trying to reach an agreement on the amount of the material damages using the various mechanisms brought to bear for this purpose; they have failed. Effectively, from the moment the State acknowledged its responsibility in this case (*supra* para. 18), the parties attempted to reach an agreement on the reparations owed before the admissibility and the merits report was issued.[92] Following that report, a high-level commission was formed under the auspices of the Ministry of Justice and comprising representatives of the Labor Ministry, the Ministry of Mining and Energy, and the National Fund for Financing State Business Activity. The State reported on the meetings held by that Commission, the way in which it had heard the parties out, and the failure to reach an agreement.[93]

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92 As such, in the Report No. 52-2004-JUS/CNDH-SE issued on September 3, 2004, the State mentioned the multiple Official Letter No. 023-2004-JUS/CNDH, of August 17, 2004, forwarded to SIFUSE, where it was stated, that in the framework of the case of friendly settlement in the present case, “in order to have a technical opinion on the arguments of the [victims], and considering that it does not have personnel specialized in labor law, it requested the support of one of the external consultants and the Ministry of Labor.” Report No. 52-2004-JUS/CNDH-SE of September 3, 2004, issued by the Executive Secretary of the National Council of Human Rights of the Ministry of Justice (case file of annexes to the application, tome I, annex 17, folios 150 to 153).

93 The formation of the commission was established through Supreme Resolution No. 226-2009-PCM of September 2, 2009. According to the resolution forming the high-level Commission, once SEDAPAL presented a series of documents and the petitioners presented evidence to be considered (optional), the Commission would have 20 working days to evaluate the documentation. Where necessary, the high-level Commission could summon the parties. Once this time period was up, the members of the Union could request a chance to speak. Once these steps have been taken, the high-level Commission would have 20 working days (no deadline extensions permitted) to prepare a final report that must be submitted to the President of the State Legal Defense Council. This report would issue a ruling with regard to the reach of the IACHR recommendation as well as the mechanisms for implementing it. The high-level Commission had a maximum operational time period of 90 days from September 11, 2009, the date on which the high-level Commission was launched. Supreme Order N° 226-2009-PCM of September 2, 2009 (case file of the answer to the application, tome IX, annex 6, folios 2486 to 2489). In its Reports of September 11 and October 7, 2009, before the Inter-American Commission, the State indicated that the Commission “and had sessioned four times, once in the presence of the SEDAPAL and approximately 120 victims (out of a total of 233). However, on January 11, 2010, the State reported on the internal negotiations that “failed at the domestic level.” The State indicated “that the high-level Commission held 13 closed-door sessions and two sessions attended by the petitioners and the SEDAPAL. It highlighted that the Commission ‘[gave] the petitioners access to an appropriate and effective remedy that was able to provide reparations for the violation of their rights due to the application of law 25876 and for the denial of judicial

99. Before the Court, the representative and the State have submitted expert witness reports calculating the pecuniary damages that the victims should receive.[94] The Tribunal observes that that calculation involves a certain degree of complexity, taking into account that it is not possible to carry out a general calculation that would be applicable to all the workers. On the contrary, each of the expert witness reports prepared a case-by-case calculation. Despite this complexity and taking into account that approximately 18 years have passed without the victims having access to domestic courts for determining the indemnity they are owed, the Court will weigh the evidence available in the case file and rule on the dispute between the parties over the criteria used to calculate the amount in question.

100. To start with, the Tribunal recalls that the expert witness reports intended to quantify the scope of the damages caused by the human rights violation must include an argumentative structure that allows the Tribunal to understand them and weigh them along with the rest of the body of evidence, in keeping with the rules of sound judgment. This is even more relevant when the expert witness reports resort to technical expertise beyond that of the Court,[95]as in this case.

101. In this regard, the Court notes that both expert reports indicate various standards considered at the time the calculations on the scope of pecuniary damages were effectuated in this case. Taking this into account, the expert witness report submitted by the representative takes into consideration dates, standards and categories, as well as several elements and criteria[96] to make the calculation through 2010. For its part, the calculations of the State's expert witness report includes, in general terms:

a) the reimbursements for the failure to pay the remaining raise to be applied to the salary scales based on the raise of S/. 70.00 that was granted to the unskilled laborer position;

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protection in response to the complaint submitted.'" The State noted that the representative had said "that the current amount they are requesting for reparations is equivalent to 17 million dollars." The State added that "the extreme difference between the positions of the parties, who will not budge in their demands (...) explains the Commission's failure." Finally, the State indicated that the "Special State's Attorney's Office attempted to broker a rapprochement; however that was not possible either for the same reasons." (case file on the Merits, tome I, folio 9).

94 Cf. Expert witness report presented by Felix D. Aquije Soler *supra* note 29, folios 2568 a 2668 and Expert report of Mrs. Lily Isabel Albornoz Castro, *supra* note 40, folios 1622 a 1627.

95 Cf. *Case of Chaparro Álvarez and Lapo Íñiguez v. Ecuador. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 21, 2007. Series C No. 170, para. 230.

96 Pursuant to the text of the cited expert report, "the elements of judgment" used to calculate are: "date of hire," "date of dismissal or resignation (for those no longer working there), "salary group," "category," "salary scale," "raise in unskilled laborer remuneration, July 1992 S/. 70.00," "base worker remuneration through November 1992," and "base worker remuneration through December 1992." , annex 1, folios 1900 to folio 2440). Expert report of Mrs. Lily Isabel Albornoz Castro, *supra* note 40, folio 1626. The expert witness report submitted by the representative does not provide an exhaustive explanation of the formula used for calculating the sums that it offers, for which reason it is not possible to repeat the calculations in such a way as to arrive at the same conclusions. However, from the tables provided in the case file, the Court notes that the amounts correspond to the denominated basics regarding the "application of an increase in the remunerations of the unskillsed workers of S/. 70.00" and in regard to the "lowering of salaries" that coincide with specific stements of the expert presented by the State.

b) the amounts corresponding to the restoration of the reduction in monthly remunerations in effect as of the month of December 1992;
c) the amount for paying non-salary compensation, like incentives and bonuses that come after the restitution of basic remuneration;
d) reimbursement of the part of remunerations deducted from January to November of 1992;
e) interest (D. L 25920) on the amounts referred to in a) + b) + c) + d);
f) reimbursements for ESSALUD plus corresponding interest;
g) determination of the reimbursements for Compensation for Time of Service - CTS - plus bank (financial) interest on it, and
h) total amounts that SEDAPAL must reimburse to its personnel holding positions as functionaries and senior management.[97]

102. The Court finds that the reparation of pecuniary damages demands, in the context of this case, demands the payment of the following: i) a reduction in salaries as of December 1992; ii) retroactive collection of the payments made between January and November 1992, and iii) no increase in salaries as a consequence of the last applicable salary scale adjustment that corresponded to the victims (*supra* para. 63). The two expert witness reports agree on these three points.[98] However, if they agree on the amounts that should be compensated for the decrease in the salaries and the non-increase, they do not agree on the specific amounts regarding the retroactive payment.[99] Similarly, there are differences with regard to other

[97] In addition to the foregoing, the expert of the State included in the calculations of the compensation of the reimbursement of the reductions made until March 1994. *Cf.* Expert Opinion of Mr. Félix Daniel Aquije Soler, *supra* note 29, folio 2583.

[98] Both expert witness reports presented by the parties agreed that, i) "There is no complaint with regard to the application of the salary scale system in the periods previous to 1992;" ii) the system of salary scales was suspended "between January 10 and October 22," 1992, by virtue of Law Decree 25.334, "and between November 1 and November 26, 1992, through the application of Law Decree No. 25388 and its modifying statues" Official Letter Nº. 1-2005-MTPE/ATAD of January 7, 2005, *supra* note 44, folio 1883; iii) the workers did not receive payment according to the base pay in force as of January 1992 and there were improper deductions made from their remunerations between December 1992 and March 1994; iv) "for the workers who were dismissed or resigned, or who had passed away, the calculations have been applied through the date corresponding to their last day of employment" Expert report of Mrs. Lily Isabel Albornoz Castro, *supra* note 40, folio 1626. This can be observed in the specific analysis of workers who stopped worker prior to the final payment date established by the State. For example, in the case of Jorge Juis Neyra Yáñez, according to the details that could be observed in both expert witness reports: Expert accounting report, in both the expert report presented by the State as in the one of the representative, the respective calculation has as an end date the month of June 1993. Expert report of Mrs. Lily Isabel Albornoz Castro, *supra* note 40, folio 2136 and Expert Opinion of Mr. Félix Daniel Aquije Soler, *supra* note 29, folio 2659. On this point it is necessary to clarify that although the salary scales should be taken into account through the date on which the individual stopped working, the interest on this debt is considered by both expert witness reports to have accrued through the date on which the briefs of both parties were submitted. It is assumed that interest will continue to accrue "up until the day the debt is paid." Expert Opinion of Mr. Félix Daniel Aquije Soler, *supra* note 29, folio 2585.

[99] Among the criteria taken into account in the expert witness report are the following: i) a first base salary corresponding to S/. 70.00 that was not applied in July 1992; ii) a second base salary representing the lowering of the workers' salaries; iii) the result of applying to each of the basic amounts a 10% for personal remuneration; iv) for each of these base salaries 10% was added for remuneration and 10% for FONAVI; iv) the amount charged retroactively to the victims, and v) the gratifications, vi) the total of all the above-mentioned variables is called the "gross total." Interest, bonuses and non-monetary compensation owned through 1993 are calculated over the "gross total" in the case of the first two base salaries and through February 19, 1994, the date on which the retroactive charges to the workers ceased. To this, the amount is added for "Debt for the Social

standards used to calculate the payment.[100]

103. On the other hand, the expert report presented by the representative calculates, until 2010, the amount due for the ommission to increase based on the amount derived from the application of the last scale of the salary of the victims. In order to justify the end-date for calculation purposes, the calculation is based on a report issued by a consultant of the Labor Ministry in the context of the friendly settlement proceeding carried out in this case (*supra* para. 95). Among the reports' various statements, it indicates that:

> "the fact that the system was eliminated in November 1992 by Law Decree 25876 does not mean that the raises granted while it was in force cease to form part of the workers' remuneration; the elimination of the system only means that the updating of the remunerations would cease to happen as of that time. Therefore, the sums owed for the application of the salary scale system during the periods in which it was in force form part of the remuneration of the functionaries and must to this day be included in the base calculation of work compensation."[101]

104. Also, the expert witness report from the State takes into account that on October 8,

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Security (EsSALUD)" and the "Debt for Compensation for Time of Service," which in both cases incurs interests. Taking as example the table of legal withdraws and interests presented both in the expert opinion of the State and of the representatives regarding Mr. Abrill Alosilla, it is noted that in both the basis for the calculation regarding the amount not increased is of 214,90. Moreover, regarding the basis of the calculation for the improper discount refund, the values in both tables correspond to 92,00. However, in the expert opinion of the State, the amount for the improper discount refund is larger until the month of March 1994, which totals 1524,62. In fact, in the representatives' expert opinion the amount is less, giving that adding * and * is a total of 1399,64 (refunds of March and April 1993 and October 1993 to March 1994). *Cf.* Expert Opinion of Mr. Félix Daniel Aquije Soler, *supra* note 29, folio 2632 and Expert report of Mrs. Lily Isabel Albornoz Castro, *supra* note 40, folio 1954.

[100] The expert reports differed on certain criteria that must be used to pay, for example, the reimbursement of the deductions carried out improperly by the company. Although it is clear that the major difference between the two expert witness reports submitted by the parties centers on the date on which the calculation of the debt to the victims must conclude, the Court observes that there are other technical differences that result in amounts that differ on some points. Effectively, there are differences depending on the way the percentage of the scales is calculated, as with the State's expert witness report interest is added for benefits that are not taken into account in the expert witness report of the representative. The expert witness report of the State calculates interest for the following items: i) work established by Decree Law. 25920; ii) health reimbursements by EsSALUD; and, iii) compensation refunds for time of services (CTS). Regarding this last criterion, it should be noted that according to Article 21 of the Law on CTS, "employers make a deposit in the months of May and November of every year, as many twelfths of the received remuneration of the worker in the months of April and October respectively, as complete worked months". Likewise, the Court notes that the Emergency Decree 127-2000 established that in the temporal regime of monthly deposits of CTS as of [January 1, 2001], which was extended succesively until [October 31, 2004]. According to Article 2 of the provision, the deposit of monthly CTS is determined applying the 8.33% of the monthly remuneration" *Cf.* Expert Opinion of Mr. Félix Daniel Aquije Soler, *supra* note 29, folio 2590. On the other hand, the expert opinion presented by the representatives did not explain on what the name or the criterion given to each of the boxes used in the table of refunds entails. On the other hand, in the calculation of the value of refunds for the improper discount, the values and the dates do not match. These differences between the expert witness reports have not been subject to specific pleadings from the parties, for which reason the Tribunal does not find it proper to rule on them.

[101] Official Letter No. 1-2005MTPE/ATAD of January 7, 2005, *supra* note 44, folios 1884 and 1885.

1993, SEDAPAL[102] "approved, among other things, the Basic Remuneration Structure for levels I through VI - that is, functionary positions - stipulating its implementation and payment starting in August 1993. This structure increase[d] the remuneration of workers not subject to collective bargaining, absorbing all the prior raises from as far back as July 1993."[103] In this regard, the expert witness report indicated that:

> "the 18th Civil Court has ruled that the elimination of the salary scale system does not bring with it the obligation to eliminate the remunerative raises granted while the scale system was in force. This is because the law only calls for updates to remuneration to cease starting in 27.NOV.92. Therefore, the sums owed for the application of the salary scale system during the periods in which it was in force form part of the remuneration of the functionaries and must to the present day be included in the base calculation of compensation for labor." [104]

105. As has been observed, the expert witness report presented by the State expressly indicates that "the raises granted" form part of the remunerations and must be taken into consideration when calculating benefits "to the present day." This expert witness report calculates material damages as through the date of salary restructuring in 1993, since the company considers that that restructuring had "raised employee remuneration" and, in that sense, would include the salaries they were receiving prior to 1993 through the application of the salary scales.

106. The Court observes that with regard to the purpose of the salary restructuring in 1993, the expert De Los Santos noted that "SEDAPAL [did not set up] a structure with the salary scales in mind. [Rather] the expert was thinking of the challenges facing the State [...] and the company and therefore doing a total restructuring. For this reason, the new structure was not set up "for remunerative reasons, but rather for the purpose of modernizing the institution."[105] The testimony also indicated that the 1993 salary restructuring increased the salary-based remuneration of the company's employees.[106]

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[102] Agreement of the Directory of SEDAPAL No. 168-026-93 of October 8, 1993. *Cf.* Expert Opinion of Mr. Félix Daniel Aquije Soler, *supra* note 29, folio 2579.

[103] Cf. Expert Opinion of Mr. Félix Daniel Aquije Soler, *supra* note 29, folio 2579.

[104] *Cf.* Expert Opinion of Mr. Félix Daniel Aquije Soler, *supra* note 29, folio 2580.

[105] *Cf.* Statement rendered by expert witness Víctor Hugo De Los Santos, *supra* note 30.

[106] In agreement with Mr. De Los Santos, the restructuring of salaries of 1993 created "a comprehensive structural and organized reform of the company and created increases in such a manner […] that the salary received by the employees in December 1992 increased on average in August 1993 up to a 111% in nominal value" and "considering that the inflation had a real effect of 63.29%." As such, "any ration that may have been in that intermi of 8 months would always have been less than that offered by SEDAPAL in the new remunerative structure." In this regard, Mr. De Los Santos formulated an example in the following terms: in the case of a professional in category 4, whose scale was 3.42, of 725 soles of salary, "without having provided an increase to unskilled worers [for the collective negotiation of 70 soles], without having given the difference of the [remuneration base from December 1991 to January 1992], without having returned the owed discount [that was made to the workers as a result of the enactment of Decree Law 25876], there is an increase of 96.46." Now, "when establishing the new compensation structure, [...] of the salary of 725, we would have [increased] the increase to the unskilled worker that was [of] 70 soles, multiplied by the ratio gives us 239 soles of increase, the difference of the base that was 301 soles multiplied by the ratio was 102 soles, the owed discount provided

107. Taking all this into account, the Court observes that although the representative and the State agree that the omission of a raise in salary for the victims should be considered "through the present day," the two parties interpret that assertion differently. While the representative argues that from 1993 through the present day there is a failure to pay a portion of the salary that the workers acquired through the application of the salary scales, as well as the increase in employee salaries that should have been made in July 1992, the State argues that the benefits from the 1993 salary restructuring already include those amounts and that the employees therefore are not owed any salary reimbursement from 1993 to the present day. Given this, and as the State's expert witness report specifies that the 1993 salary restructuring meant that the salary levels in force through the present day take into account the salary scale levels already part of the victims' personal wealth, the Tribunal finds that the next step is to examine whether with this argument the representative rejected the idea that the restructuring included the failure to pay the amount added to the victims' personal wealth through the application of the salary scales.

108. In this regard, the representative argued that:

> a) covering the salary scales "was not the purpose of the new salary structure implemented by SEDAPAL." Rather, "it was a response to an inflationary shock taking place at that time." Specifically, the representative argued that the restructuring could not cover the amounts no longer being received because "the salary scale system had already been eliminated and its restoration [was] not being sought." Additionally, the representative highlighted that the State itself recognized that the restructuring "does not cover the [s]alary [s]cales, [thus] eliminating the groundless justification put forward by the State for limiting the calculation";
> b) "at no time has the salary restructuring been more beneficial than the salary scale system" as the latter was "permanent and successive;"
> c) "[the representative] takes into account the remuneration adjustment carried out in 1993, but it does not assign it any juridical significance, as in keeping with the guarantees established in the Political Constitution, no remuneration adjustment can nullify rights that have been granted to employees." The Labor Ministry itself recognizes this;
> d) the last salary restructuring was carried out in 1997 and not in 2002, as the State has said. For this reason the representative argued that "it is false [...] that the company [...] implemented the remunerative policy approved in 2002," and
> e) that if the State fully acknowledged its international responsibility for lack of judicial protection, it transgresses the *Estoppel* principle by not acknowledging the totality of pecuniary damages.

109. With regard to the representative's argument that "it [did] not assign any juridical significance" to the salary restructuring in 1993 because it "nullified" workers' rights, the Tribunal observes that specific evidence was not submitted before the Court invalidating the effects of that restructuring and contradicting the statements made in the expert witness report presented by the State and De Los Santos with regard to the way in which that restructuring

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to the worker should have been returned [to which] it would have reached a compensation of 1247 [soles] and that [...] was less than 1425 given by the new compensation structure." *Cf.* See Statement expert witness rendered by Victor Hugo De Los Santos, supra note 30.

had even improved employees' salary-based remuneration at that time.

110. On the representatives argument that the salary scale system was more beneficial than the salary restructuring that took place in 1993, the Tribunal observes that this argument contradicts the representative's position that the elimination of that system was valid because at the time of the facts, "measures were needed for national reactivation." (*supra* paras. 62 and 78)

111. With regard to the supposed non-existence of salary increases in 2002, according to the evidence submitted by the representative,[107] this is an issue that is under debate domestically. Also, the evidence submitted on the alleged lack of raises does not include specific information on the salary restructuring that took place in 1993.

112. With regard to the *estoppel* principle, the Tribunal indicated previously that it means that once the State has acquiesced to the Commission with regard to certain disputes, contrary positions on the same disputes are not possible before the Court (*supra* para. 26). This does not necessarily imply, as the representative argues, that the State's acknowledgment of responsibility must be broadened or has an effect on disputes that were not included in the acquiescence. Therefore, the fact that the State has recognized its responsibility while on the other hand not accepting the amount of the pecuniary damages, does not constitute does not constitute a violation of that principle.

113. Separately, the representative emphasized that the report from the Ministry's consultant "has not received any comments or challenges from the State" and that it therefore invalidates the State's expert witness report. However, the Court highlights that although the representative and the State are in dispute over whether the report from that consultant is binding, the truth is that both that report and the State's expert witness report agree on how the calculation through the present day should be done (*supra* para. 107). The only difference is that the State's expert witness report argues that this is the case through the present day thanks to the 1993 salary restructuring. The report from the consultant specifies nothing regarding this restructuring, for which reason it does not constitute evidence that detracts from the State's expert witness report.

114. The Tribunal concludes that the representative did not submit specific evidence and arguments that invalidate the scope of the 1993 salary restructuring established in the State's expert witness report. In addition, the Court highlights that the representative does not present evidence on each of the victims' salaries after the 1993 restructuring entered into force for

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[107] The representative reported that given the situation, on March 14, 2008, the SIFUSE of SEDAPAL "filed a judicial action […] before the Mixed Court of El Agustino, requesting the leveling off of the salaries that correspond to [w]orkers, [e]mployees, [p]rofessionals, and [t]echnicians of the noted [c]ompany, as a result of the approvals carried out by FONAFE as well as by SEDAPAL regarding the [p]olitical [r]emunerations for the year […] 2002, [j]udicial [a]ction in process." *Cf.* Petition for leveling off of remunerations pursuant to a scale salary system, filed by the Union of Employees, Professionals and Workers of SEDAPAL on March 14, 2008, before the Mixed Court of the Basic Module of Justice of Agustino of the Superior Court of Peru (case file on the Merits, tome III, folios 1274 a 1288). The alleged situation of freezing salaires, undue relocation of subcategories presented by the representative as annexes to the brief of pleadings and motions. Nevertheless, the Court notes that only some of said statements make reference to the alleged interposition of legal complaints filed at a domestic level given the facts. *Cf.* Sworn statements of Messers. Luis Humberto Tori Gentille, José Miguel Toche Lora, Daniel F. Quinto Patiño, Marco Aurelio Benavides Galvez and Manuel Nava Valdeiglesias (case file of annexes to the brief of pleadings and motions, tome VI, annex 5, folios 1650, 1730, 1758, 1781 and 1789).

comparison to what was in place before the retroactive elimination of the scales. Likewise, the representative does not submit specific arguments that would allow for the determination of whether the formula used to calculate the new salaries in 1993 included the salary scales. Neither did the representative indicate which salary was used as a basis for carrying out the restructuring - the salary from before or after the scale system was eliminated. Finally, the argument that a 2010 SEDAPAL open tender discredits the State's expert witness report cannot be admitted either. It has already been established that that tender was declared void and that it does not affect the admissibility of the State's expert witness report (*supra* paras. 48 and 49). The aforementioned tender does not indicate a criteria that would serve as evidence to detract from the scope that the State's expert witness report establishes for the 1993 restructuring - that is, that it absorbs "all the raises prior to" 1993.

115. Consequently, taking into account that the representative did not present specific evidence and arguments to refute the scope of the 1993 salary restructuration in the expert opinion presented by the State and that the open tender by SEDAPAL does not constitute evidence to refute such scope, this Tribunal rules to set the amount of pecuniary damages in this case at 9,622,607.88 (nine million, six hundred and twenty-two thousand, six hundred and seven nuevo soles and eight-eight cents), which has been determined based on the standards of equity, considering, among other elements, the expert opinion of the State. Said amount should be distributed in detailed form in the attached annex to this Judgment and its equivalent in US$ 3,475,120.22 (three million four hundred and seventy-five thousand, one hundred and twenty and 22/100 dollars of the United States of America), pursuant to the exchange rate at the time of issuance of this Judgment, according to the Central Reserve Bank of Peru, as established in the State's expert witness report.

c.2. Non-pecuniary damages

116. The Court has developed the concept of non-pecuniary damages in its jurisprudence, along with the circumstances under which it should be indemnified.[108]

117. The Commission did not request a specific amount of non-pecuniary damages for the victims. It only indicated that "in keeping with standard practice, it is up to the Court to establish the corresponding amounts based on the available information and in equity." For his part, the representative indicated that the victims had been subject to "psychological and/or emotional suffering and claimed a compensation of US$70,000 (seventy thousand American dollars) per [...] victim, that being a total of US$16,310,000 (sixteen million, three hundred and ten thousand American dollars). In response, the State "indicat[ed] its profound disagreement with the high [amount requested]" and asked the Court to "grant the amount of one thousand dollars each," indicating that "these kinds of demands look to turn the [...] Court into an economic court, which is not consistent with the purpose of its operation." The State continued that, "these kinds of reparations must be just and in line with the object of the dispute. In no way should they imply economic hardship for the State or unjustified enrichment for the alleged victims."

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[108] The Tribunal has established that non-pecuniary damages "may include distress and suffering caused directly to the victims or their relatives, tampering with individual core values, and changes of a non pecuniary nature in the living conditions of the victims or their families." *Case of the "Street Children" (Villagrán-Morales et al.) v. Guatemala.* Reparations and Costs, *supra note* 243, para. 84; *Case of Gomes Lund et al (Guerrilha do Araguaia), supra* note 17, para. 305, and *Case of Cabrera García and Montiel Flores, supra* note 17, para. 255.

118. Based on the claims of the representative, the Tribunal will move to determine the possible generation of non-pecuniary damages through a) the alleged effects of the excessive duration of the proceedings on the victims; b) the alleged retaliation against some of the victims; c) the alleged "reckless conduct" of the State on not reaching an agreement in the friendly settlement process and for questioning the reparatory amounts proposed by the representative; d) the alleged effects on victims' life plans, and e) final considerations of the Tribunal on non-pecuniary damages in this case.

c.2.1 The alleged effects of the excessive duration of the proceedings on the victims

119. The representative indicated that to determine non-pecuniary damages, it has taken into consideration the fact that the workers have been subject to psychological and/or emotional suffering that include [...] anguish, uncertainty, expectations, and frustration over "a judicial process of extraordinary duration - more than seventeen (17) years - in order to get recognition of their rights and payment of the reparations that they are legitimately owed."

120. With respect to this, the Court finds that based on the duration of the domestic and international proceedings corresponding to this case, the 233 victims have been affected in a variety of ways. However, the Tribunal observes that the merits of this case have focused on a violation of the rights to judicial protection and to property (*supra* para. 76 and 85) A violation related to an unreasonable duration of judicial proceedings has not been declared in this case. Separately, following the acknowledgment of responsibility made by the State in 2002, the delay has been over an agreement between the parties on the amount regarding the reparations due. However, this is not necessarily a factor for which the State is responsible and which could be relevant for the determination of non-pecuniary damages.

c.2.2 The alleged retaliation against some of the victims

121. The representative also indicated that it must be taken into consideration that the 225 workers who were plaintiffs in the initial proceeding - 185 of whom are victims in this case - have been subject to psychological and/or emotional suffering that includes "various kinds of retaliation that SEDAPAL has carried out over these claims, both domestically and internationally[109] through freezing their salaries without the right to a raise for more than two (02) years in a row, and later through the improper relocation of the lowest subcategory in its hierarchical salary levels, even though they had sufficient merit to deserve placement in the highest subcategory;" Moreover, he indicated that due to the various forms of retaliation "that have culminated in the firing of more than 50% of employees from its payroll [... which is

[109] According to the representative, the first act of retaliation consisted of "the expediting of Decree Law No. 25876, [which] constituted an initial and immediate State act of retaliation to the writ of *amparo* granted to the victims, given that Law Decree 25876 was expedited for this specific SEDAPAL case. It is on the record in the text of the decree itself that it directly involves the suspension of court rulings and systems whose effect is the indexation of base salaries, elements corresponding specifically to the salary scale system. Thus it is on the record and found in the seventh clause of the Certification of Agreements in the Extrajudicial Negotiation that was filed in Annex No. 14 of the documents in evidence of our brief of pleadings, motions, and evidence. In that clause, SEDAPAL announces, with extraordinary premonitory power, in the month of June 1992 that Law Decree No. 25876 will be issued. That issuing took place in the month of November of that year." (case file on the Merits, tome II, folio 621).

the] subject of this international proceeding;" [110] "and [due to] the subsequent impossibility of finding another job because of the fact that their average age was over 45 years old." The representative indicated that, "[s]adly, there is no concrete evidence of [these] acts of violation," but [...] it is not a massive coincidence" that the workers who sued SEDAPAL have been affected by the alleged acts of retaliation and that, in this sense, "the legal presumption that [these acts] have been committed by the company is submitted."

122. In this regard, this Tribunal has established that reparations must have a causal link to the facts of the case, the violations declared and the damage attributed to those violations, as well as to the measures requested in reparation of the corresponding damages (*supra* para. 87). Therefore, the Court must examine that concurrence in order to duly rule in keeping with the law.[111] In this case, the Tribunal did not analyze State responsibility for the alleged freezing of salaries, the alleged improper placement of employment subcategories or the alleged arbitrary dismissals of some of the victims given that these facts do not form part of the factual context of the application (*supra* para. 51). For this reason, it cannot order measures intended to provided reparations for damages related to those alleged situations. The Court also observes that the representative did not specify the particular facts linked to the alleged incidents, nor their connection as retaliation for the challenge of the retroactive application of Law Decree 25876 and the later withdrawal of some of the victims from the judicial proceeding. In addition, these incidents require a specific exhaustion of domestic remedies[112] and other kinds of evidence that are not found in the case file of this case.

c.2.3 The alleged "reckless conduct" of the State on not reaching an agreement in the friendly settlement process and for questioning the reparatory amounts

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[110] Among the victims that filed sworn statements in the present case, the following fourty-two (42) persons affirmed that they had been laid off as a consequence of the legal proceedings they formed a part of: 1. Luis Humberto Tori Gentille; 2. Jorge Enrique García Carmen; 3. César A. Lazcano Carreño; 4. Stanchi Vargas Julio; 5. Leopoldo Alfonso Jáuregui Pereyra; 6. Wuile Héctor Portillo Silva; 7. Roberto Rojas Bustamante; 8. Francisco Oswaldo Levano Valenzuela; 9. Felix Isaías Cotito Arias; 10. Juan Manuel Espinoza Yarleque; 11. Rosa Elizabeth Aspillaga Benavides; 12. Félix Alejandro Trigoso Granados; 13. Roberto Hall Arias; 14. Fulgencio Honorato Peña Ricse; 15. Juan Faustino Salcedo Artica; 16. Pedro Amador Dueñas Toledo; 17. Guido Estuardo Velásquez Quipuzco; 18. Toche Lora José Miguel; 19. Juana Luz Rodríguez Puell; 20. Rosalinda del Rosario Ortega Sánchez; 21. Oscar Abraham Miñano Zevallos; 22. Jaime Leopoldo Caceres Rivera; 23. Betty Ríos Cobos; 24. Víctor Manuel Jesús Rodríguez Gonzales Zúñiga; 25. Eduardo Ricardo Timana Carcovich; 26. Oscar Eduardo Moreno Hernandez; 27. Rigoberto René Carranza Chávez; 28. Víctor Manuel Grandez Rojas; 29. Arnulfo Gómez Villasante; 30. Nesse Ysabel Pizarro Pecho; 31. Daniel F. Quinto Patiño; 32. Ebel Salas Flores; 33. Martha Luz Jesús Aranguren Carbajal; 34. Eleuterio Carranza Ruiz; 35. Feliz Meza Santillana; 36. Francisco Caracciolo Rojas Espinoza; 37. Marco Aurelio Benavides Galvez; 38. José Antonio Clavo Delgado; 39. Humberto Chilet Pichilingue; 40. Raúl Orestes Rodríguez Ríos; 41. Víctor Romero Castro, and 42. Alfonso Eduardo Escobar Zamalloa.

[111] *Cf. Case of Ticona Estrada et al. v. Bolivia, Merits, Reparations and Costs*. Judgment of November 27, 2008. Serie C No. 191, para. 110; *Case of Gomes Lund et al (Guerrilha do Araguaia), supra* note 17, para. 246, and *Case of Cabrera García and Montiel Flores, supra* note 17, para. 209.

[112] In this regard, and in a similar sense, in its Admisssibility and Merits Report the Inter-American Commission noted that "in regard to the alleged arbitrary laying off of Mr. Luis Humberto Tori Gentille, the IACHR noted that the information provided by the parties up until the date of approvel of the present Report, the result is that the legal proceeding is in process before the 34th Civil Court of Lima. Therefore, the IACHR considers that the domestic remedies have not been exahusted to which it must dem this argument inadmissible." Report N° 8/09 of March 17, 2009, *supra* note 3, folio 12.

proposed by the representative

123. On the other hand, the representative also indicated that "the reckless conduct of the State and SEDAPAL [on] having given the victims false hope of a friendly settlement that was never delivered and an implementation [...] that was never fulfilled." In addition, for the representative, that reckless conduct by the State and the company are evidence that "far from expressing a sentiment of repentance and desire for amendment with regard to the violations perpetrated, [...], they question the reparation of pecuniary and non-pecuniary damages in an attempt to reduce them to a minimum."

124. On this point, the Tribunal finds it necessary to recall that the friendly settlement proceeding before the Inter-American Commission does not require any of the parties to reach an agreement. In this sense, the Rules of Procedure of the Commission itself include the possibility that one of the parties might not offer their consent to a potential agreement and establishes the continuation of the case as part of the proceeding. [113] Thus the fact that an agreement has not been reached in the context of a friendly settlement proceeding in this case is not any sort of violation of the American Convention, and in that sense it does not imply any obligation to provide reparations on the part of the State. The Tribunal recalls that not all positions taken within the context of a proceeding before the Commission automatically generate acknowledgment of facts or responsibility, or the assumption of corresponding obligations.

125. The Court also notes that the questioning of the amounts requested for pecuniary and non-pecuniary damages is related to the adversarial principle and does not constitute an autonomous violation that would establish an obligation for the State to provide reparations for the victims, nor is it a factor to be taken into account in establishing the amount of non-pecuniary damages in this case.

c.2.4 The alleged effects on victims' life plans

126. Finally, the representative alleged that the life plans of the victims had been affected, indicating that, "at issue is not only the damage that could be caused by the deduction of 20% of monthly remunerations. Adding up the damages suffered we have 25% less in the monthly salary as a result of the omission of a raise in remunerations as of July 1992, plus the 20% decrease in the monthly salary starting in the month of December 1992, plus the 20% deduction in the monthly salary starting in March 1993 for [recovering] the - according to the State - improper payments made between January and November of 1992. We have a total of 65% of the monthly salary that the workers/victims were not receiving. If one adds taxes of 20%, we have a grand total of 85% of the [v]ictims [r]emunerations that have been affected. For the representative, that 85% reduction in the [v]ictims' [r]emunerations comprises acts whose indecency is so great [...] that a family must completely change its life plans [with regard to] type of education, graduate studies, and access to housing, among other damage."

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[113] Therefore, Article 40 fo the Rules of Procedure of the Inter-American Commision on Human Rights stated that: "[t]he friendly settlement procedure shall be initiated and continue on the basis of the consent of the parties." Likewise, it notes that "[t]he Commission may terminate its intervention in the friendly settlement procedure if it finds that the matter is not susceptible to such a resolution or any of the parties does not consent to its application, decides not to continue it, or does not display the willingness to reach a friendly settlement based on the respect for human rights". Therefore, "[i]f no friendly settlement is reached, the Commission shall continue to process the petition or case."

127. For its part, the State noted that "at the moment of the new salary structure, the victims obtained a salary that was on average 14% higher than the one they received through the salary scales. In that sense, one cannot talk about a grave reduction in opportunities for maximum personal development if over time and through the present day [the] victims have received and, in the majority of cases, continued to receive, salaries that range between S/.5,061.41 nuevos soles (five thousand and sixty one nuevos soles), and S/. 18,924.00 nuevos soles (eighteen thousand, nine hundred and twenty-four nuevos soles) - salaries, it is worth saying, that are on average more than 21.8 times greater than the minimum remuneration in Peru."

128. The Court highlights that of the two hundred and thirty-three (233) victims, the representative only submitted 131 sworn statements attempting to demonstrate non-pecuniary damages caused to them. This Tribunal finds that in cases in which it is not possible to discern with clarity and certainty the non-pecuniary damages of the victims - if for example the case does not involve grave violations of human rights - the representative's burden of proof is greater at the moment of establishing the causal link between the violation of the Convention and the alleged damage. In cases where the causal link is not proven in a detailed manner, the Court cannot itself attempt to determine damage that is not fully demonstrated. Thus in these cases, complete and precise evidentiary argumentation is needed to make a well-grounded ruling.

129. The Tribunal observes that in his statement before a public notary, Mr. Juan Eroídes Vargas Vergaray stated that "because of the reductions in [his] remuneration and a lack of raises, [... he] stop[ped] taking care of [his] father, given that with the reductions in [his] income, [he] stop[ped] purchasing medicine that [his father] had to take for the rest of his life starting in 1980." His father's illness caused his death in 1995. Similarly, Mr. Luis Humberto Tori Gentille expressed that his situation "was directly detrimental to [his] family, to the point that [his] mother passed away [...] due to an illness that worsened as a consequence of [his] dismissal. She was completely dependent on [him] for her wellbeing [...] and [...] subsistence." For her part, Mrs. Juana Luz Rodríguez Puell stated that she "had to change [her] children's school [and that] in the case of her son [with] special needs, he stopped receiving therapy that was very important for his development. This has caused an enormous setback in [...] his health." Also, "[she] had to sell [her] house that she had bought with a mortgage in order to pay off that mortgage, since she could not continue making payments." Mr. Carlos Alfredo Malaver Heredia stated that he "sacrificed [his] son's studies so that his son could work to support the family." Similarly, Mr. Jorge Armando Raygada Correa stated that he "had to take on bank debt to be able to provide a mid-level education for [his] children."

130. The Court considers that all workers organize their finances and make expense projections based on their salaries. The receipt of monthly income provides economic security for workers and allows them to take care of their different needs. Through their statements, some of the victims have made reference to their specific case and, in some cases, to those of the 233 victims in this case in order to provide information on the difficulties and needs generated by the salary reduction, the deductions, and the lack of salary increases. Some of them had compromised their personal wealth through taking out loans or selling possessions, lost the opportunity to provide economic support to sick family members, or had to adapt themselves to a new socio-economic reality. In this way, their economic security and the availability of the monthly income they had counted on were affected by the State's

actions declared to be violations in chapter VII. However, the Court has established that the failure to give raises only took place through 1993 (*supra* para. 114). As a consequence, the Tribunal notes the non-existence of sufficient evidence on the facts alleged by some victims, to which it is not able to determine them, and as a consequence, to associate many of the effects mentioned with the injury suffered due to the specific violations declared in this case.

c.2.5 Final considerations of the Tribunal on non-pecuniary damages in this case

131. Notwithstanding the foregoing, the Court must recognize that the violations declared in this Judgment did produce non-pecuniary damages, as it is a fact of human nature that every individual who suffers a human rights violation experiences suffering.[114]

132. International jurisprudence has repeatedly established that the Judgment can constitute *per se* a form of reparation.[115] However, considering the circumstances of the *sub judice* case, the Court finds it pertinent to establish an amount, in equity, as compensation for non-pecuniary damages.[116] The Court consequently establishes an in-equity compensation of US$ 1,500 (one thousand five hundred dollars of the United States of America) as compensation for non-pecuniary damages. This amount must be paid to each victim or to each victim's claimant within one year as of the notification of this Judgment.

D. Costs and expenses

133. As previously indicated by the Court on other occasions, costs and expenses are included in the concept of reparations enshrined in Article 63(1) of the American Convention.[117]

134. The Commission requested that "once [the representative has been] heard," the Court order the State to "pay the costs and expenses that have been and are being incurred in the processing of this case both domestically and before the inter-American system."

135. The representative indicated that "due to the impossibility of proving some expenses and with the purpose of simplifying the process and avoiding further burdening the important and sensitive work of the International Tribunal, it is requested that the just and equitable criteria of the Court [...] establish the sum to be reimbursed in this category."

136. For its part, the State said that the representative's "intention to not comply with the requirement to submit receipts and other documentation justifying the payment of this reparation is unacceptable. The Peruvian State indicated that the payment of costs and

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114 *Cf. Case of Reverón Trujillo v. Venezuela, supra note* 23, para. 176.

115 *Cf. Case of Neira Alegría et al. v. Peru. Reparations and Costs*. Judgment of September 19, 1996. Series C No. 29, para. 56; *Case of Gomes Lund et al (Guerrilha do Araguaia), supra* note 17, para. 310, and *Case of Cabrera García and Montiel Flores, supra* note 17, para. 260.

116 *Cf. Case of Neira Alegría et al V. Perú. Reparations* and *Costs*. Judgment of September 19, 1996. Serie C No. 29, para. 56; *Case of Gomes Lund et al (Guerrilha do Araguaia), supra* note 17, para. 310, and *Case of Cabrera García and Montiel Flores, supra* note 17, para. 260.

117 *Cf. Case of Garrido and Baigorria v. Argentina.* Reparations and Costs. Judgment of August 27, 1998. Series C No. 39, para. 79; *Case of Gomes Lund et al (Guerrilha do Araguaia), supra* note 17, para. 312, and *Case of Cabrera García and Montiel Flores, supra* note 17, para. 262.

expenses is only valid if there are receipts, ticket stubs or other documentation that prove the expenditure was made in the context of this proceeding." Thus in its final arguments, the State indicated that it "cannot accept the request made to the Court that it grant a lump sum without submitting any evidence demonstrating the expenses incurred [by the victims and the representative]."

137. The Tribunal has indicated that, "the claims of the victims or their representatives as to costs and expenses and the supporting evidence must be offered to the Court at the first procedural occasion granted to them, that is, in the brief of requests and motions, without prejudice to the fact that such claim may be later on updated, according to new costs and expenses incurred during the processing of the case before this Court."[118] In regard to the reimbursement of costs and expenses, it is the Tribunal's responsibility to prudently estimate its extent. This includes expenses incurred before domestic authorities, as well as those incurred during the course of this proceeding before the inter-American system, taking into account the circumstances of the specific case and the nature of international human rights protection jurisdiction. This estimate may be made based on the principle of equity and in consideration of the expenses reported by the parties, provided the amount be reasonable.[119]

138. In this case, the Tribunal observes that the representative did not submit receipts establishing the amount of the expenses that he and the victims had to incur during the processing of this case. For this reason, based on the provisions of Article 58(b) of the Rules of Procedure, the representative was ordered to submit a list of costs and expenses along with corresponding supporting documentation by the non-extendible deadline of January 28, 2011.[120] That information was not received. [121]

139. Nevertheless, the Tribunal can infer that the representative incurred expenses to attend the public hearing in the case (*supra* para. 12), as well as expenses related to the exercise of legal representation, such as the submission of briefs and communications expenses, among others, during the proceeding before this Court. It is also reasonable to assume that during the years in which the case was before the Commission, the victims and the representative incurred expenses. Taking this into account and given the lack of receipts demonstrating these expenses, the Court establishes, in equity, that the State must pay the total amount of US$ 15,000.00 (fifteen thousand dollars of the United States of America) or its equivalent in Peruvian currency for costs and expenses incurred in the litigation of this case. That sum must be paid by the State to the representative, and the representative will distribute it as needed. The sum includes future expenses that could be incurred domestically or during the monitoring of compliance with this Judgment.

E. Method of compliance with the payments ordered

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118 *Cf. Case of Chaparro Álvarez and Lapo Íñiguez, supra* note 96, para. 275; *Case of Vélez Loor, supra* note 12, para. 318, and *Case of Gomes Lund et al (Guerrilha do Araguaia), supra* note 17, para. 317.

119 *Cf. Case of Garrido and Baigorria, supra* note 117, para. 82; *Case of Gomes Lund et al (Guerrilha do Araguaia), supra* note 17, para. 316, and *Case of Cabrera García and Montiel Flores, supra* note 17, para. 266.

120 Note of the Secretariat of the Inter-American Court of Human Rights of January 21, 2011.

121 During the note of the Secretariat of the Inter-American Court of Human Rights of February 7, 2011, it noted that pursuant to that requested by note by the Secretariat of the Court of January 21, 2011, the January 28, 2011 the deadline lapsed for the representative to provide a list of costs and expenses and the documentary evidence in connection with this case, without these being received by the Secretariat.

140. The State shall pay the indemnities for pecuniary and non-pecuniary damages directly to the beneficiaries and the payment for costs and expenses directly the the representatives within one year from the notification of this Judgment and according to the terms of the following clauses.

141. In the event that a beneficiary passes away before the corresponding compensation is paid, the compensation shall be paid directly to his or her heir in keeping with applicable domestic law.

142. Pursuant to that provided in paragraph 115, the State shall comply with its obligations through the payment of dollars of the United States of America or an equivalent amount in Peruvian currency, using for the corresponding calculation the currency exchange rate in force in New York, United States of America, on the day prior to the payment.

143. If for reasons attributable to the beneficiaries of the above indemnities or their claimants they were not able to collect them within the period indicated, the State shall deposit said amounts in an account held in the beneficiaries' name or draw a certificate of deposit from a reputable Peruvian financial institution in US dollars and under the most favorable financial terms allowed by the legislation in force and customary banking practice. If after 10 years compensation is still unclaimed, the corresponding amount, plus any accrued interest, shall be returned to the State.

144. The amounts assigned in this Judgment for indemnity and reimbursement of costs and expenses shall be paid to the individuals indicated in full and in keeping with the provisions of this Ruling, without reductions for future tax obligations.

145. Should the State fall into arrears with its payments, it shall pay interest on the amount owed corresponding to Peruvian banking default interest rates.

X

OPERATIVE PARAGRAPHS

146. Therefore,

THE COURT,

DECLARES:

unanimously, that,

1. It accepts the partial acknowledgment of international responsibility made by the State, in the terms of paragraphs 23 and 26 of this Judgment.

2. The State is responsible for the violation of the right to judicial protection recognized in Article 25(1), with regard to Article 1(1) of the American Convention on Human Rights, to the detriment of the 233 victims in this case, in the terms of paragraphs 76 of this Judgment.

3. The State is responsible for the violation of the right to private property recognized in Article 21(1) and 21(2) with regard to Articles 25(1) and 1(1) of the American Convention on

Human Rights, to the detriment of the 233 victims in this case, in the terms of paragraphs 84 and 85 of this Judgment.

AND ORDERS:

unanimously, that,

4. This Judgment constitutes *per se* a form of reparation.

5. The State shall pay, within one year, the amounts set in paragraph 132 of this Judgment for compensation of pecuniary and non-pecuniary damages and for the reimbursement of the corresponding costs and expenses according to the terms of paragraphs 115, 132, 139, and 140 to 145 of the Judgment.

6. The State shall, within a period of six months, publish this Judgment in the Official Gazette in keeping with paragraph 92 of this Judgment

7. The Court shall monitor full compliance with this Judgment in exercise of its authority and in compliance with its duties, in keeping with the provisions of the American Convention on Human Rights. It will consider this case closed once the State has fully complied with this Judgment's provisions. Within one year of the notification of this Judgment, the State shall submit a report to the Tribunal on the measures adopted regarding compliance.

Written in Spanish and English, the Spanish text being authentic, in San Jose, Costa Rica, on March 4, 2011.

Leonardo A. Franco
Acting President

Manuel E. Ventura Robles Margarette May Macaulay

Rhadys Abreu Blondet Alberto Pérez Pérez

Eduardo Vio Grossi

Pablo Saavedra Alessandri
Secretary

So ordered,

Leonardo A. Franco
Acting President

Pablo Saavedra Alessandri
Secretary