INTER-AMERICAN COURT OF HUMAN RIGHTS

CASE OF CRUZ SÁNCHEZ ET AL. V. PERU

JUDGMENT OF APRIL 17, 2015

(Preliminary Objections, Merits, Reparations and Costs)

In the case of *Cruz Sánchez et al.*,

the Inter-American Court of Human Rights (hereinafter "the Inter-American Court" or "the Court,") composed of the following judges:[*]

Humberto Antonio Sierra Porto, President;
Roberto F. Caldas, Vice President;
Manuel E. Ventura Robles;
Alberto Pérez Pérez;
Eduardo Vio Grossi, and
Eduardo Ferrer Mac-Gregor Poisot;

also present,

Pablo Saavedra Alessandri, Registrar, and
Emilia Segares Rodríguez, Deputy Registrar,

pursuant to Articles 62(3) and 63(1) of the American Convention on Human Rights (hereinafter "the American Convention or "the Convention") and Articles 31, 32, 42, 65 and 67 of the Rules of Procedure of the Court (hereinafter "the Rules of Procedure"), delivers this judgment structured as follows:

[*] Pursuant to Article 19(1) of the Rules of Procedure of the Inter-American Court applicable to the instant case, which holds, "[i]n the cases referred to in Article 44 of the [American] Convention, a Judge who is a national of the respondent State shall not be able to participate in the hearing and deliberation of the case," Judge Diego García-Sayán, who is Peruvian by nationality, did not take part in processing or deliberating this case, or signing this judgment.

Table of Contents

I INTRODUCTION OF THE CASE AND CAUSE OF ACTION 5

II PROCEEDINGS BEFORE THE COURT 6

III JURISDICTION 10

IV PARTIAL RECOGNITION OF INTERNATIONAL RESPONSIBILITY 10

V PRELIMINARY OBJECTIONS 13

A. First preliminary objection: "Objection on the legality of Admissibility Report 13/04 concerning Petition 136/03 for the failure to exhaust domestic remedies" 13

B. Second preliminary objection: "Objection for failure to exhaust domestic remedies" 17

C. Third preliminary objection: "Objection calling for a review of the legality of Report on the Merits 66/11 regarding the identification of the alleged victims and human rights not included in Admissibility Report 13/04;" 20

D. Fourth preliminary objection: "Objection on the grounds that the Inter-American Commission on Human Rights violated the Peruvian State's right of defense;" 26

E. Fifth preliminary objection: "Objection for omission of relevant material" 28

VI PRELIMINARY CONSIDERATIONS 29

A. Alleged inadmissibility of facts 29

B. Decision on the status of Lucinda Rojas Landa as an alleged victim 31

VII EVIDENCE 33

A. Documentary, testimonial and expert evidence 33

B. Admission of evidence 33

B.1 Admission of documentary evidence 33

B.2 Admission of statements and expert opinions 36

B.3 Admission of videos 37

C. Assessment of the Evidence 39

D. Evidentiary value and assessment of the "procedure to reconstruct the facts" 39

VIII FACTS 41

A. Context 41

B. The "seizing" of the residence of the Japanese ambassador to Peru by members of the Túpac Amaru Revolutionary Movement (MRTA) 43

C. Negotiations between the government and the guerrillas 44

D. Planning the "Nipón 69 Plan of Operation" or "Operation Chavín de Huántar" 46

E. Execution of "Plan of Operation Nipón 96" or Operation "Chavín de Huántar" 50

F. Actions subsequent to the operation 53

G. Investigation of the facts and beginning of criminal proceedings in the ordinary courts 55

H. The jurisdictional dispute and the military courts 60

I. Continuation of the criminal case in the ordinary courts 64

J. Criminal proceedings against Alberto Fujimori Fujimori and Manuel Tullume Gonzáles 73

IX THE RIGHT TO LIFE, READ IN CONJUNCTION WITH THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS 75

A. Arguments of the parties and of the Commission 75

B. Considerations of the Court 78

B.1 The right to life and analysis of the use of force in the circumstances and context of the facts in this case. 78

B.2 Matters to be examined and verified by the Inter-American Court 86

B.3 Circumstances surrounding the death of Eduardo Nicolás Cruz Sánchez and the alleged international responsibility of the State 89

B.4 Circumstances surrounding the deaths of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza and the State's alleged international responsibility 98

X RIGHT TO JUDICIAL GUARANTEES AND RIGHT TO JUDICIAL PROTECTION, READ IN CONJUNCTION WITH THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS AND THE OBLIGATION TO ADOPT DOMESTIC LEGAL EFFECTS 107

A. General discussion of the obligation to investigate in the instant case 108

B. Initial procedures and securing of evidence 110

C. Duty to initiate an investigation ex officio 114

D. The military courts' lack of jurisdiction to hold trial on the alleged extrajudicial executions of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza 116

E. Alleged violation of the obligation to adopt domestic legal effects under the terms of Article 2, read in conjunction with Articles 8 and 25, of the American Convention 121

F. Lack of due diligence 123

G. Right to know the truth 125

H. Conclusion 127

XI RIGHT TO HUMANE TREATMENT, READ IN CONJUNCTION WITH THE OBLIGATION TO RESPECT RIGHTS 127

A. Arguments of the parties and of the Commission 127

B. Considerations of the Court 130

XII REPARATIONS (Application of Article 63(1) of the American Convention) 132

A. Injured Party 133

B. Obligation to investigate the facts in the ordinary courts and to identify, prosecute and, if applicable, punish those responsible 133

C. Measures of rehabilitation, satisfaction and guarantees of non-repetition 135

Compensatory damages 138

E. Costs and expenses 139

F. Reimbursement of expenditures to the Legal Assistance Fund 141

G. Method of compliance with the payments ordered 142

XIII OPERATIVE PARAGRAPHS 142

I
INTRODUCTION OF THE CASE AND CAUSE OF ACTION

1. *The case submitted to the Court.* – On December 13, 2011, the Inter-American Commission on Human Rights (hereinafter "the Inter-American Commission" or "the Commission") lodged a brief (hereinafter "application") submitting to the Court the case "Eduardo Nicolás Cruz Sánchez et al." versus the Republic of Peru (hereinafter "the Peruvian State," "the State" or "Peru"). According to the Commission's filing, the case addresses: (a) the alleged extrajudicial execution of three members of the Túpac Amaru Revolutionary Movement (hereinafter "MRTA") during Operation "Chavín de Huántar" that retook control of the residence of the Japanese ambassador in Peru. According to the Commission, the property had been in the hands of 14 members of the armed group since December 17, 1996, and 72 hostages had been rescued in 1997; (b) the three individuals in question had allegedly been in the custody of agents of the State, and at the time of their deaths, were allegedly posing no threat to their captors; (c) after the operation, the lifeless bodies of the 14 members of the MRTA had been sent to the Central Hospital of the Peruvian National Police, where they had not been properly autopsied; (d) apparently, hours later, the remains had been buried, 11 as John Doe, in various cemeteries around the city of Lima; and (e) the State of Peru had not conducted a diligent, effective investigation of the facts and had not attached responsibility to the perpetrators and masterminds of the case.

2. *Proceedings before the Commission.* – The following proceedings took place before the Commission:

a) *Petition.* – On February 19, 2003, the Human Rights Association (APRODEH), together with Edgar Odón Cruz Acuña, brother of Eduardo Nicolás Cruz Sánchez, and Herma Luz Cueva Torres, mother of Herma Luz Meléndez Cueva, brought their opening petition before the Commission. On February 18, 2005, the Center for Justice and International Law (CEJIL) was recognized as co-petitioner.

b) *Admissibility Report.* – On February 27, 2004, the Commission approved Admissibility Report No. 13/04.[1]

c) *Report on the Merits.* – On March 31, 2011, the Commission issued Report on the Merits No. 66/11 under the terms of Article 50 of the Convention (hereinafter "Merits Report" or "Report 66/11"), drawing a set of conclusions and providing the State with several recommendations.

   a. *Conclusions.* – The Commission concluded that the State was responsible for violating:

      i. the right to life as enshrined in Article 4(1) of the American Convention, read in conjunction with Article 1(1) thereof, in injury of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza;

      ii. the right to judicial guarantees and the right to judicial protection, enshrined in Articles 8 and 25 of the American Convention, in injury of the next of kin of the victims who had allegedly been executed;

      iii. Article 2 of the American Convention, read in conjunction with Articles 8 and 25 thereof, and

[1] In the report, the Commission declared admissible the petition concerning alleged violations of the right to life, the right to judicial guarantees and right to judicial protection, as established in Articles 4, 8 and 25 of the American Convention, read in conjunction with Article 1(1), in injury of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and "David" Peceros Pedraza (Commission file, volume III, folios 1612 to 1627). The Commission, in Admissibility Report 13/04, used the name "David" for Peceros Pedraza, but his correct name is "Víctor Salomón."

iv. the right to personal integrity, enshrined in Article 5(1) and 5(2) of the American Convention, read in conjunction with Article 1(1) thereof, in injury of the next of kin of the victims who had allegedly been executed.

b. *Recommendations.* – The Commission therefore made a number of recommendations to the State:

i. make adequate reparations for the human rights violations declared in [the] report in both their material and moral aspects[;]

ii. conclude and conduct, respectively, an investigation in the ordinary jurisdiction of the facts concerning the human rights violations declared in [the] report in relation to the direct perpetrators and to conduct the investigations in an impartial and effective manner, and within a reasonable time period, for the purpose of completely clarifying the facts, identifying all of the masterminds and direct perpetrators and imposing the applicable punishments[;]

iii. [t]ake all necessary administrative, disciplinary or criminal measures in response to the acts or omissions of State officials that contributed to the denial of justice and impunity associated with the facts of this case[, and]

iv. [a]dopt the necessary measures to prevent a future recurrence of events such as these, in accordance with the duty of prevention and guarantee of the human rights enshrined in the American Convention. In particular, implement ongoing human rights programs in Armed Forces and National Police training schools, and carry out awareness-raising programs for active-duty military.

c. *Notification to the State.* – The State was notified of Report on the Merits 66/11 on June 13, 2011.

d) *Reports on the Commission's recommendations.* – The State submitted information on August 12 and December 6, 2011, on implementing the Commission's recommendations from Report 66/11.

e) *Submission to the Court.* – The Commission submitted the case to the jurisdiction of the Inter-American Court on December 13, 2011, forwarding its Report on the Merits 66/11 "because of the need to obtain justice for the [alleged] victims, given the State's failure to comply with the recommendations." The Commission designated its delegates to the Court: Commissioner José de Jesús Orozco and then Executive Secretary Santiago A. Canton, and designated Elizabeth Abi-Mershed, Assistant Executive Secretary and Karla I. Quintana Osuna as legal advisors.

3. *Requests of the Inter-American Commission.* – The Commission asked the Court therefore to hold the State internationally liable for the violations set out in the Report on the Merits (*supra* para. 2.c.a). The Commission also asked that the Court order the State to provide certain measures of reparation, as detailed and discussed in Chapter XII below.

II PROCEEDINGS BEFORE THE COURT

4. *Notification to the State and to the representatives.* – The Court notified the representatives of the alleged victims on February 24, 2012, that the Commission had submitted the case,[2] and notified the State on February 27, 2012.

5. *Brief with pleadings, motions and evidence.* – The representatives of the alleged victims (hereinafter "the representatives") submitted their brief of pleadings, motions and evidence (hereinafter "pleadings and motions brief") to the Court on April 24, 2012. The representatives

[2] The representatives of the alleged victims in this case are the Human Rights Association (APRODEH) and the Center for Justice and International Law (CEJIL).

were mostly in agreement with the Commission's arguments, asked the Court to hold the State internationally responsible for having violated the same rights alleged by the Commission, and added "violation of the [alleged] victims' right to the truth, protected jointly by Articles 8, 13 and 25 of the [Convention], read in conjunction with Article 1(1)." The alleged victims, through their representatives, also asked to avail themselves of the Court's Victims Legal Assistance Fund (hereinafter "Court's Assistance Fund" or "Fund"). Finally, they asked the Court to order the State to adopt a variety of measures of redress and to reimburse particular court costs and attorney fees.

6. *Answering brief.* – The State submitted its brief to the Court on August 17, 2012 with preliminary objections, its reply to the application brief and its observations on the pleadings and motions brief (hereinafter "answering brief"). It lodged six preliminary objections and, in paragraph 231, pointed to its recognition of responsibility "for the excessive amount of time taken to conduct criminal proceedings." The State also offered as evidence, *inter alia*, a "reconstruction of the facts." The State initially designated Pedro Cateriano Bellido as head of its delegation and Joaquín Manuel Missiego del Solar, Alberto Villanueva Eslava and Oscar José Cubas Barrueto as alternate agents. The Specialized Solicitor General for Supranational Affairs Oscar José Cubas Barrueto was certified as head agent on August 6, 2012. Later, on December 6, 2012, the State designated Luis Alberto Huerta Guerrero, Specialized Solicitor General for Supranational Affairs, to serve as head agent. The certification of Alberto Villanueva Eslava as alternate agent was terminated on February 18, 2014.

7. *Use of the Court's Assistance Fund.* – The President of the Court issued an order on August 28, 2012, admitting the alleged victims' request, extended through their representatives, for access to the Court's Assistance Fund, and approved financial assistance as necessary for submitting up to four declarations, whether by affidavit or in the public hearing.[3]

8. *Observations on the preliminary objections and on paragraph 231 of the answering brief.* – The representatives on December 6, 2012, and the Commission on December 9, 2012, filed their comments on the State's preliminary objections and the statements in paragraph 231 of the answering brief to the effect that the State "acknowledged responsibility for the excessive amount of time taken to conduct criminal proceedings." The representatives also submitted up-to-date information on the status of the criminal proceedings undertaken in the instant case and asked the Court "to dismiss evidence submitted by the State that had no bearing on the case."

9. *Procedure to "reconstruct the facts."* – The State was asked to specify how and where it would "reconstruct the facts" as proposed (*supra* para. 6) and to assure that it was willing to assume all the costs of producing the reconstruction and making it available to the Court. The Commission and the representatives were given the opportunity to submit their comments to the proposal. The President issued an order on November 6, 2013, holding that it would be useful and necessary for shedding light on and proving the facts in dispute, and for better understanding certain circumstances relevant to the case, to apply Article 58(a) and 58(d) of the Rules of Procedure and pay a visit to the city of Lima, Peru, to collect the procedure of "reconstructing the facts" as offered by the State. The Court, on November 28, 2013, denied a motion lodged by Peru for reconsideration of the measure detailed in paragraph 18(b) of the November 6, 2013 order, to cover the costs for one of the entities representing the alleged victims, thereby upholding the President's order as issued. The State and the representatives pointed to several documents as sources for planning and carrying out the process of

---

[3] *Cf. Case of Cruz Sánchez et al. v. Peru.* Order of the acting President of the Inter-American Court, August 28, 2012. Available online in Spanish at: http://www.corteidh.or.cr/docs/asuntos/cruz_fv_28.pdf.

"reconstructing the facts" (*infra* para. 108). The procedure took place in Lima, Peru on January 24, 2014.[4] The parties submitted certain documentation as part of the process.[5]

10. *Further helpful evidence* – The President issued an order on November 6, 2013 (*supra* para. 9), asking the State to submit a complete copy of judicial case files with facts of the instant case from the criminal proceedings pursued in both the military and general jurisdictions. The State on December 2 and 16, 2013, submitted "a portion of the copies requested, as well as explanations and additional information on the case files from the ordinary courts and the military courts, as further helpful evidence." As for the copies of the "judicial file from the proceedings in the ordinary courts," the State submitted only "several items of evidence" in view of the very large volume of material, noting that, if this "documentation should prove insufficient, […] it [would] submit copies of whatever items from the judicial case files that the Court [should] indicate, allowing additional time." It sent a copy of the full "judicial case file from the military courts." The State also submitted unsolicited documentation "in the understanding that it could be useful to the Court," to wit, a copy of the Spanish-language report by the Truth and Reconciliation Commission, entitled "El Operativo Chavín de Huántar y la ejecución extrajudicial de miembros del MRTA" (Operation Chavín de Huántar and the extrajudicial execution of members of the MRTA), together with the body of evidence used as a basis for the report, entitled "Fuentes para el Case of Chavín de Huántar" (sources for the Chavín de Huántar case).

11. *Public hearing and additional evidence.* – The President issued an order on December 19, 2013,[6] convening the parties and the Commission to a public hearing to present their pleadings and final oral arguments on the preliminary objections and possible merits, reparations and costs in this case, including any relevant comments on the procedure of "reconstruction of the facts." The public hearing took place on February 3 and 4, 2014, during the Court's 102nd Regular Session at its seat.[7] The hearing included statements by a witness[8]

---

[4] The Court's delegation on the visit was made up of Court President Humberto Antonio Sierra Porto, Court Vice President Roberto F. Caldas and Judge Eduardo Ferrer Mac-Gregor Poisot, as well as Registrar Pablo Saavedra Alessandri and a staff attorney. Present for the State of Peru were Specialized Solicitor General for Supranational Affairs and the State's agent for the case, Luis Alberto Huerta Guerrero, alternate state agent Joaquín Manuel Missiego del Solar, solicitor for the Ministry of Defense Gustavo Lino Adrianzén Olaya, Retired Army General Luis Alatrista Rodríguez, and other state officials from the Office of the Specialized Solicitor General for Supranational Affairs and the Human Rights Division of the Foreign Ministry. The Inter-American Commission was represented by Assistant Executive Secretary Elizabeth Abi-Mershed and staff attorney Silvia Serrano Guzmán. Also present for the representatives were Executive Director of the Human Rights Association (APRODEH) Gloria Cano Legua, APRODEH attorney Jorge Abrego Hinostroza, CEJIL Program Director for the Andean Region, North America and the Caribbean Francisco Quintana, and CEJIL attorney Gisela De León.

[5] For the State: copies of pages 6, 7, 228, 229, 138, 159, 126, 242, 230, 231, 48, 32, 44, 45, 131, 96, 97, 64, 65, 214, 215, 5, 152, 153, 155, 196, 191, 205, 170, 171, 210, 211, 240 and 241 of the Spanish-language book *Base Tokio: la crisis de los rehenes en el Peru. El verano sangriento*, published by Editorial El Comercio, Peru, 1997; and for the representatives: eight color photographs.

[6] *Cf. Cruz Sánchez et al. v. Peru.* Order of the acting President of the Inter-American Court, December 19, 2013. Available online in Spanish at: http://www.corteidh.or.cr/docs/asuntos/cruz_19_12_13.pdf

[7] Appearing at the hearing were: (a) for the Inter-American Commission: Commissioner José de Jesús Orozco, Assistant Executive Secretary Elizabeth Abi-Mershed, and staff attorneys Silvia Serrano Guzmán and Jorge Meza Flores; (b) for the representatives of the alleged victims, Gloria Cano Legua and Jorge Abrego Hinostroza from APRODEH, and Francisco Quintana and Gisela De León from CEJIL; and (c) for the State of Peru: head agent Luis Alberto Huerta Guerrero, alternate agent Joaquín Manuel Missiego del Solar, and attorney Sofía Donaires Vega from the office of the Specialized Solicitor General for Supranational Affairs.

[8] The Registrar issued a note on January 28, 2014, on instructions of the full Court, notifying the parties and the Commission that, because no documentation had been received to verify that witness Jorge Gumucio Granier would be unable to attend the public hearing due to alleged health problems, the State's request for him to take part in the public hearing by videoconference had been denied, and therefore Jorge Gumucio Granier could instead submit

and four expert witnesses,[9] one of whom took part by videoconference.[10] The representatives[11] and the expert witnesses[12] who appeared in the hearing also submitted certain documentation. The Court asked the parties to submit additional information as well. Finally, the Court received statements by affidavit under the terms of the President's December 19, 2013 order.

12. *Documents submitted by "friends of the Court."* – Antero Flores Aráoz Esparza submitted a "friend of the Court" brief on February 3, 2014, consisting of the Spanish-language book *Rehén por Siempre. Operación Chavín de Huántar*, by Luis Giampietri, along with copies of selected pages, certified by a public attestor, from the Spanish-language books, *Rehén voluntario. 126 días en la residencia del Embajador del Japón*, by Juan Julio Wicht and Luis Rey de Castro; *Cumpleaños del Emperador. 126 días de secuestro*, by Jorge San Román de la Fuente; and *Rehenes en la Sartén*, by Samuel Matsuda Nishimura; and an interview with Francisco Tudela van Breugel Douglas. The Court noted that such items could not be held as *amicus curiae* briefs or weighed as evidence per se. Therefore, these documents submitted as "friend of the Court" briefs were declared inadmissible. Later, on February 27 and 28, 2014, Antero Flores Aráoz Esparza sent additional documents as *amicus curiae* briefs and, together with Delia Muñoz Muñoz, submitted "an extension of the *amicus curiae.*" These briefs and documents were time-barred and held inadmissible.[13]

---

his testimony in writing before a public attestor. The State withdrew the statement by Jorge Gumucio Granier on February14, 2014.

[9] A note from the Registrar on January 28, 2014 informed, on instructions from the full Court, that the Commission's explanations of prior commitments did not qualify as an exceptional situation that could justify the request for another expert witness to replace Christof Heyns, under the terms of Article 49 of the Rules of Procedure, and therefore the Court admitted the alternate request to receive this expert's statement by affidavit to be delivered in writing before a public attestor.

[10] A note from the Registrar on January 16, 2014, on instructions from the President of the Court, responded to the information submitted by the representatives that expert witness Fondebrider would be unable to travel to the seat of the Court to deliver his expert statement as ordered, due to health problems as validated by medical certificate. The Court admitted the request to allow this expert witness to give his statement over audiovisual electronic media during the hearing, in accordance with Article 51(11) of the Rules of Procedure, so that the parties and Commission could cross-examine him and the judges could ask any questions they deemed relevant at the time the statement was delivered.

[11] The representatives submitted the following documents:

(1) Report by Professor Derrick Pounder from the Chavín de Huántar proceedings.

(2) Report by Juan Manuel Cartagena: forensic report from case 1244, "Chavín de Huántar," from the State of Peru to the Inter-American Court of Human Rights.

(3) Report by Juan Manuel Cartagena: forensic report from case 1244, "Chavín de Huántar" from the State of Peru to the Inter-American Court of Human Rights / Report 2.

4) Expert witness statement by Juan Carlos Leiva Pimentel and Antonio Loayza Miranda.

5) Report by John H.M. Austin, Professor Emeritus of Radiology and member of the Department of Radiology of Columbia University Medical Center.

6) 18 (eighteen) photographs of the judicial case file.

[12] By expert witness Federico Andreu Guzmán: a Spanish-language summary of his statement, "Resumen escrito del peritaje de Federico Andreu-Guzmán en el caso Cruz Sánchez et al. v. Peru ante la Corte Interamericana de Derechos Humanos;" by expert witness Jean Carlo Mejía Azuero: the Spanish-language document "Operación `Chavín de Huántar´ mirada desde el derecho internacional aplicable a los conflictos armados. Del uso de la fuerza letal;" and by expert witness Juan Manuel Cartagena Pastor: (1) Forensic report of May 24, 2012, (2) Forensic report 2 of June 22, 2012, (3) Annex to forensic reports 1 and 2 of July 7, 2012 and (4) Forensic report 3 of July 21, 2012.

[13] Article 44(3) of the Court's Rules of Procedure states, among other things, that "[*a*]*micus curiae* briefs may be submitted at any time during contentious proceedings for up to 15 days following the public hearing. If the Court does not hold a public hearing, amicus briefs must be submitted within 15 days following the order setting deadlines for the submission of final arguments." The hearing in the instant case took place on February 3 and 4, 2014, meaning that the deadline given in this rule lapsed on February 19, 2014.

13. *Final written arguments and observations.* – On March 4, 2014, the State and the representatives submitted their final written arguments and the Commission filed its final written observations.

14. *Observations of the parties and of the Commission.* – The President gave the parties and the Commission a deadline to submit any comments they deemed relevant on the annexes that the parties had filed along with their final written arguments (*infra* para. 113). The State filed its observations as requested on April 7, 2014, the representatives on April 11, 2014, and the Commission on April 14, 2014. The Commission's comments on the annexes to the State's final written arguments were submitted after the deadline,[14] and therefore will not be taken into account.

15. *Outlays in application of the Court's Assistance Fund.* – The Registrar, on instructions from the President, sent information to the State on March 20, 2014, concerning outlays made under the Victims' Legal Assistance Fund in the instant case, and in keeping with the provisions of article 5 of the Court's rules for the operation of the fund, set a deadline for it to submit any comments it deemed appropriate. The State filed its comments on April 7, 2014.

16. *Deliberation of the case.* - The Court began deliberations on the instant case on April 15, 2015.

III
JURISDICTION

17. The Court is competent to hear the instant case pursuant to article 62(3) of the Convention, as Peru ratified the the American Convention on July 28, 1978 and recognized the contentious jurisdiction of the Court on June 21, 1985.

IV
PARTIAL RECOGNITION OF INTERNATIONAL RESPONSIBILITY

The State's arguments on recognition of responsibility for the excessive amount of time in conducting the criminal proceedings, and comments by the Commission and the representatives

18. The ***State*** asserted in paragraph 231 of its answering brief that, "although […] it acknowledged responsibility in report 535-2011-JUS/PPES for the excessive amount of time it took to conduct the criminal proceedings, […] the delay in processing the criminal trial was not in any sense due to a will to deny justice, but to organizational issues in the courts and the criminal procedural code still in effect in the Lima judicial district," and therefore asked the Court to take into consideration "the complexity of the criminal process in view of the large volume of evidence that needed to be processed, as well as the many motions brought by the defense attorneys of the accused." It added that it "offered this recognition of responsibility" on the basis of the principle of proportionality and reasonableness and taking into account this Court's case law, even though the domestic procedural rules did not set a timetable for the duration of criminal trials.

---

[14] By means of a note from the Registrar on March 19, 2014, the President of the Court granted a term through April 7, 2014 for the parties and the Inter-American Commission to submit their comments on the annexes to the State's and representatives' final written arguments. The Commission requested a time extension on April 7, 2014, to submit the requested comments by April 11, 2014, and the extension was granted.

19. Therefore, "with respect to the Peruvian State's recognition of international responsibility for violating the right to a reasonable period in the criminal proceedings undertaken before the Third Special Criminal Chamber of the Superior Court of Lima, as set forth in report 535-2011-JUS/PPES, the State of Peru asked the Court to consider the points discussed in the answering brief, which outline the objective reasons for the delay in processing the criminal case." Finally, the State reiterated "its serious commitment to finalize the criminal proceedings as quickly as possible, for which purpose [it stated that it was] adopting the necessary measures […], and there was no denial of justice whatsoever."

20. The ***Commission*** noted that, while the State's recognition that it had violated the right to a reasonable period in the instant case was a positive step and should have full effect, there were several points in its brief in which the State appeared to rationalize the delay. The Commission asked the Court to give due consideration to the recognition and accordingly hold that the State's comments to justify the delay not hold legal effect.

21. The ***representatives*** recalled that the Court had expressly held on several occasions that a State's recognition of responsibility before the Inter-American Commission produces full legal effect. Accordingly, the representatives held that the Court should "grant full legal effect to the State's acquiescence before the Commission and, in application of the rule of estoppel, find that the State is not entitled to present the preliminary objection of failure to exhaust domestic remedies. Finally, the representatives felt that, "because the State does not elaborate on its recognition of responsibility, […] it is essential for this Court to discuss the proven facts of the case involving this violation and how it occurred, in view of the context and circumstances of the case." The representatives reiterated that the State itself, in its answering brief, had drawn attention to report 535-2011-JUS/PPES, acknowledging responsibility for the excessive amount of time taken in processing the criminal case under discussion, and therefore viewed that "the acquiescence should have full legal effect at this stage of the process."

Considerations of the Court

22. While the case was being processed before the Commission, the State had submitted report 535-2011-JUS/PPES, dated December 6, 2011 (*supra* para. 2.d), outlining progress made with the recommendations contained in the Inter-American Commission's Report on the Merits No. 66/11 issued on March 31, 2011. The State's brief said the following under the heading "Recognition of responsibility for excessive time in conducting the criminal proceedings":

> […] as the State of Peru has indicated in earlier reports, the Peruvian criminal procedural laws do not set a time limit for processing a criminal trial; however, the principles of proportionality and reasonableness do apply throughout Peru's legal system. Therefore, **the State of Peru acknowledges delay in the judicial proceedings for these cases.** We do find it important for the Commission to consider that this excessive amount of time in processing the criminal trial is not due to any wish whatsoever to deny justice, but unfortunately, to organizational issues in the court system and actions by the National Council of the Judiciary, among other things […]."[15] [emphasis original]

23. When the State lodged its answering brief in the procedure before this Court, it took as a premise that it had issued its acceptance of international responsibility before the Commission for having violated the right to a reasonable period, regardless of the procedural stage when this recognition took place. That is, the terminology that the State used in its answering brief clearly reveals that the State sees the paragraph quoted above as a recognition

[15] Report 535-2011-JUS/PPES, dated December 6, 2011, submitted by the State of Peru to the Inter-American Commission, para. 24 (case file of the proceedings before the Commission., volume IV, folio 3333).

of responsibility. The State at the current stage of the procedure has made reference to its actions before the Commission, but in its arguments on the alleged violations of the right to a reasonable period, it asked that the reasons for the delay in processing the criminal case be taken into account, particularly the reasons involving the complexity of the case and the multiple motions lodged by the defense, as well as organizational issues in the judicial branch and actions by the National Council of the Judiciary. The State also explained the factors behind the breakdown of two criminal trials and reported that, in order to avoid similar breakdown of the third criminal trial, the executive board of the judiciary had ordered the Third Special Criminal Chamber to devote itself to the case on a full-time basis until it was completed.

24. The Court holds, as it has in other cases,[16] that the State's assumption of international responsibility in the procedure before the Commission produces full legal effect, under the terms of Article 62 of the Court's Rules of Procedure. Therefore, in keeping with its own case law, the Court admits and grants full effect to the recognition of responsibility submitted before the Commission in the instant case. This recognition by the State is partial, referring only to the infringement of the right to a reasonable period in the judicial proceedings before the criminal courts.

25. Moreover, the Court cautions that in the proceedings before this Court, the State's answering brief included a preliminary objection of failure to exhaust domestic remedies, under the terms of Article 46 of the American Convention (*infra* para. 45). The State questioned in its arguments why, when the Commission conducted its examination of admissibility, it had applied the exception to the rule on exhaustion of domestic remedies given in subparagraph "c" of Article 46(2) of the Convention and found unwarranted delay in processing the case and infringement of the right to a reasonable period.

26. The Court considers that, even though an act of acknowledgment implies, in principle, the acceptance of its jurisdiction, in each case it must determine the nature and scope of any objection filed in order to determine its compatibility with the acknowledgment.[17] The Court finds that the preliminary objection on failure to exhaust domestic remedies in the instant case contradicts the material scope of the partial recognition of responsibility. The Court would note in this regard that the objection filed may not limit, contradict or nullify the content of the recognition of responsibility.

27. The Court therefore holds that, having recognized its responsibility before the Commission on a matter associated with one of the objections to the rule on failure to exhaust domestic remedies, the State may not now shift its position and argue again before the Court that there is no evidence of a failure to adopt domestic remedies, but instead, has implicitly accepted the Court's full jurisdiction to hear the instant case.[18]

28. Thus, in keeping with the provisions of Article 42(6) of its Rules of Procedure, and consistent with Articles 62 and 64 thereof, the Court will examine the preliminary objections lodged in light of the above discussion.

---

[16] *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, and *Case of Tiu Tojin v. Guatemala. Merits, Reparations and Costs.* Judgment of November 26, 2008. Series C No. 190, para. 21.

[17] *Cf. Case of Cepeda Vargas v. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of May 26, 2010. Series C No. 213, para. 26.

[18] *Cf. Case of the Mapiripán Massacre v. Colombia. Preliminary Objections.* Judgment of March 7, 2005. Series C No. 122, para. 30.

V PRELIMINARY OBJECTIONS

29. Peru raised six preliminary objections in its answering brief,[19] to wit: (i) objection on the legality of Admissibility Report 13/04 concerning petition 136/03 for the failure to exhaust domestic remedies; (ii) objection for failure to exhaust domestic remedies; (iii) objection calling for a review of the legality of Report on the Merits 66/11 regarding the identification of the alleged victims and human rights not included in Admissibility Report 13/04; (iv) objection for inadmissibility of the representatives of the alleged victims bringing new facts into the process before the Inter-American Court; (v) objection on the grounds that the Inter-American Commission on Human Rights violated the Peruvian State's right of defense; and (vi) objection for omission of relevant material.

30. In view of the highly diverse nature of the arguments brought by the State as preliminary objections, it should be clarified that the Court will hold as preliminary objections only those arguments whose content and purpose are entirely or exclusively consistent with the definition of a preliminary objection; thus, if upheld, they would fully or partially block continuation of the procedure or a decision on the merits. The Court has repeatedly held that a preliminary objection must address matters involving the admissibility of a case or the Court's jurisdiction to hear a particular case or certain of its aspects for reasons of person, matter, time or place.[20] Therefore, regardless of whether the State defines its position as a "preliminary objection," if these arguments cannot be considered without previously analyzing the merits of a case, they cease to be preliminary and cannot be examined by means of a preliminary objection.[21]

31. Based on these principles, the Court will now proceed to examine the arguments in the order introduced by the State; however, item (iv) will be discussed in the next chapter, preliminary questions, as it more particularly addresses the corpus of facts of the case.[22]

A. First preliminary objection: "Objection on the legality of Admissibility Report 13/04 concerning Petition 136/03 for the failure to exhaust domestic remedies"

Arguments by the State, the Commission and the representatives

32. The ***State*** lodged this objection on two grounds. First, it held that the admissibility report "did not duly establish the failure to exhaust ideal, effective remedies for the purposes of admissibility, in accordance with Article 46(1)(a) of the American Convention, the Court's consistent case law […] and the decisions of the [Commission itself]," such that there was no "correct analysis" of the objections on failure to exhaust domestic remedies as given in Article 46(2) of the Convention. Second, it alleged that the report, in analyzing the effectiveness of the remedy, had "prejudged" the merits of the matter while the case was still in the admissibility stage.

---

[19] According to Article 42(1) of the Court's Rules of Procedure, "Preliminary objections may only be filed in the brief indicated in the preceding Article."

[20] *Cf. Case of Las Palmeras v. Colombia. Preliminary Objections.* Judgment of February 4, 2000. Series C No. 67, para. 34, and *Case of Human Rights Defender et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 28, 2014. Series C No. 283, para. 15.

[21] *Cf. Case of Castañeda Gutman v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 06, 2008. Series C No. 184, para. 39, and *Case of Human Rights Defender et al. v. Guatemala, supra*, para. 15.

[22] *Cf. Case of Mendoza et al. v. Argentina. Preliminary Objections, Merits and Reparations.* Judgment of May 14, 2013. Series C No. 260, para. 25, and *Case of Human Rights Defender et al. v. Guatemala, supra*, para. 16.

33. With regard to the first matter, the State argued that the Commission had not examined the appropriateness and effectiveness of remedies applied in the domestic jurisdiction, either in the military courts or in the general courts. Thus, according to the State, the Commission had set aside its usual practice in this area, which was first to determine whether the remedy is appropriate, and then to find whether it is effective. More specifically, it argued that the Commission had examined only the question of whether the remedy was effective, without first having discussed the requirement for a suitable remedy to exist. The State held that the appropriate remedy to guarantee the right to life of the alleged victims and the right to personal integrity and access to justice for their families would be the criminal proceedings undertaken against Vladimiro Montesinos Torres et al., and not, as the Commission maintained, the criminal cases lodged for the alleged crime of complicity or being an accessory after the fact. Peru also held that the Commission had based its arguments on a remedy that would not be appropriate for guaranteeing the rights claimed to have been breached, that is, the process for alleged criminal complicity after the facts involving the "the handling of victims' bodies, the scene of the crimes and the chain of custody of the evidence."

34. The ***Commission*** asked the Court to deny the preliminary objection because the question of exhaustion of domestic remedies had been resolved at the right time and established during the correct procedural stage. The Commission maintained more particularly that the State "offered no arguments as to whether or not the military criminal process to investigate the facts of the case was appropriate" and that it had merely made generic reference during the admissibility stage to the fact that the process was ongoing, which the Commission considered insufficient. With respect to the ordinary courts, the Commission noted that the State had emphasized that the process on criminal complicity had been joined on August 12, 2003, with the process against Vladimiro Montesinos Torres et al., and had asked at that time for the case to be deemed inadmissible because "it was in an ongoing criminal proceeding" and "the relevant jurisdiction had not been exhausted." The Commission added that it had considered the amount of time elapsed from when the acts had been committed in April, 1997, until the release of the 2004 report, and emphasized the report's views on the minimal progress made in the investigations in the general courts, as well as the fact that the State had not undertaken the investigation on its own initiative, but only in 2001 after a complaint had been been lodged, and that seven years after the events of the case, part of the investigation had been reassigned to the military jurisdiction.

35. The Commission, responding to the claim that it had prejudged the merits of the case, pointed out that, based on the information contained in the case file, it had held prima facie that at the time the Admissibility Report was issued, the State "failed to demonstrate that effective remedies were available." In short, it argued that, in keeping with the Commission's consistent standard on violation of the right to life and personal integrity, the appropriate remedy for addressing the situation was investigation and a criminal trial in the common courts, which should be undertaken voluntarily and conducted with due diligence, but the Commission found that these features were not present in the ordinary criminal process pursued in the instant case. The Commission also held that there was unwarranted delay and reiterated its statement in the Admissibility Report concerning the application to this case of the objections provided in Article 46(2)(a) and (c) of the Convention.

36. The ***representatives*** argued that the position expressed by the State more closely resembled a "grievance or difference of opinion regarding the actions by the Commission" and that in fact the decision on admissibility was well founded. They believed that the State was mistaken in its interpretation of the Admissibility Report for two reasons: (i) it was not true that the Commission in its report had examined only the trial for the crime of complicity, and not the trial for extrajudicial executions; what the Commission had done instead was to use the facts investigated for the complicity trial to indicate a lack of diligence in the investigation

of the extrajudicial killings, resulting in the irreparable loss of evidence and rendering that trial ineffective; and (ii) the admissibility analysis had been conducted on the basis of facts that were known to both parties, and thus there had been no loss of legal certainty. With respect to the argument that the Commission had formed a premature judgment, the representatives held that the Commission's statement should be taken as "a prima facie or preliminary analysis to determine whether a violation may have existed and to meet the requirements of admissibility, rather than to determine whether a violation had actually occurred. They believed, moreover, that the State's arguments concerning the unwarranted delay pertained more properly to the merits of the case. Because the State had not demonstrated any serious error that could have undermined its right to defense, the representatives asked the Court to deny the preliminary objection.

Considerations of the Court

37. The Court finds it relevant to recall that, according to its case law, when a preliminary objection questions the Commission's actions regarding a process undertaken before it, the Inter-American Commission has full autonomy and independence to exercise its mandate in accordance with the American Convention, particularly in the exercise of the functions entrusted to it for processing individual petitions, set forth in Articles 44 to 51 of the Convention.[23] In turn, when the Court examines matters, it has the authority to review the legality of the Commission's action.[24] It does not necessarily have to review the proceedings conducted before the Commission,[25] unless one of the parties submits a well-founded claim that there has been a serious error that violated its right of defense.[26] The Court must preserve a fair balance between the protection of human rights, which is the ultimate purpose of the inter-American system, and the legal certainty and procedural equity that will safeguard the stability and reliability of international protection.[27]

38. Therefore, in keeping with the Court's consistent case law, the party affirming that an action by the Commission during the proceedings before it has been irregular, affecting its right of defense, must prove this prejudice.[28] In this regard, a complaint or difference of opinion in relation to the actions of the Inter-American Commission is not sufficient.[29] The task at hand

---

[23] *Cf. Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights (Articles 41 and 44 to 51 of the American Convention on Human Rights).* Advisory Opinion OC-19/05 of November 28, 2005. Series A No. 19, operative paragraph one, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 14, 2014. Series C No. 287, para. 54.

[24] *Cf. Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights, supra*, operative paragraph three, and *Case of Brewer Carías v. Venezuela. Preliminary Objections.* Judgment of May 26, 2014. Series C No. 278, para. 102.

[25] *Cf. Case of the Dismissed Congressional Employees (Aguado Alfaro et al.) v. Peru. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2006. Series C No. 158, para. 66, and *Case of Brewer Carías v. Venezuela, supra*, para. 102.

[26] *Cf. Case of González Medina and family v. Dominican Republic*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of February 27, 2012. Series C No. 240, para. 28, and *Case of Pacheco Tineo family v. Bolivia. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 25, 2013. Series C No. 272, note 32.

[27] *Cf. Case of Cayara v. Peru. Preliminary Objections*. Judgment of February 3, 1993. Series C No. 14, para. 63, and *Case of Mémoli v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 22, 2013. Series C No. 265, para. 25.

[28] *Cf. Case of Castañeda Gutman v. Mexico, supra*, para. 42, and *Case of Brewer Carías v. Venezuela, supra*, para. 102.

[29] *Cf. Case of Castañeda Gutman v. Mexico, supra*, para. 42, and *Case of Brewer Carías v. Venezuela, supra*, para. 102.

is to consider the arguments submitted by the State in order to determine whether the Commission's actions produced a violation of its right to defense.

39. As for the alleged irreparable defects in the process due to the erroneous arguments advanced in the Admissibility Report regarding the exhaustion of appropriate, effective remedies in the domestic jurisdiction, the Count has seen that the Commission's analysis distinguished between the process undertaken in the military courts and the investigations and processes in the ordinary courts, "with respect to the prospects for effectiveness." Thus, with respect the the process begun in the military courts, the Commission found that it was not the appropriate forum, and consequently, did not provide an appropriate remedy.[30] It was therefore unnecessary to determine whether it was effective, given that it was a remedy that did not need to be exhausted.

40. The Commission noted, regarding the proceedings conducted in the ordinary courts, that, although the case against Vladimiro Montesinos Torres and others was in the examination stage, "a case could yet be made for failure to exhaust remedies under domestic law," but that the investigation did not seem to suggest that the domestic remedy might be effective. This was because the process for handling case evidence had culminated in dismissal of the case against the accused on grounds that they were acting on court orders. In this regard, the Commission noted, in a criminal investigation of this nature, the "preservation [of the crime scene], the [handling of] the bodies, autopsy procedures–which must meet international standards–and the chain of custody of the evidence gathered, are functions that, in combination with other investigative procedures, are essential to establish what happened and to identify the authors." The Commission therefore concluded that "the absence of all this activity at the time and, worse still, the measures these State agents allegedly took to hide the facts, combined with the amount of time that passed before these facts were uncovered, does not augur well for the effectiveness of the domestic remedy to meet the requirement established in Article 46(2) of the American Convention."[31]

41. Thus, the Commission implicitly questioned whether the criminal process in the ordinary jurisdiction was a suitable remedy when it held that, because the process was still ongoing, it could constitute a failure to exhaust domestic remedies. The Commission could not have drawn this conclusion without asserting that the ordinary jurisdiction, unlike the military courts, was the proper place for investigating the facts of the case. The Court clearly believes that the Commission's procedure in reviewing the effectiveness of the remedy presupposes its view that this remedy was suitable.

42. The next argument is that Commission's analysis of the objections of failure to exhaust domestic remedies under Article 46(2) of the Convention was flawed. The Court would reply that the State did not clearly identify the serious error that had breached its right to defense,

---

[30] In this regard, the Commission maintained that "on October 15, 2003, the Chamber of the Supreme Council of Military Justice dismissed the case against the commandos, who had been charged with violation of international law, abuse of authority and qualified homicide. It did so on the grounds that the presence of a crime and the guilt of the accused had not been proved. The Inspector General of the Superior Council of Military Justice has had that ruling under review since November 30, 2003." It added, "the investigation and prosecution of Army personnel in the military justice system for the events related to the alleged executions of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and David Peceros Pedra, [was] not an adequate remedy for ascertaining their responsibility in the serious violations denounced, in the sense of Article 46(1) of the American Convention Admissibility Report No. 13/04 by the Inter-American Commission on Human Rights, February 27, 2004, paras. 58 and 59 (case file of the proceedings before the Commission, volume III, folios 1624 to 1625).

[31] Admissibility Report No. 13/04 by the Inter-American Commission on Human Rights, February 27, 2004, paras. 60 and 61 (case file of the proceedings before the Commission, volume III, folio 1625).

but merely took exception to the Commission's views. This argument can thus be dismissed as groundless.

43. The Court will also address the possibility that the Commission prejudged the effectiveness of investigations undertaken in the ordinary courts and recalls that the points set forth in the Admissibility Report constitute a prima facie legal discussion serving merely as a preliminary analysis. The Court would like to note, in this regard, that the Commission must necessarily conduct just such a preliminary analysis to determine whether or not the objections of failure to exhaust domestic remedies are admissible. To construe this in any other way would suggest that during the admissibility stage, the Commission cannot give an opinion on the reasons for holding a petition admissible and would strip the provisions of Convention Article 46(2) of any useful effect, because if any of its conditions is present, the Commission must conduct a preliminary analysis in order to justify its decision.

44. The Court, having considered the State's arguments, therefore holds that the claims of serious error, violating the right to defense of the parties, is groundless. Therefore, the instant case presents no postulates that the Court should review the proceeding before the Commission. The Court denies the preliminary objection brought by the State.

B. Second preliminary objection: "Objection for failure to exhaust domestic remedies"

Arguments by the State, the Commission, and the representatives

45. The ***State*** noted that it had lodged this preliminary objection at the proper time during the admissibility stage of the proceedings before the Inter-American Commission. It pointed out that the Commission "ignored the State's arguments [on the complexity of the case and the need to process a large volume of evidence], issuing a Report on the Merits that brought the case before the Court; this had triggered an inconsistency because a process was taking place before the inter-American system with a ruling on the merits by the […] Commission, even as the criminal proceeding continued to unfold in the domestic jurisdiction, the natural sphere for deciding whether the alleged extrajudicial executions had been committed." It added that the Court, in its analysis of this objection, should consider the situation that existed at the time the Commission gave its ruling on the admissibility of the petition, that is, February 27, 2004; according to the State, any legal irregularity committed by the Commission in its Admissibility Report should be examined in light of the circumstances prevailing at the moment, when the amount of time was not being challenged as unjustified, or at least, when sufficient grounds for the alleged violation had not been found. It added that the domestic courts had been pursuing another criminal trial at the time against Alberto Fujimori Fujimori for the murder of Cruz Sánchez, Meléndez Cueva and Peceros Pedraza; and against Manuel Tullume Gonzáles as the alleged accomplice in the same crime against Cruz Sánchez, and the process had not yet been completed.

46. The ***Commission*** noted that while the State had reported in due time about the conflict of jurisdiction between the military courts and the ordinary courts, and submitted information on both processes, it had brought no arguments about whether or not the military criminal proceeding was appropriate for investigating the facts of the case; moreover, its brief implied only the existence of "a pending criminal trial," which because it was not described as military, should be understood as pertaining to the ordinary courts. The Commission also emphasized that during the admissibility stage, the State had brought no specific arguments about the military criminal process, which at that time was still underway. It was in the Commission's stage on the merits and, subsequently, in the process before the Court, that the State had brought up the alleged complexity of the case, which was not a preliminary argument, but part

of the merits. It therefore clarified that the analysis of unwarranted delay, conducted during the admissibility stage, had been performed as prima facie, while the standard of a reasonable period pertains to the analysis of the merits. The Commission further argued that the evaluation of whether to apply objections based on Article 46(2) of the American Convention should take place in advance, separately from the discussion of the merits, using a different standard from the one employed for assessing violation of Articles 8 and 25 of the Convention. It held, in this regard, that the State had not supplied enough information during the admissibility stage, and therefore the report examined "the passage of time since the facts occurred and the lack of progress with the investigation in the ordinary courts." The Commission noted in closing that the process against Fujimori Fujimori had formally begun with criminal charges lodged in 2007, that is, 10 years after the facts, and was still awaiting a decision. The Commission also addressed the State's argument concerning the alleged inconsistency as a process followed its course through the inter-American system while, at the same time, the domestic criminal trial was still underway. It emphasized that it was specifically for cases such as this, when the facts date back more than 15 years and investigations have been open for more than 10 years without a final verdict, that the Convention allows for exceptions to the failure to exhaust domestic remedies, and added that, "in over half of the cases before it, the Court […] has applied these exceptions during the admissibility stage before the [Commission]" and that the Court has examined the reasonableness of the period in the merits. It therefore asked the Court to deny the preliminary objection as inadmissible.

47. The ***representatives*** explained that in their understanding, the State's arguments would apply only to the objection on unwarranted delay in the ordinary criminal courts; the objection should not be considered, based on the principle of estoppel, as the Peruvian State "recognized its responsibility for the excessive time taken in trying the criminal case." They argued that the objection now being lodged by the State contradicted the earlier position, and the State was therefore barred from presenting it and it should be denied. They further argued that while the process before the military courts had been finalized at the time the Admissibility Report was issued and therefore could be considered to have been exhausted, they did not consider it an appropriate remedy and "therefore, it did not need to be exhausted." They maintained that the exceptions to the requirement for exhaustion of remedies allowed under Article 46(2)(a) and (c) of the Convention was, in fact, applicable to the process underway in the ordinary courts, even though it was not yet final. They noted that "at the time of the facts and for several years thereafter, Peru did not have minimum guarantees of due process," and that the criminal proceedings undertaken to investigate the facts of the instant case in the ordinary jurisdiction had taken place within this same context and presented the same defects. They added that the exception to the provisions of Article 46(2)(a) of the Convention was perfectly applicable, given the "situation of widespread impunity for cases of serious human rights violations committed as part of the fight against terrorism." They noted in closing that the State itself was responsible for the unwarranted delay, because before opening the proceedings in the ordinary courts, the State itself had committed actions and omissions intended to "interfere with the investigation and had therefore contributed to the delay." In summary, they asked the Court to deny the preliminary objection raised by the State.

Considerations of the Court

48. Article 46(1)(a) of the American Convention states that the admissibility of a petition or communication lodged by the Inter-American Commission in accordance with Articles 44 or 45 is subject to the requirement that the remedies under domestic law have been pursued and

exhausted in accordance with generally recognized principles of international law.[32] The Court recalls that the rule on prior exhaustion of domestic remedies was conceived in the interest of the State, relieving it of the need to face international proceedings for actions ascribed to it before resolving the dispute using its own processes.[33] This entails not only the formal existence of such remedies, but also their appropriateness and effectiveness, as shown by the exceptions set out in Article 46(2) of the Convention.[34]

49. Similarly, the Court has consistently maintained that an objection to the exercise of its jurisdiction based on the alleged failure to exhaust domestic remedies should be lodged at the correct stage of the proceedings, that is, during the admissibility stage before the Commission.[35] A State that claims failure to exhaust domestic remedies needs to spell out the particular domestic remedies that have not yet been exhausted and demonstrate that they were in fact available and were appropriate, fitting and effective.[36] Again, it is not the task of the Court or the Commission to identify ex officio the domestic remedies that remain to be exhausted, and international bodies are not expected to rectify a lack of precision in the State's arguments.[37]

50. The Court recalls that the first decision to be made on a preliminary objection of this kind is whether it was raised at the correct stage of the proceedings. The State, notes the Court, did in fact submit its observations on the initial petition of December 1, 2003, asking the Commission to [declare the inadmissibility of petition 136/2003, as provided in Articles 46(1)(a) [*sic*] of the American Convention, in keeping with Article 31 of the [Commission's] Rules of Procedure," based on the fact that "a criminal trial was underway in the domestic jurisdiction" and that "the relevant remedy had not been exhausted."[38] The Court therefore holds that the State filed its objection at the correct time.

51. The Commission replied to the State's claim in its Admissibility Report, saying that even though a criminal process was still open in the ordinary jurisdiction for the alleged commission of the crimes associated with the case, the exceptions to the rule on the exhaustion of domestic remedies provided for in Article 46(2)(a)[39] and (c)[40] of the American Convention were

---

[32] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary Objections.* Judgment of June 26, 1987. Series C No. 1, para. 85, and *Case of Argüelles et al. v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2014. Series C No. 288, para. 42.

[33] *Cf. Case of Velásquez Rodríguez v. Honduras*. *Merits.* Judgment of July 29, 1988. Series C No. 4, para 61, and *Case of Argüelles et al. v. Argentina, supra*, para. 43.

[34] *Cf. Case of Velásquez Rodríguez v. Honduras*. *Merits, supra*, para. 63, and *Case of Human Rights Defender et al. v. Guatemala, supra*, para. 20.

[35] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 88, and *Case of Argüelles et al. v. Argentina, supra*, para. 42.

[36] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, paras. 88 and 91, and *Case of Argüelles et al. v. Argentina, supra*, para. 43.

[37] *Cf. Case of Reverón Trujillo v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 30, 2009. Series C No. 197, para. 23, and *Case of Argüelles et al. v. Argentina, supra*, para. 44.

[38] Report 77-2003-JUS/CNDH-SE of December 1, 2003 (case file of the proceedings before the Commission, volume III, folios 1632 to 1641).

[39] Article 46(2)(a) of the Convention states that the provisions on exhaustion of domestic remedies and the six-month term do not apply when "the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated."

[40] Article 46(2)(c) of the Convention states that the provisions on exhaustion of domestic remedies and the six-month term do not apply when "there has been unwarranted delay in rendering a final judgment under the aforementioned remedies."

applicable.[41] It should be recalled in this regard that on the date the report was released, the primary case had been subject to a dispute on jurisdiction, and the ruling in favor of the military courts had led to dismissal of the case in favor of all those who had been tried in that jurisdiction (*infra* paras. 189 and 191). Moreover, a criminal investigation was underway in the ordinary jurisdiction against the alleged commanding officers, and an investigation for the crime of complicity and concealment had been joined to it (*infra* paras. 197 and 199).

52. The State also argued before this Court that it would be "inconsistent to pursue a process before the inter-American system when the criminal proceedings for the same facts were still in progress in the domestic courts" (*supra* para. 45). The Court would recall in this regard that the American Convention itself expressly allows for a petition to be declared admissible under certain assumptions, even if the prior exhaustion of domestic remedies has not yet been established at the time the admissibility report is issued. Adopting the position held by the State would mean removing all content and useful effect from the provisions of Article 46(2) of the American Convention.

53. The Court would respond to the Commission's decision to apply the exception set forth in subparagraph (c) when it issued the Admissibility Report by noting that at a later date, in 2011, the State itself admitted responsibility for breaching the right to a reasonable period in the trial held in the criminal courts (*supra* para. 22), that the ruling to uphold the acquittals of all the people being tried was issued in July, 2013, and a new investigation was ordered in 2014 (*infra* paras. 233 to 236). This Court recalls international practice and its own case law, which indicate that when a party in a case adopts a position that is either detrimental to itself or beneficial to the other party, the principle of estoppel prevents it from subsequently assuming the contrary position.[42] Therefore, the objection raised by the State before this Court, questioning the Commission's claim of unwarranted delay in trying the case in the ordinary courts, and the State's arguments about possible justification for the delay in processing the domestic case constitute a change in the position it adopted previously and is not admissible under the principle of estoppel. The State's objection for failure to exhaust domestic remedies must accordingly be denied.

C. Third preliminary objection: "Objection calling for a review of the legality of Report on the Merits 66/11 regarding the identification of the alleged victims and human rights not included in Admissibility Report 13/04;"

Arguments by the State, the Commission, and the representatives

54. The ***State*** doubted the Court's jurisdiction *ratione personae* and *ratione materiae* in the instant case because the Commission, in Admissibility Report 13/04, had expressly identified the alleged victims and the rights in question, meaning that it had not admitted family members of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza as victims of the alleged violation of the right to personal integrity. The State emphasized that one of the purposes of the Admissibility Report was to set the parameters of the dispute in the merits stage of the contentious proceeding before the Commission, and therefore, "the admissibility reports become the *conditio sine qua non* of the discussion on the

---

[41] *Cf.* Admissibility Report No. 13/04 by the Inter-American Commission on Human Rights, February 27, 2004, para. 62 (case file of the proceedings before the Commission, volume III, folio 1625).

[42] In keeping with its own case law, this Court believes that, under the principle of estoppel, a State that has taken a particular stance that produces legal effects cannot then take a different, contrary position that changes the status of a matter on which the other party based its actions. *Cf. Case of Neira Alegría et al. v. Peru. Preliminary Objections*. Judgment of December 11, 1991. Series C No. 13, para. 29, and *Case of Human Rights Defender et al. v. Guatemala, supra*, para. 24.

merits of a petition or claim, except when, in exceptional circumstances, the Commission decides to defer the consideration of admissibility until the debate and decision on the merits, in application of Article 36 of its Rules of Procedure." The State maintained that in the instant case, the Commission had handled the admissibility and the merits separately; thus, if the Commission had established its human and material jurisdiction, it could not "arbitrarily expand this jurisdiction during the merits stage," because such an action ceased to be available upon conclusion of the admissibility process. Nevertheless, according to the State, the Commission sought to "validate its procedural error by stating that the 'petitioners had raised the claim only after the Admissibility Report.'" The State held, in this regard, that any argument on admissibility submitted by the petitioners after the admissibility report had been adopted was out of order, and the Commission was not entitled to weigh it during the merits stage. This reflected the spirit of the rules on the system of individual petitions and the provisions of Article 30(5) of the Commission's Rules of Procedure, because "accepting it would infringe the principle of legal certainty, as such a procedure is not allowed under any of the rules of the inter-American system for the protection of human rights." It also argued that the time limits on the admissibility stage were clear in Articles 30(6) of the Commission's Rules of Procedure, which, "while addressed exclusively to the State, can nonetheless be required of petitioners in application of the principle of procedural equity."

55. The State closed by explaining that the Commission, in its Report on the Merits, had concluded that, "in application of the *iura novit curia"* principle, it would proceed to offer its views on the alleged violation of the right to personal integrity of the family members of the alleged victims. The State objected, as this matter had not been discussed during the admissibility stage, and argued that the application of this principle cannot be arbitrary or unrestricted. It explained that, in the instant case, the application of the principle was delimited by the Commission's decision in the Admissibility Report concerning its jurisdiction *ratione personae*. In the view of the State, during the merits stage, the Commission was entitled to assert violations of rights other than those admitted, only if based on proven facts and limited strictly to the persons who had allegedly been executed. It argued, therefore, that legal certainty and procedural equality had been undermined in the instant case, and the Court should review the legality of the Report on the Merits concerning the identification of alleged victims and human rights not addressed in Admissibility Report 13/04.

56. The ***Commission*** replied that the State, from the very beginning of the case, had been aware of the existence and even names of some of the family members of the alleged victims, who in fact had lodged the petition. Subsequent to the Admissibility Report, the parties had updated the judicial case files. The Commission had found that these same files, together with alleged facts known by the State from the time of the initial petition and during the processing of the merits, provided content and more complete information on the personal integrity of the family members of alleged victims. It emphasized that the alleged violation was based on harm caused by the alleged executions and their alleged impunity, both of which were key points from the time of the initial petition. The Commission explained that, in accordance with its own practice, the admissibility report is limited or bound *prima facie* by the evidence available at the time it is issued and the cause of action that will be examined during the merits stage. Therefore, the detailed analysis of the facts, based on evidence received, is performed during the merits. From the time of the initial petition and throughout the process before the Commission, the State had been aware of the existence of the family members of the alleged victims, as well as their role in the domestic processes, and it was during the merits stage that this was made explicit and further information was provided. The Commission asked the Court to deny the preliminary objection, as it was unfounded.

57. The ***representatives*** agreed that the admissibility stage and the merits stage in proceedings before the Commission served different purposes and should not be confused with

one another. They argued that the intent of the admissibility stage was to examine the formal aspects, without which the Commission would be unable to give an opinion on the matter brought before it; because it is a preliminary examination, the Commission's decisions on the possible existence of a violation do not set limits on its ultimate decisions concerning the merits or the possibility for the Court to judge the case. They also agreed that, once the admissibility report has been issued, this stage of the proceedings has ended, and the Commission should not give further consideration to admissibility arguments that the parties may lodge subsequently. By contrast, the arguments on the facts that had taken place and the rights violated pertained to the merits.

58. The representatives also held that the right to defense for both parties had been broadly respected, given that the arguments on violation of the right to personal integrity of the family members had been presented for the first time on April 22, 2008, and the State had been given at least five opportunities over the course of three years to submit its reply, but during this time, it had filed no comments on the subject. The representatives therefore believed that the State could not "claim to justify its own negligence in the proceedings […] due to alleged procedural flaws that never existed." The representatives also addressed the Commission's application of the *iura novit curia* principle, recalling that it was soundly backed by international jurisprudence and that both the Commission and the Court were empowered to apply it, so long as they respected the rights of the parties, as in the instant case. They further argued that the Commission itself could have decided on its own motion to include more individuals if, availing itself of its powers, it found that they should receive protection. They cautioned, moreover, that, according to the Court's case law, the alleged victims should be identified in the Commission's Report on the Merits, as in fact had occurred in this case. For these reasons, they held that the State had not demonstrated that the Commission had injured its right to defense by committing a serious error when it asserted the right to personal integrity for the family members of the alleged victims in the instant case. To the contrary, the representatives said that the arguments had actually addressed disagreements with the Commission's conclusions, and therefore asked the Court to deny the State's preliminary objection.

Considerations of the Court

59. It should be recalled, first of all, that when a preliminary objection questions the Inter-American Commission's procedures, the Court is empowered to exercise review of the legality of Commission actions, so long as one of the parties offers well-founded claims that a serious error has breached its right to defense (*supra* para. 37). Therefore, in keeping with the Court's own consistent case law, the party making the claim must convincingly demonstrate the damage suffered. In this regard, a complaint or difference of opinion in relation to the actions of the Inter-American Commission is not sufficient (*supra* para. 38).

60. The Court will reply to the State's arguments on estoppel derived from the Commission's admissibility stage, recalling its own view that the conditions for admissibility of a petition (Articles 44 to 46 of the American Convention) stand as a guarantee to ensure that the parties can exercise the right to defense in the procedure.[43] It is worth remembering that, in cases where the Commission handles the admissibility separately from the merits, the admissibility stage is bound by the requirements given in Articles 44 to 46 of the Convention. The text does offer certain exceptions, as in Article 48(1)(c), under which the Commission can, after admitting the petition, "declare the petition or communication inadmissible or out of order, based on subsequent information or evidence."

---

[43] *Cf. Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights, supra*, para. 27, and *Case of Furlan and Family v. Argentina. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 31, 2012. Series C No. 246, para. 49.

61. The Court notes in the instant case that the preliminary objection does not address the requirements for admissibility established in the American Convention; instead, the State is questioning the Commission's actions regarding the total number of people who can be considered alleged victims in the case before the Court, as well as certain human rights violations established in the Commission's Report on the Merits No. 66/11. These are the grounds on which the State is asking the Court to review the legality of Report No. 66/11. The Court must therefore decide whether, based on the submissions by the State, the Commission's actions can be held to constitute a serious error that undermined the State's right to defense, such that the Court would be blocked from holding certain persons to be alleged victims and from weighing the violations they are alleged to have experienced.

62. The Court will first address the situation of alleged victims included in the Report on the Merits who were not previously named in the Commission's Admissibility Report, and it recalls that Article 35(1) of the Court's Rules of Procedure provides for the case to be presented through the submission of the Report on the Merits, which should "identify the alleged victims." It corresponds to the Commission to identify precisely and at the right procedural stage the alleged victims in a case before the Court.[44] This means that subsequent to the Report on the Merits, no more alleged victims can be added, absent the exceptional circumstances provided under Article 35(2) of the Court's Rules of Procedure,[45] involving situations in which it is not possible to "identify one or more of the alleged victims who figure in the facts of the case because it concerns massive or collective violations." Therefore, under this Article 35, which is clear and unambiguous, it is the *jurisprudence constante* of this Court that the alleged victims must be identified in the Merits Report issued pursuant to Article 50 of the Convention.[46] The Commission identified family members as alleged victims in the instant case in Merits Report No. 66/11, thus complying with these rules.

63. The Court will now address the conclusion of the Commission's Report on the Merits No. 66/11 concerning the violation of rights that had not been mentioned previously in the Admissibility Report. It is worth recalling from the Court's case law that the rights set forth in the Commission's admissibility report are the result of a preliminary examination of the relevant petition. This does not preclude the possibility for subsequent stages of the process to consider other rights or articles that have allegedly been breached, so long as the State's right to defense is respected and the claims remain within the framework of facts in the case under discussion.[47]

---

[44] *Cf. Case of the Barrios family v. Venezuela. Merits, Reparations and Costs.* Judgment of November 24, 2011. Series C No. 237, para. 214, and *Case of Argüelles et al. v. Argentina, supra*, para. 236.

[45] Article 35(2) of the Court's Rules of Procedure reads, "When it has not been possible to identify one or more of the alleged victims who figure in the facts of the case because it concerns massive or collective violations, the Tribunal shall decide whether to consider those individuals as victims." *Cf. Case of the Río Negro Massacres v. Guatemala. Preliminary Objection, Merits, Reparations and Costs.* Judgment of September 4, 2012. Series C No. 250, para. 47 to 51, and C*ase of the Massacres of El Mozote and nearby places v. El Salvador. Merits, Reparations and Costs.* Judgment of October 25, 2012. Series C No. 252, paras. 49 to 57.

[46] *Cf. Case of the Barrios family v. Venezuela, supra*, footnote 214, and *Case of Argüelles et al. v. Argentina, supra*, para. 236.

[47] Neither the American Convention, nor the current Rules of Procedure of the Inter-American Commission, nor the Rules of the Commission in force at the time when the Merits Report was issued, contains any rules requiring that the Admissibility Report establish all the rights presumably violated. Furthermore, the Court has indicated that, in the context of proceedings in the Inter-American System, it is possible to change or modify the legal classification of the facts of a specific case. This is clearly reflected in the Court's consistent case law, according to which the presumed victims and their representatives may invoke the violation of rights other than those included in the Merits Report, provided that these remain within the factual framework. *Cf. Case of the "Five Pensioners" v. Peru. Merits, Reparations and Costs.* Judgment of February 28, 2003. Series C No. 98, para. 155, and *Case of Human Rights Defender et al. v. Guatemala, supra*, para. 28 and footnote 21.

64. The Court would note, in this regard, that from the time the petitioners first submitted their claim, they maintained that, after the hostage rescue operation had been completed, at least three members of the MRT had been detained and summarily executed; their remains had been hidden from their families to avert any judicial actions; the family members had not been allowed to take part in the identification or autopsy of the bodies; the remains had been buried in clandestine locations in several different cemeteries in the city of Lima; the military courts had not served as an effective remedy to protect the rights of the alleged victims and the members of their families, and the decision to partition the criminal investigation and submit part of it to the military courts had facilitated impunity.[48]

65. The Commission concluded in its Admissibility Report No. 13/04 that it had jurisdiction to hear the merits of the case and that the petition was admissible with respect to the alleged violations of the right to life, the right to judicial guarantees and the right to judicial protection, established in the American Convention in Articles 4, 8 and 25, read in conjunction with Article 1(1), in injury of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza[49]. The Commission's Admissibility Report also included a section entitled "III. Positions of the parties," containing the following arguments submitted by the petitioners:

> […]
>
> 11. When the military rescue operation was over, the bodies were removed by military prosecutors; representatives from the Attorney General's Office were not permitted entry. The corpses were not taken to the Institute of Forensic Medicine for the autopsy required by law; in a highly irregular move, the bodies were taken instead to the morgue at the Police Hospital. It was there that the autopsies would be performed. The autopsy reports were kept secret until 2001. Next of kin of the deceased were not allowed to be present for the identification of the bodies and the autopsies. The bodies were buried in secrecy in various cemeteries throughout Lima. […]
>
> 30. The petitioners' contention was that the proceedings in the military court system cannot be an effective recourse for the protection of the rights of the victims and their next of kin and for reparation of the damages caused. The military system of criminal justice claimed jurisdiction over the case to protect those involved; hence, the military court proceedings do not afford the minimum guarantees of independence and impartiality required under Article 8(1) of the Convention.
>
> […]

66. The petitioners, during the merits stage, repeatedly made reference to the alleged facts and to the alleged injuries suffered by the families.[50] After April 23, 2008, the petitioners

---

[48] *Cf.* Brief of the initial petition submitted to the Inter-American Commission on Human Rights on February 19, 2003 (case file of the proceedings before the Commission, volume III, folios 1707 to 1716).

[49] *Cf. Admissibility Report No. 13/04 by the Inter-American Commission on Human Rights, February 27, 2004, para. 3 (case file of the proceedings before the Commission, volume III, folio 1613).*

[50] *Cf.* Petitioners' brief submitted to the Inter-American Commission on Human Rights, June 1, 2004 (case file of the proceeding before the Commission, volume III, folios 1589 to 1605); audio recording of the public hearing on February 28, 2005, during the 122nd regular session of the Inter-American Commission on Human Rights (evidence file, volume II, annex 46 of the case submission brief, folio 1326); petitioners' brief before the Inter-American Commission on Human Rights, April 23, 2008 (case file of the proceeding before the Commission, volume III, folios 1887 to 1932); petitioners' brief submitted to the Inter-American Commission on Human Rights, October 8, 2008 (case file of the proceeding before the Commission, volume III, folios 2363 to 2374); petitioners' brief submitted to the Inter-American Commission on Human Rights, December 10, 2009 (case file of the proceeding before the Commission, volume IV, folios 2739 to 2743), and petitioners' brief submitted to the Inter-American Commission on Human Rights, February 8, 2011 (case file of the proceeding before the Commission, volume IV, folios 2723 to 2725).

clearly and specifically argued that family members Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza had experienced violation of their right to personal integrity, right to judicial guarantees and right to judicial protection (Articles 8(1), 25(1), 5(1) and 5(2) of the American Convention).[51] Later, on February 8, 2011, they provided the names of all the family members—Edgar Odón Cruz Acuña, Herma Luz Cueva Torres, Florentino Peceros Farfán, Nemecia Pedraza de Peceros and Jhenifer Solanch Peceros Quispe.[52] These briefs were promptly transferred to the State for comment. Finally, in the Report on the Merits approved March 31, 2011, the Commission took the initiative of adding Lucinda Rojas Landa as a family member (*infra* paras. 92 and 97).

67. It is therefore beyond question that the State had been aware of the facts alleged to have occurred in violation of Article 5(1) and 5(2) of the Convention in injury of the family members of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza ever since the beginning of the process before the Commission, and could have expressed its position if it so chose. The case file also shows that for a period of over seven years during the merits stage, the State had at least six procedural opportunities to challenge the facts being raised by the petitioners;[53] on at least four of these occasions, it was in a position to respond specifically to the arguments that the petitioners had submitted concerning the alleged violation of Article 5 of the Convention,[54] and subsequently, concerning the full identification of family members as alleged victims.[55] Clearly, it had procedural opportunities to avail itself of its right to defense during the process before the Commission. The Court therefore finds that Peru's right to defense was not violated by the Commission's decision in its Report No. 66/11 to cite violation of Article 5(1) and 5(2) of the Convention in injury of the family members of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, in application of the principle of *iura novit curia* and taking into account that "the facts substantiating these allegations are contained in the information and documentation provided by the parties during the processing of the instant case, with respect to which the State has had the opportunity to defend itself and submit its pleadings."[56]

---

[51] *Cf.* Petitioners' brief submitted to the Inter-American Commission on Human Rights, April 23, 2008 (case file of the proceeding before the Commission, volume III, folios 1887 to 1932).

[52] *Cf.* Petitioners' brief submitted to the Inter-American Commission on Human Rights, February 8, 2011 (case file of the proceeding before the Commission, volume IV, folios 2723 to 2725).

[53] *Cf.* Communication from the Inter-American Commission on Human Rights, June 17, 2004 (case file of the proceeding before the Commission, volume III, folios 1580 to 1581). The State submitted no arguments at that time; audio recording of the public hearing on February 28, 2005, during the 122nd regular session of the Inter-American Commission on Human Rights (evidence file, volume II, annex 46 of the case submission brief, folio 1326); Report 129-2008-JUS/CNDH-SE/CESAPI, July 24, 2008 (case file of the proceeding before the Commission, volume IV, folios 2386 to 2393); Report 08-2009-JUS/PPES, February 6, 2009 (evidence file, volume II, annex 47 of the case submission brief, folios 1328 to 1343); Report 38-2010-JUS/PPES, February 17, 2010 (case file of the proceeding before the Commission, volume IV, folios 2697 to 2699), and Report 116-2011-JUS/PPES, March 9, 2011 (case file of the proceeding before the Commission, volume IV, folios 2709 to 2711).

[54] *Cf.* Report 129-2008-JUS/CNDH-SE/CESAPI, July 24, 2008 (case file of the proceeding before the Commission, volume IV, folios 2386 to 2393); Report 08-2009-JUS/PPES, February 6, 2009 (evidence file, volume II, annex 47 of the case submission brief, folios 1328 to 1343); Report 38-2010-JUS/PPES, February 17, 2010 (case file of the proceeding before the Commission, volume IV, folios 2697 to 2699), and Report 116-2011-JUS/PPES, March 9, 2011 (case file of the proceeding before the Commission, volume IV, folios 2709 to 2711).

[55] *Cf.* Report 116-2011-JUS/PPES, March 9, 2011 (case file of the proceedings before the Commission, volume IV, folios 2709 to 2711).

[56] Report on the Merits No. 66/11 issued by the Inter-American Commission on Human Rights, March 31, 2011, para. 220.

68. The Court, taking into account that the Commission has acted in the exercise of powers set forth in the Rules of Procedure, and that there are no well-founded reasons to believe that the actions of the Commission could have been injurious to the the State's right to defense, finds no grounds in the instant case on which to review the procedure before the Commission.

69. In view of these considerations, the Court denies the preliminary objection submitted by the State to review the legality of Report on the Merits No. 66/11 concerning the inclusion of alleged victims and certain human rights not cited in Admissibility Report 13/04.

D. Fourth preliminary objection: "Objection on the grounds that the Inter-American Commission on Human Rights violated the Peruvian State's right of defense;"

Arguments by the State, the Commission, and the representatives

70. The ***State*** argued that the Commission's decision on admissibility of the case was delivered after a period of only four months and 17 days from the time the State received notification of the petition. It held, in this regard, that admissibility decisions had been made more quickly in the instant case than in any other petitions against Peru from 2000 through 2012. The State argued that this had breached the principles of adversarial proceedings, procedural equality and legal certainty in the international process against it. It noted that the Commission had taken an average of 47.4 months, nearly four years, to draw its 66 admissibility decisions in cases against Peru from 2000 through 2012. The State also observed that the Commission's admissibility decisions in 2004 regarding 14 other countries had taken an average of 24.5 months, and the admissibility decisions on the four petitions against Peru had taken an average of 32.5 months. It concluded that the Commission had taken only one-fifth the time to adopt a position of admissibility of petitions for Peru that year than for the other countries of the region.

71. According to the State, the Commission had displayed "bias and lack of objectivity, and had twisted the system of rules for admissibility decisions." It had deprived the State of the possibility to submit additional arguments on the admissibility of the petition, giving it only one opportunity to respond to matters of admissibility, despite the fact that two criminal proceedings were underway in the domestic courts. The petitioners, by contrast, had been able to submit their comments on the State's response, and this was the only information the Commission had used to examine and settle the admissibility of the petition. The State argued that this had favored the petitioners. The State noted that, while it is debatable whether the Commission can be held to the same standard of impartiality as the Court because it is not a judiciary, but a quasi-judicial administrative body, it should at least remain objective. In the instant case, the Commission had made its decision even knowing that two criminal proceedings were underway in the domestic jurisdiction, one in the military courts, and the other in the ordinary courts, so that when it published Admissibility Report 13/04, there was as yet no final military judicial finding. It was only later that the military court decided to drop the case, but according to the State, the Commission had been willing to accept merely a preliminary decision from this military judicial body as sufficient grounds to decide without consulting back with the State on this point of admissibility.

72. In short, the State believed that its right to defense had been breached and hindered by the Commission's conduct because it did not have enough time to examine the requirements of admissibility contained in the petition, nor had it been able to comment on the information submitted by the representatives of the alleged victims before the admissibility decision on the petition was made.

73. The ***Commission*** pointed to Article 30 of its Rules of Procedure in effect at the time the petition was submitted, and held that it has met its obligation under the Convention and Rules of Procedure, as it had sent the relevant sections of the petition to the State, which, after requesting a time extension, had filed its observations on December 1, 2003. The Commission commented, in this regard, that the State had merely questioned the alleged swiftness of the admissibility process, which meant it recognized compliance with the Commission's Rules of Procedure. It therefore asked the Court to deny the preliminary objection for lack of merit.

74. The ***representatives*** said that Peru in the instant case had not provided grounds to claim manifest error or noncompliance with the requirements for admissibility in breach of its right to defense or any other right, that could justify a reconsideration of the procedure before the Commission. The representatives also felt that Peru's claims better resembled a complaint or disagreement with the criteria for the Commission's actions, and this was an insufficient basis to justify a preliminary objection. The representatives maintained that the Commission's actions had been fully consistent with the provisions of Articles 26 to 30 of its Rules of Procedure applicable to the case, which covered the initial review of the petition and the admissibility procedure. They added that the State had not shown how its right to defense had been undermined by the amount of time the Commission took to make its admissibility decision, as both parties had been given an opportunity to file their arguments. Nor had it demonstrated that the amount of time had breached the parties' procedural equality, and it could not be said that the principle of procedural equality applied to parties in other processes involving different facts and different claims, under circumstances different from those of the instant case, and therefore they held that the State's argument in this regard was not valid. The representatives also held that in any case, the time period under discussion had affected both parties alike, and therefore, procedural equality had not been affected. They therefore asked that the preliminary objection be denied.

Considerations of the Court

75. The Court finds it worth mentioning that the inter-American system for the protection of human rights is built on a foundation of the full autonomy and independence of its organs for the exercise of the functions entrusted to them; and that it is only in the area mentioned above (*supra* para. 37) that the Court has the power to review whether the Commission has complied with the provisions of the American Convention, the Statutes and the Rules of Procedure.[57]

76. Article 30 of the Commission's Rules of Procedure in force while the instant case was in the admissibility stage established:

> 1. The Commission, through its Executive Secretariat, shall process the petitions that meet the requirements set forth in Article 28 of these Rules of Procedure.
>
> 2. For this purpose, it shall forward the relevant parts of the petition to the State in question. The identity of the petitioner shall not be revealed without his or her express authorization. The request for information made to the State shall not constitute a prejudgment with regard to any decision the Commission may adopt on the admissibility of the petition.
>
> 3. The State shall submit its response within three months from the date the request is transmitted. The Executive Secretariat shall evaluate requests for extensions of the

[57] *Cf. Control of Due Process in the Exercise of the Powers of the Inter-American Commission on Human Rights, supra,* para. 25.

period that are duly founded. However, it shall not grant extensions that exceed four months from the date of transmission of the first request for information sent to the State.

[…]

5. Prior to deciding upon the admissibility of the petition, the Commission may invite the parties to submit additional observations, either in writing or in a hearing, as provided for in Chapter VI of these Rules of Procedure.

6. Once it has received the observations, or at the end of the time set for them to be received, the Commission shall verify whether the grounds for the petition exist or remain. If it finds that they do not exist or no longer remain, it shall order the file to be closed.

77. As can be seen in the case file, the Commission received the petition on February 19, 2003[58] and registered it as petition number P-0136/2003 on March 3, de 2003.[59] On September 9, 2003, it forwarded the relevant sections of the petition to Peru and gave the State two months to reply.[60] The State was then given a time extension,[61] after which it submitted its answering brief to the petition on December 1, de 2003.[62] The petitioners filed their brief of observations to the State's reply on December 10, 2003.[63] The Commission approved Admissibility Report No. 13/04 on February 27, 2004.[64]

78. The Court finds, on this basis, that the Commission complied with this provision of its Rules of Procedure and there are no grounds to suggest that it could have caused a violation of the State's right to defense. Therefore, the instant case presents no postulates that the Court should review the proceeding before the Commission. The Court denies the preliminary objection brought by the State.

E. Fifth preliminary objection: "Objection for omission of relevant material"

Arguments by the State, the Commission, and the representatives

79. The ***State*** argued that, once it learned about the statement made by Hidetaka Ogura, it undertook a criminal investigation which led to two criminal trials. It added that one of the matters addressed by both the Commission and the representatives was the fact that the State had not conducted the proper procedures after the military operation to secure evidence and determine the cause of death of the MRT members. The State said that "it acted on its own motion to carry out a number of procedures immediately after the military operation, and although they could be considered insufficient, it later corrected any omissions it may have

---

[58] *Cf.* Brief of the initial petition submitted to the Inter-American Commission on Human Rights on February 19, 2003 (case file of the proceedings before the Commission, volume III, folios 1707 to 1716).

[59] *Cf.* Communication from the Inter-American Commission on Human Rights, March 3, 2003 (case file of the proceeding before the Commission, volume III, folios 1821).

[60] *Cf.* Communication from the Inter-American Commission on Human Rights, September 9, 2003 (case file of the proceeding before the Commission, volume III, folios 1823).

[61] *Cf.* Communication from the Inter-American Commission on Human Rights, November 11, 2003 (case file of the proceeding before the Commission, volume III, folios 1693).

[62] *Cf.* Report 77-2003-JUS/CNDH-SE of December 1, 2003 (case file of the proceedings before the Commission, volume III, folios 1632 to 1641).

[63] *Cf.* Petitioners' brief submitted to the Inter-American Commission on Human Rights, December 10, 2003 (case file of the proceeding before the Commission, volume III, folios 1586 to 1588).

[64] *Cf.* Admissibility Report 13/04 by the Inter-American Commission on Human Rights, February 27, 2004 (case file of the proceedings before the Commission, volume III, folios 1613 to 1627).

committed, as a result of the criminal complaint and the opening of the criminal investigation." It therefore asked the Court to bear in mind that, "while the procedures undertaken by the State in the immediate aftermath of the military operation were inadequate, the situation was corrected […] as a result of a prosecutorial investigation in which the State made every effort to correct the situation as described," and as a result, the State of Peru should not be found responsible for these violations.

80. The ***Commission*** pointed out that the State's argument was not a preliminary objection, but a recognition of the fact that the procedures taken immediately after the operation were deficient. It was also an attempt to open debate on an argument on the merits during the admissibility stage, concerning whether these procedures had been corrected at a later stage of the process, and whether the investigation protocols had been improved. It asked the Court, therefore, to deny this objection as unfounded.

81. The ***representatives*** said that the State's arguments on the matter were applicable to the merits. It noted, accordingly, that the State had expressly requested that it be declared not responsible for the violations of which it stood accused. It therefore asked the Court to address the matter during the appropriate stage in the proceedings, and to deny this objection.

Considerations of the Court

82. The State based its position essentially on the fact that it had conducted a number of actions that, in its view, remedied the alleged shortcomings in the proceedings conducted immediately after the military operation. The State had added that at present, through the Institute of Forensic Medicine and the National Directorate of Criminal Science, it was applying protocols attuned to international standards. It also asked this Court to hold the State not responsible for the violations of which it stands accused.

83. The Court finds that the State's arguments concerning its later rectification of shortcomings in the initial proceedings, such as working under what it called "current international standards," fall within the analysis of the merits of the case, and therefore should not be resolved as a preliminary objection. The Court therefore holds that the actions the State claims to have taken to correct the alleged acts of negligence committed in the investigation of the facts that took place on April 22, 1997, may be relevant for the Court's discussion of the merits of the case and any reparations it may order, but they have no impact on the exercise of the Court's jurisdiction in the instant case.

VI
PRELIMINARY CONSIDERATIONS

84. The Court will use this chapter to consider the State's arguments on the "objection for inadmissibility of new facts brought by the representatives of the alleged victims into the process before the Inter-American Court," and the status of Lucinda Rojas Landa as an alleged victim.

A. Alleged inadmissibility of facts

Arguments by the State, the Commission, and the representatives

85. The ***State*** argued that the Commission had not indicated what facts contained in its Report on the Merits would be submitted to the consideration of the Court, and that the legal consequences of this omission would be to consider that it had submitted the full chapter on proven facts from Report No. 66/11. It deemed, in this regard, that the representatives of the

alleged victims had brought new facts in its pleadings and motions brief that the Commission had not held as proven in its Report on the Merits, specifically, facts that ultimately could point to a violation of the right to personal integrity for family members of the alleged victims. It therefore asked the Court to remove from the process several facts intended to prove alleged violation of the right to personal integrity for family members of the alleged victims, "given that they were not considered by the [Commission] or discussed during the time the […] petition was being processed." The State transcribed the relevant sections of the facts and maintained that, while the facts were indeed related, they were "substantially broader" than those established by the Commission, and thus could not be considered "material that explains, sets the context or sheds light on" the facts proven by the Commission in its Report on the Merits.

86. The ***Commission*** emphasized that the State had recognized that the facts about family members, submitted by the representatives, were "related" to those brought by the Commission. It further highlighted that the facts raised by the representatives merely supplied supplementary information about some of the family members identified by the Commission and who, it concluded, had experienced violations for which the State was responsible.

87. The ***representatives*** clarified that the State had recognized that the facts to which it was objecting were related to those included in the Commission's Report on the Merits and therefore, far from standing as new facts, instead further developed or explained points already held as proven by the Commission. They also explained that the facts contained in their pleadings and motions brief to which the State objected fell into two categories: (i) those that show who the alleged victims of extrajudicial execution were and provide relevant background details, included merely as context information, and (ii) those revealing the way family members of the alleged victims learned about the alleged execution and the various processes they undertook to obtain justice. According to the representatives, these facts had been included in general terms in the Commission's Report on the Merits, and the pleadings and motions brief provided certain details about how these facts had occurred. The representatives also held that, because both parties had received ample opportunity to exercise their right of defense, "it would be utterly untrue" to claim that these facts had not been aired in the relevant process. They therefore asked the Court to dismiss the State's arguments.

Considerations of the Court

88. The Court already decided to deny the State's "[o]bjection, based on a legality review of Report on the Merits 66/11, regarding the identification of alleged victims and human rights not included in Admissibility Report 13/04", that would have removed the family members of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza as alleged victims of the claimed violation of the right to personal integrity (*supra* paras. 59 to 69).

89. The State's arguments on "inadmissibility of the representatives of the alleged victims bringing new facts into the process before the Inter-American Court," were intended to bar certain facts raised by the representatives to prove the alleged violation of the right to personal integrity of family members of the alleged victims, to which the State objected under the argument that they entailed new facts that the Commission had not held as proven in its Report on the Merits No. 66/11.

90. This Court has established that the factual framework of the proceedings before the Court consists of the facts contained in the Report on Admissibility and Merits submitted to its consideration. Consequently, it is not admissible for the parties to argue new facts that diverge from those contained in the said report, without prejudice to including those that may explain,

clarify or reject the facts that have been mentioned in the report and submitted to the Court's consideration (also known as "complementary facts").[65] The exception to this principle are facts that qualify as supervening, which can be submitted to the Court at any stage of the proceedings prior to the delivery of judgment.

91. The Court finds in the instant case that the circumstances leading to the State's position serve to explain or clarify the information given in the factual framework set forth in Report on the Merits 66/11. The State's arguments will not therefore be held as preliminary considerations. Likewise, considering the decision on preliminary objections, the Court will hold the facts provided by the representatives in their autonomous brief as evidence and will consider them in its discussion on the merits of the case.

B. Decision on the status of Lucinda Rojas Landa as an alleged victim

The position of the Commission and the representatives and the State's arguments

92. When the ***Commission*** brought the case before the Court, it named Lucinda Rojas Landa as an alleged victim of violations of Article 8, 25, 5(1) and 5(2) of the American Convention, read in conjunction with Article 1(1), given her relationship with Eduardo Nicolás Cruz Sánchez. This was based on an expert forensic anthropological opinion that had recorded participation by Lucinda Rojas Landa in her capacity as Eduardo Nicolás Cruz Sánchez' domestic partner.

93. The ***representatives*** clarified that "they [did] not represent Lucinda Rojas Landa in this proceeding" and that at no point in the litigation had they identified her as an alleged victim of the case.

94. The ***State*** dismissed the claims of a relationship between alleged victim Eduardo Nicolás Cruz Sánchez and Lucinda Rojas Landa, arguing that they had not had such a sustained, ongoing relationship as to have created family ties or an emotional link that could justify holding her as an alleged victim. The State explained that, although Lucinda Rojas Landa did live for a time with Eduardo Nicolás Cruz Sánchez, she had done so without contracting marriage or meeting the domestic legal requirements for common-law marriage, by which she would have acquired legal rights as his partner. They also drew attention to the statements that Lucinda Rojas Landa had made in the domestic jurisdiction in which she had not mentioned Eduardo Nicolás Cruz Sánchez, instead naming another partner. The State also pointed to the fact that Edgar Odón Cruz Acuña, Eduardo Nicolás Cruz Sánchez' brother, had not mentioned Lucinda Rojas Landa at any time as part of the family group, and this demonstrated that she was not close to the alleged victim and therefore, her rights had not been breached. Finally, responding to the fact that Lucinda Rojas Landa had been singled out as an alleged victim, the State argued that she had not been named as such by the representatives, and therefore, they did not represent her legally; this demonstrated, among other things, that she was not close to the other family members of the alleged victim. The State also held that the evidence submitted by the Commission was neither indicative nor sufficient to prove an affective bond. It particularly noted that Lucinda Rojas Landa had given testimony during the domestic legal investigations, revealing that her relationship with Nicolás Cruz Sánchez "had not lasted more than a year and a half, and that it had ended two years, ten months prior to the death […] in April, 1997." It consequently asked that she not be included as an alleged victim.

Considerations of the Court

---

[65] *Cf. Case of the "Five Pensioners" v. Peru. supra*, para. 153, and *Case of Espinoza Gonzáles v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2014. Series C No. 289, para. 35.

95. In the interest of procedural economy and greater clarity, the Court considers it best to deal with these arguments by the State before examining the facts of the case[66] because, if they are admitted, there would be no grounds to begin examining the alleged violations of this person's Convention-based rights. For the same reasons and to this end, the Court will also examine here the State's information and arguments, which are closely related to identifying the alleged victims of the case. In so doing, it will follow established criteria for weighing evidence, as will be discussed below (*infra* paras. 129 to 131).

96. In the case of Lucinda Rojas Landa, the Court understands that the State is questioning her status as the domestic partner or common-law spouse of Eduardo Nicolás Cruz Sánchez, and therefore, the Court must look to the evidence in the case file to determine whether she was his partner at the time of the facts and, thus, whether she can be considered a "family member".

97. The Commission's Report on the Merits included Lucinda Rojas Landa as the domestic partner of Eduardo Nicolás Cruz Sánchez based on an expert opinion by forensic anthropology. The expert report from forensic anthropology includes Lucinda Rojas Landa as a person interviewed to collect anthropomorphic data on Eduardo Nicolás Cruz Sánchez[67]. This evidence, and the fact that Lucinda Rojas Landa appears as his live-in partner, led the Commission to conclude that she did indeed have a family tie to the alleged victim. The State, meanwhile, supplied further evidence in the form testimony delivered by Lucinda Rojas Landa in 2001,[68] in which she told of her relationship with Eduardo Nicolás Cruz Sánchez and the nature and the duration of that relationship. Her statement reveals that they had lived together "from the summer of 1993 until the month of June, 1994", after which they saw each other sporadically every two months, and in December, 1995 Rojas Landa was arrested and was still in custody at the time of the facts of the instant case.

98. The Court, having heard the State's arguments, finds that the expert opinion from forensic anthropology, reporting an interview with Lucinda Rojas Landa, does not serve to demonstrate that she was the domestic partner of Eduardo Nicolás Cruz Sánchez; although Lucinda Rojas Landa is indeed named in the opinion as cohabiting with him, the document does not at any time develop or explain the relationship, but merely assumes it. The Court holds that this evidence brought by the Commission cannot lead to the conclusion that there was a family bond between the two at the time of the facts. The Court also agrees with the State that the the statement rendered by Lucinda Rojas Landa does not verify a family bond because there is no clear indication that she was Eduardo Nicolás Cruz Sánchez' partner at the time of the facts. Furthermore, even beyond the question of whether the evidence demonstrates a family tie, the Commission did not submit any other evidence to demonstrate possible injury to the rights of Lucinda Rojas Landa. The Court therefore finds that the State is correct that there is no verification of a family bond between Lucinda Rojas Landa and Eduardo Nicolás Cruz Sánchez at the time of the facts, and consequently she will not be held an alleged victim in the instant case.

---

[66] *Cf. Case of expelled Dominicans and Haitians v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs.* Judgment of August 28, 2014. Series C No. 282, para. 59.

[67] *Cf.* Expert opinion No. 390-2001 of forensic anthropology, July 24, 2001 (evidence file, volume I, annex 7 to the case submission, folios 600 to 605).

[68] *Cf.* Statement delivered by Lucinda Rojas Landa to the Specialized Provincial Prosecutor, March 9, 2001 (evidence file, volume XXXI, annex 7 to the State's final written arguments, folio 21075).

VII
EVIDENCE

99. Based on the provisions of Articles 46 to 51, 57 and 58 of the Rules of Procedure, the Court will analyze the admissibility of the documentary evidence submitted by the parties at the various stages of the proceeding, witness statements, and expert opinions delivered by affidavit and in the public hearing, as well as additional helpful evidence provided at the Court's behest. It will also discuss the evidentiary value and assessment of the "procedure to reconstruct the facts".

A. Documentary, testimonial and expert evidence

100. The Court received several documents submitted as evidence by the Inter-American Commission, the representatives and the State, attached to their main briefs. It further received a variety of documentary materials at other stages of the proceedings (*infra* paras. 107 to 113).

101. The Court received affidavits rendered before public attestors from Hidetaka Ogura, Edgar Odón Cruz Acuña, Herma Luz Cueva Torres, Nemecia Pedraza de Peceros, José Pablo Baraybar do Carmo, José Gerardo Garrido Garrido, Luis Alejandro Giampietri Rojas, José Daniel Williams Zapata and Carlos Alberto Tello Aliaga. It also received opinions from expert witnesses Hans Petter Hougen, Alejandro Valencia Villa, Viviana Valz Gen Rivera, Derrick John Pounder, Luis Antonio Loayza Miranda, Jean Carlo Mejía Azuero and Christof Heyns. Finally, the Court took evidence in the public hearing, consisting of a statement from witness Hugo Sivina Hurtado and opinions from expert witnesses Federico Andreu Guzmán, Luis Bernardo Fondebrider (the latter via audiovisual technology), Jean Carlo Mejía Azuero and Juan Manuel Cartagena Pastor.

B. Admission of evidence

B.1 Admission of documentary evidence

102. As it has done in other cases, the Court admits documents presented at the appropriate procedural opportunity[69] by the parties and by the Commission, the admissibility of which was not objected to or contested,[70] as well as those requested as helpful evidence in keeping with the provisions of Article 58 of the Court's Rules of Procedure (*supra* para. 10).

103. The Commission and the parties referenced several documents via electronic link, and the Court has held that, if a party provides at least the direct electronic link to the document cited as evidence and it is possible to access it, neither legal certainty nor procedural equality is impaired, because the Court and the other parties can locate it immediately.[71] As there were no objections in this case to the content or authenticity thereof, either by the parties or by the Commission, these documents were admitted.

---

[69] Regarding procedural time limits for adducing documentary evidence, under the terms of article 57(2) of the Rules of Procedure, evidence should be submitted together with the briefs of submission of the case, the pleadings brief or the answering brief, whichever applies.

[70] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 140, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 40.

[71] *Cf. Case of Escué Zapata v. Colombia. Merits, Reparations and Costs.* Judgment of July 4, 2007. Series C No. 165, para. 26, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 42.

104. The representatives and the Commission also submitted several press reports together with their various briefs, and this Court has held that they can be considered if they report well-known public facts or declarations by State officials, or when they corroborate aspects related to the case.[72] The Court will therefore admit those documents that are complete, or if at least their source and date of publication can be ascertained.[73]

105. Other articles or texts discuss facts associated with the case, which the Court understands to be written pieces containing the authors' statements or comments, intended for public dissemination, and it will thus include them.

106. The Court notes that evidence submitted outside the procedural time limits is not admissible, except as stated in Article 57(2) of the Rules of Procedure, that is, in cases of force majeure or serious impediment, or if it addresses an event that occurred subsequent to the expiration of the time limit.

107. Both the representatives and the State, subsequent to their main briefs, submitted the ruling by the Third Special Criminal Chamber of the Superior Court of Lima, delivered on October 15, 2012, as part of the proceedings against Vladimiro Montesinos Torres, Roberto Huamán Ascurra, Nicolás de Bari Hermoza Ríos and Jesús Zamudio Aliaga. The State also submitted the ruling by the Transitory Criminal Chamber of the Supreme Court on July 24, 2013. The Court notes that these items of evidence make reference to decisions delivered by domestic judicial authorities as part of ongoing judicial processes involving the facts of the instant case. It finds that this evidence of facts that occurred subsequent to April 24 and August 17, 2012 can be admitted under the terms of Article 57(2) of the Rules of Procedure.

108. When they were planning and conducting the procedure to reconstruct the facts, the State and the representatives cited a number of documents. Specifically, the State proposed ten official administrative and judicial documents to use as sources,[74] and the representatives asked that, in addition to the information supplied by the State, other sources containing relevant statements also be considered for conducting the reconstruction exercise.[75] Most of these documents had been submitted earlier. Because some of them had not previously been

---

[72] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra,* para. 146, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 41.

[73] Annex 9 to the pleadings and motions brief, identified as "press clippings," includes a press note labeled "*El Comercio* newspaper, report from December 18, 2000, 'Emerretistas fueron capturados vivos'", indicating neither date nor source. The representatives clarified that the file copy of this press note identifies it coming from the *El Comercio* newspaper, December 18, 2000. Thus, and in view of the fact that the State did not challenge its authenticity, the Court will admit it in the understanding that the source and date of publication are as indicated by the representatives.

[74] To wit: (1) Ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice, July 24, de 2013 (Writ of Nullity-R.N.- N° 3521-2012); (2) Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (case file No. 26-2002); (3) Plan of Operation A: "Nipón 96" (1st Div. 1ª Div FFEE), January, 1997; (4) Plan of Operation B: "Nipón" 96/"TENAZ" (*Tenaz* Patrol), March, 1997; (5) Annex 05: Evacuation of hostages, annex to Plan of Operation B: "Nipón 96"/"TENAZ" ("*Tenaz*" Patrol); (6) Report No. 01/1st Div. FFEE, April 30, 1997. Report on implementation of the Plan of Operation "Chavín de Huántar" by the counterterrorist task force; (7) Annex No. 02 to Report No. 01/1st Div FFEE, April 30, 1997: Operations Report No. 001/Pat "TENAZ". Report on the intervention by the "TENAZ" Patrol under Operation "Chavín de Huántar"; (8) Proceedings for Reconstruction of the Events in the Replica of the Residence of the Japanese ambassador, June 3, 2003; (9) Report on intervention by law enforcement in compliance with the Plan of Operation "Chavín de Huántar", April 22, 1997, and (10) Floor plan of the first two floors of the residence, which are part of the case file in the military courts.

[75] These include Opinion No. 13-2006 by the Third Special Prosecutor on Crimes of Corruption by Public Officials; the letter delivered by Hidetaka Ogura to the Judiciary of Peru on August 20, 2001; the statement delivered by Hidetaka Ogura in a public hearing during the criminal trial in the domestic courts, and statements by Raúl Robles Reynoso and Marcial Teodorico Torres Arteaga to the Provincial Special Prosecutor and in public hearing during the criminal proceedings in the domestic courts.

included in the body of evidence for the instant case, they will be added to it because they are germane to the examination of the case.

109. Likewise, during the procedure for "reconstruction of the facts" (*supra* para. 9), the State and the representatives provided new documentation and photographs on the facts of the instant case. No objections were raised as to the admissibility of the documents and photographs, nor were their authenticity or accuracy challenged. Therefore, under the terms of Article 58(a) of the Rules of Procedure, the Court finds that it can proceed to admit the documents submitted by the representatives and the State.

110. Prior to the public hearing, the State had submitted certain documents in response to requests for information and helpful evidence issued under Court order on November 6, 2013 (*supra* para. 10). The State also submitted unsolicited documents "in the understanding that they might prove useful to the Court," and more specifically, it sent "copies from the files of documents on this case by the Truth and Reconciliation Commission." The representatives and the Commission had the opportunity to submit their observations. The representatives filed a petition regarding the State's failure to submit the entirety of case files from the criminal proceedings in the ordinary jurisdiction, asking that certain alleged facts be held as true "when the only way to disprove them is through evidence that the State should have submitted but refused to do so." The State had explained that the documents pertained to material compiled by the Truth and Reconciliation Commission, held by the Ombudsman, and the representatives cautioned that because the State was not claiming exceptional circumstances to justify the overdue submission, these documents therefore "were time-barred" and should be rejected. Nevertheless, they noted that these documents included copies of statements delivered by various people who had taken part in the facts of the case, as well as certain other procedural documents from the investigations conducted by the ordinary jurisdiction. They therefore agreed that the material should be admitted only if it proved relevant to the Court's request for further helpful evidence They also contended that the document "Annex 12.1-Legal Report of the Truth and Reconciliation Commission" should be admitted "because it summarizes the Truth Commission's findings on the facts addressed by this case. The Commission stressed that the documents were procedurally time-barred, "unless the [...] Court should deem the evidence relevant for an understanding of the case."

111. This Court holds that, although the documentation under discussion had not been requested, it could prove useful for adjudging the instant case, as it consisted primarily of statements by persons who took part in the operation and witnesses, as well as documents submitted as part of the judicial proceedings. It should also be noted that these documents are part of the material collected for the final report of the Truth and Reconciliation Commission of Peru, which in turn had also been used as evidence by both the Commission and the representatives; as such, it would be necessary to include the material in the case file to ensure as much as possible that the Court could know the truth of the matter and correctly weigh the processes and investigations the State had undertaken. Thus, under the terms of Article 58(a) of the Rules of Procedure, and having granted the parties the opportunity to comment, the Court holds that these documents can be admitted, as they are relevant for examination of the instant case.

112. Over the course of the public hearing (*supra* para. 11), the representatives submitted several documents, providing copies to the State and the Commission. No objections were raised to the admissibility of the information and documentation submitted, nor were their truth or authenticity challenged. The Court therefore agrees to add this material, pursuant to Article 58(a) of the Rules of Procedure, as it is relevant and useful for ruling on the instant case.

113. Furthermore, the State[76] and the representatives[77] adduced certain documents attached to their final written arguments. The representatives then objected to most of the material submitted by the State at that stage of the proceedings, holding that it was "time-barred". The Court replied that annexes 1 to 11 addressed the criminal trial in the domestic jurisdiction and therefore derived from the request for further helpful evidence; thus, it was necessary to add this material to the case file in order to perform a correct assessment of the proceedings and investigations conducted by the State. These evidentiary documents could properly be added to the case file in keeping with Article 58(a) of the Rules of Procedure. The Court added that the State had submitted annexes 12 and 13 without any explanation as to why they had been presented subsequent to the answering brief. The Court therefore holds that the documents were time-barred, as outlined in Article 57(2) of the Rules of Procedure, as the State had been aware of them before filing its brief, and the Court therefore would not consider them in its decision.

B.2 Admission of statements and expert opinions

114. The State offered comments about how to weigh the expert opinions delivered by Alejandro Valencia Villa, Federico Andreu Guzmán and Viviana Valz Gen Rivera, as well as the testimony of Hidetaka Ogura and the statements by family members. Likewise, the representatives posed observations about assessing the statements of José Gerardo Garrido Garrido and Luis Alejandro Giampietri Rojas and of José Daniel Williams Zapata and Carlos Alberto Tello Aliaga. They argued that certain sections of the expert opinions by Derrick John Pounder and Jean Carlo Mejía Azuero should be held inadmissible. The Court is pleased to receive statements and expert opinions delivered in the public hearing or as declarations before a public attestor if they strictly apply to the purposes set forth by the President in the order of subpoena[78] and to the object of the case at hand.

115. In response to the argument that the declarants had failed to answer the questions asked, the Court reiterates that the fact that the Rules of Procedure allow the parties to pose written questions to declarants brought by the other party and, when appropriate, by the Commission. This creates a related obligation for the party offering the statement to coordinate and take the necessary steps to forward the questions to the declarants and to include the respective answers. In certain circumstances, the failure to answer different questions may be

---

[76] The State submitted the following annexes: (1) Complaint filed by inmates at the Yanamayo prison, December 22, 2000, stamped as received on December 28, 2000; 2. Complaint filed by Eligia Rodriguez de Villoslada (mother of Luz Dina Villoslada), stamped as received on January 18, 2001; 3. Complaint filed by Maria Genara Fernandez Rosales (mother of Roli Rojas Fernandez) on January 3, 2001; 4. Ruling by the Specialized Prosecutor to designate Clyde Collins Snow and Jose Pablo Baraybar from the Peruvian Team of Forensic Anthropology as expert witnesses, March 2, 2001; 5. Opinion 018-2014 of the Second Supreme Office of the Criminal Prosecutor, January 10, 2014, registered on January 21, 2014, to submit the matter to a higher court for review (Consultation 26-2002); 6. Documents certifying the request and actions for taking statements from the Japanese citizens held hostage, and designating them to the "First Chamber" by order of the Criminal Court conducting the criminal trial, and the response to this request; 7. Statement rendered by Lucinda Rojas Landa on March 9, 2001, to the provincial prosecutor; 8. Document submitted by APRODEH asking the prosecutor to take the statement from Lucinda Rojas Landa as "domestic partner", stamped as received on March 1, 2001; 9. Note 483-2014-P-CNM, dated February 27, 2014, sent by the National Council of the Judiciary; 10. Note 209-2010-JUS-CRJST, dated February 21, 2014, sent by the National Reparations Council; 11. Note 106-2014-IN-PTE, dated February 20, 2014, sent by the Specialized Public Prosecutor for Crimes of Terrorism; 12. Verdict by the National Criminal Chamber, May 3, 2006, concerning Lucinda Rojas Landa (case file 546-03); 13. Final superior judgment of June 20, 2008 concerning Lucinda Rojas Landa (R.N. 3818-2006).

[77] The representatives supplied vouchers for expenditures incurred subsequent to the submission of the pleadings, motions and evidence brief.

[78] The purposes of all these statements were explained in the President's order, issued on behalf of the Court in this case, on December 19, 2013, operative paragraphs one and five, which can be found in Spanish on the Court's website at: http://www.corteidh.or.cr/docs/asuntos/cruz_19_12_13.pdf

incompatible with the obligation of procedural cooperation and the principle of good faith that governs the international proceedings. Nevertheless, the Court deems that the fact that the questions of the other party are not answered does not affect a statement's admissibility; rather, it is a factor that, depending on the implications of a declarant's silences, could have an impact on the probative force of a statement or an expert opinion, and this is assessed when the merits of the case are examined.[79]

116. The State challenged the admissibility of the expert opinion delivered by Christof Heyns in the form of an affidavit, proposed by the Inter-American Commission, because on the final day prior to expiration of the deadline for submitting final written arguments, the State had not yet received the Spanish translation of the text. This expert opinion had been submitted "as an *amicus curiae*" and "the expert witness [had not responded] to the questions asked by the Peruvian State in its letter of February 3, 2014".

117. The Court replies that the Registrar had sent the Commission a note on February 7, 2014, forwarding the questions asked of expert witness Christof Heyns. The Commission forwarded the opinion of the expert witness on February 14, 2014. The Court agrees that this statement was in English, and the Registrar therefore sent a note on February 19, 2014, asking the Commission to "send the Spanish translation of this expert statement at the earliest opportunity". The Court holds that, at the time this judgment is being delivered, the Commission has not yet sent the Spanish translation of the expert statement, even though the Court had asked the Commission to do so without delay.

118. The State was therefore unable to offer any useful observations in its final written arguments. The Court finds, consequently, that it would be out of order to admit the statement of expert witness Christof Heyns.

119. The State maintained that the submission of the statement by José Pablo Baraybar Do Carmo was time-barred and asked that it not be taken into account by the Court in its analysis of this dispute.

120. The Court would note that on January 30, 2014, the representatives had said that they were submitting the "Statement by José Pablo Baraybar Do Carmo, delivered before the public attestor Eduardo Laos de Lama on January 30, 2014". The Registrar reported that the representatives had sent an unsigned document in Word format entitled "STATEMENT GIVEN BEFORE PUBLIC ATTESTOR JOSE PABLO BARAYBAR DO CARMO". It therefore did not comply with the formalities of a publicly attested statement, nor did it bear the signature that would qualify it as a sworn statement. The next day, January 31, 2014, the representatives reported that the document had been sent in error and therefore attached the relevant statement, in pdf format, delivered before a public attestor.

121. The Court will not admit the statement by José Pablo Baraybar Do Carmo, as it was time-barred.

B.3 Admission of videos

[79] *Cf. Case of Díaz Peña v. Venezuela. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 26, 2012. Series C No. 244, para. 33, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 71.

122. The representatives included Annex 12, "documentary or journalistic videos", in their pleadings and motions brief.[80] The State also submitted several videos with its answering brief.[81] The Registrar affirmed that Annex 4 did not indicate the date when the program had been aired. Annex 10 did not did not indicate the date or the source of the videos, and the Court was unable to open the files contained in the folder "VIDEO_TS". The State replied that the Annex 4 video had been broadcast on April 27, 2008 over the local television station *Panamericana Televisión*. It also explained Annex 10 as follows: (1) file VTS 01.1.VIB is an institutional video by the Ministry of Defense released on November 16, 2011; (2) file number five, "CHAVIN DE HUANTAR", is an institutional video by the Ministry of Defense released on December 6, 2003; (3) the dates and sources of the remaining videos could not be accurately identified, but the State maintained that the Court could examine and weigh their content to verify the facts for which they had been submitted, and (4) the Annex 10 file "VIDEO_TS" contained two videos, and the State asked the Court to strike them.

123. The Court will admit those videos that the representatives and the State submitted for the instant case within the established procedural time limits, which it was able to view and that were not the object of any challenge or objection.

124. The representatives, in their brief of comments on the State's preliminary objections, challenged the admissibility of the video submitted by the State as Annex 4,[82] arguing that it was unrelated to the facts of the instant case, and instead was intended to "continue with the campaign to discredit [APRODEH]".

125. The Court has previously held that its ability to receive and weigh evidence is not bound by the same formalities that apply to domestic courts in their proceedings. Thus, when certain elements are added to the body of evidence, particular attention must be given to the circumstances of the case in question, with due regard for the conditions necessary to preserve legal certainty and the balanced procedural rights of the parties.[83]

126. Bearing this in mind, the Court has viewed the video that the State had submitted to substantiate "the nature of the MRTA terrorist group," which presents an item from the "Panorama" news broadcast about a communication from APRODEH to the European Parliament concerning the MRTA and images concerning MRTA actions during the years of violence in Peru, including information about Operation Chavín de Huántar and facts that prima facie were not part of the framework of facts in the instant case.

---

[80] Specifically, two videos entitled "David Hidalgo revela las sombras de un rescate" and "Héroes Chavín de Huantar".

[81] Annex 3 contained: a video entitled "Protocolos y manuales médico forenses con los que trabaja el Instituto de Medicina Legal y la Dirección Nacional de Criminalística en la actualidad" and an audio and video file entitled "Video del Equipo Forense Especializado". Annex 4 was identified as "a video from the 'Panorama' television program identifying MRTA as a terrorist organization and reporting on a large number of terrorist attacks it had committed. The video also reports on the APRODEH petition to the European Parliament to withdraw MRTA from the list of terrorist organizations". Annex 10 was identified as "videos (television and others) showing the hostage rescue from the house of the Japanese ambassador and the complexities of the military operation". Annex 11.b was identified as "video of the MRTA showing its preparations for taking hostages at the house of the Japanese ambassador, as well as the weapons of war they had".

[82] Video of the television program "Panorama", broadcast on April 27, 2008 over the local channel *Panamericana Televisión*.

[83] *Cf. Case of Loayza Tamayo v. Peru.* Reparations and Costs. Judgment of November 27, 1998. Series C No. 42, para. 38, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 70.

127. The Court finds the video to be admissible, as it provides background information useful for understanding the circumstances surrounding the alleged violations brought before it.[84] In view of the representatives' observations, however, its assessment of this material will not include consideration of content unrelated to the case at hand.

128. The State also submitted videos from the evidence files of the Truth and Reconciliation Commission. The Court admits them and points to its decision concerning other evidence from the same source (*supra* para. 111).

C. Assessment of the Evidence

129. Based on its consistent case law concerning evidence and its assessment,[85] the Court will examine and assess the probative elements submitted by the parties and the Commission, the statements, testimonies and expert opinions, and the additional helpful evidence it requested and added to the case file, to discern the facts of the case and adjudge the merits. To this end, it will abide by the principles of sound judicial discretion within the relevant regulatory framework, always cognizant of the full body of evidence and the allegations in the case.[86]

130. With regard to the videos presented by the representatives and the State, the Court will assess their content in the context of the body of evidence and applying the rules of sound judicial discretion.[87] Also, as regards articles or texts referring to events related to the case, the assessment of their contents is not subject to the formalities required of testimonial evidence. However, their probative value will depend on whether they corroborate or refer to aspects related to this specific case.[88]

131. Finally, in keeping with the Court's case law, the statements made by the alleged victims cannot be assessed in isolation, but only in the context of all the evidence in the proceedings, inasmuch as they can provide further information on the claimed violations and their consequences.[89]

D. Evidentiary value and assessment of the "procedure to reconstruct the facts"

132. The State, in its answering brief to the submission of the case and observations on the brief of pleadings, motions and evidence, proposed, *inter alia* as evidence, an exercise to "reconstruct the facts" as a means to help the judges on the inter-American Court (i) "understand the extreme situation facing the hostages", (ii) understand the context in which

---

[84] *Cf. Case of the Río Negro Massacres v. Guatemala, supra*, para. 55, and *Case of García and Family v. Guatemala. Merits, Reparations and Costs.* Judgment of November 29, 2012. Series C No. 258, para. 49.

[85] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits.* Judgment of March 8, 1998. Series C No. 37, paras. 69 to 76, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 46.

[86] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits, supra*, para. 76, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 46.

[87] *Cf. Case of Ríos et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 28, 2009. Series C No. 194, para. 93, and *Case of Osorio Rivera and family v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 26, 2013. Series C No. 274, para. 40.

[88] *Cf. Case of Radilla Pacheco v. Mexico. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 23, 2009. Series C No. 209, para. 72, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 75.

[89] *Cf. Case of Loayza Tamayo v. Peru. Merits.* Judgment of September 17, 1997. Series C No. 33, para. 43, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 46.

"the military Operation Nipón 96 had been planned and executed, and (iii) confirm "that it had been conducted with respect for the standards of international humanitarian law and international human rights Law".

133. The President issued an order (*supra* para. 9) holding that it would be useful and necessary for shedding light on and proving the facts in dispute, and for better understanding certain circumstances relevant to the case, to apply Article 58(a) and 58(d) of the Rules of Procedure and pay a visit to the city of Lima, Peru, on January 24, 2014, to incorporate into the evidence the procedure to "reconstruct the facts", considering that the legally relevant facts that underlie the alleged extrajudicial executions in the case at hand are essentially in dispute. The Court believed that a reconstruction of the facts would meet the need to verify the physical and spatial environment in which they occurred so as to draw a legal conclusion as to whether the events could have taken place in the terms alleged and in keeping with the evidence submitted in the case file. The Court did emphasize, however, that a procedure of this kind was of a different nature in the international jurisdiction.

134. It began with a visit to the site of the residence of the Japanese ambassador in San Isidro, Lima, and the surrounding area. The delegations then visited the Las Palmas military base in the district of Chorrillos, Lima, where the "Replica of the Residence of the Japanese ambassador" had been built, and passed through the area of the Tactical Operations Center (COT) and Peru's Military Hospital and National Police Hospital. They then received an explanation about the planning and execution of the operation, in full view of the mock-up of the residence and the display of weapons used by members of the Túpac Amaru Revolutionary Movement (MRTA) and by the forces of the State of Peru during the hostage rescue operation. The delegations also entered and toured the areas of the first and second floors of the replica. The operation was dramatized that afternoon. During the procedure, the delegations of the representatives and the Commission made any clarifying comments they deemed relevant.

135. The ***State*** said that the agreement by the Court to conduct the exercise had been "a measure that widens the scope of evidence and will facilitate their ability to understand and assess the facts and law." The State held that the procedure had allowed the Court judges to see the site of the facts and the place where Peru's state task force (*Tenaz* Patrol) had trained, and details of the hostage rescue operation according to the plans for Operation "Nipón 96", taking into account that the attempt was made to overcome material constraints, and therefore asked the Court to weigh "this piece of evidence carefully".

136. The ***representatives*** felt that the exercise to reconstruct the facts should be given "merely contextual relevance, and it is not material to the facts of the case." They noted, more specifically, that: (i) this case does not entail the overall operation, but the specific facts in which the alleged extrajudicial executions of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza had taken place; (ii) during the procedure, the State had omitted any reference on what had happened to Eduardo Nicolás Cruz Sánchez and had given no explanation whatsoever about the place where his body was found, and (iii) the State drew no association between the dramatization of what happened with Meléndez Cueva and Peceros Pedraza, and any of the evidence contained in the case file. In summary, the representatives found that the various scenes acted out during the exercise "were intended to dramatize the combat in general terms, not the way the specific facts of the case had occurred." They therefore asked the Court to hold that the procedure to reconstruct the facts, held on January 24, 2014, held only contextual value and lacked evidentiary weight regarding the facts that were the object of this case.

137. The ***Commission*** found that the cause of action addressed by the case was not consistent with the purpose of the procedure to reconstruct the facts and emphasized three

points that, in its view, were crucial for the Court as it assessed this procedure: (i) the replica of the Japanese ambassador's residence did not compare perfectly with the original residence, as for example, the replica did not show the additional staircase between the first two floors of the residence; (ii) the replica was not complete, as the back part of the building, where the body of Eduardo Nicolás Cruz Sánchez was found and where his extrajudicial execution had presumably taken place, was included neither in the model, nor in the reconstruction of the facts, and (iii) the procedure had dramatized actions by several members of the MRTA, including the alleged victims in the case, which did not necessarily reflect what had actually happened but, in the words of the State, served as "an illustration" and an approximation. It added that, regardless of the lack of evidentiary value of the reconstruction exercise as a result of all these considerations, in the view of the Commission, the procedure to reconstruct the facts could hold "limited evidentiary scope" concerning the way in which Operation Nipón 96 or Operation Chavín de Huántar had actually occurred, but had "no evidentiary value whatsoever" concerning the way Eduardo Nicolas Cruz Sanchez, Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva had died. The Commission also underscored the difficulty of ascribing evidentiary value to the procedure to reconstruct the facts when the State had not clearly associated it with the totality of the evidence contained in the case file. The Commission concluded that the exercise "was not a reconstruction of the facts per se, but rather, a demonstration of the position of one of the parties to a litigation."

138. The Court finds, with respect to the procedure whose purpose was to substantiate the physical and spatial circumstances surrounding the legally relevant facts that are essentially in dispute (*supra* para. 133), that it had provided an important illustrative overall view. It gave the Court a sense of the circumstances of means, time and place in which the hostage rescue operation had been conducted in order to gauge, understand, and frame the specific facts that stand as the basis of the alleged violations brought before it. The Court therefore holds the procedure as valid and will assess it within the overall body of evidence in the case, under the rules of sound judicial discretion, particularly considering the arguments given by the representatives and the Commission. The parties' arguments will be examined on this basis throughout the coming chapters.

VIII
FACTS

A. Context

139. To establish the context relating to the armed conflict in Peru, the Court has turned repeatedly to the conclusions issued on August 28, 2003, by the *Comisión de la Verdad y Reconciliación* (hereinafter CVR), Truth and Reconciliation Commission,[90] following publication of its final report on August 28, 2003. This commission was created by the State in 2001 to "to clarify the process, the matters of fact and the responsibility for the terrorist violence and the violation of human rights that had occurred since May 1980 and extended until November 2000, attributable both to terrorist organizations and State agents, and also to promote

[90] *Cf. Case of De La Cruz Flores v. Peru. Merits, Reparations and Costs.* Judgment of November 18, 2004. Series C No. 115; *Case of Gómez Palomino v. Peru. Merits, Reparations and Costs.* Judgment of November 22, 2005. Series C No. 136; *Case of Baldeón García v. Peru. Merits, Reparations and Costs.* Judgment of April 6, 2006. Series C No. 147; *Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs.* Judgment of November 25, 2006. Series C No. 160; *Case of La Cantuta v. Peru. Merits, Reparations and Costs.* Judgment of November 29, 2006. Series C No. 162; *Case of Cantoral Huamaní and García Santa Cruz v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 10, 2007. Series C No. 167; *Case of Anzualdo Castro v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of September 22, 2009. Series C No. 202, *Case of Osorio Rivera and Family v. Peru, supra*; *Case of J. v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 27, 2013. Series C No. 275, and *Case of Espinoza Gonzáles v. Peru, supra*.

initiatives intended to consolidate peace and harmony among Peruvian citizens."[91] The report was presented to the different branches of the State, which acknowledged its conclusions and recommendations and acted in consequence, adopting policies that reflected the significance accorded to this institutional document.[92] The report is a key point of reference, as it offers a comprehensive view of the armed conflict in Peru. The Commission, the State and the representatives in the instant case all based their arguments on the context by pointing to the CVR report, which has been included in the evidence file of the case. The Court will therefore use the report as a crucial piece of evidence on the political and historical context in place at the time of the facts.

140. In previous cases, the Court has recognized that, starting in the early 1980s and until the end of 2000, Peru experienced a conflict between armed groups and members of the police and the military forces.[93] According to the final CVR report, the armed groups in the conflict included the Communist Party of Peru (hereinafter "Shining Path") and the Túpac Amaru Revolutionary Movement (*Movimiento Revolucionario Túpac Amaru,* hereinafter MRTA), whose members were known as *emerretistas* or "MRTistas". Shining Path decided to launch a so-called "people's war" against the State to impose its own ideals of political and social organization in the country,[94] which "was the fundamental motivation for unleashing domestic armed conflict in Peru.[95]

141. The organization Túpac Amaru Revolutionary Movement was founded in 1982, inspired by leftist guerrilla groups in other countries of the region, with the goal of pursuing armed struggle to achieve its purposes.[96] At the beginning of its "people's revolutionary war" in 1984, the MRTA became one of the factors in the insecurity that Peru experienced for several years and the violation of the fundamental rights of Peruvians.[97] The CVR emphasized that actions attributable to the MRTA included hostage-taking and kidnappings for political or economic reasons, which had a particular impact on Peruvian society, given the methods and conditions by which they were carried out.[98]

---

[91] *Case of Baldeón García v. Peru*, *supra*, para. 72(1), and *Case of Espinoza Gonzáles v. Peru, supra*, para. 50.

[92] *Cf. Case of Cantoral Huamaní and García Santa Cruz v. Peru, supra*, paras. 89 and 91, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 50.

[93] *Cf. Case of the Miguel Castro Castro Prison v. Peru*, *supra*, para. 197.1, and *Espinoza Gonzáles v. Peru, supra*, para. 51.

[94] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume II, chapter 1.1, The Communist Party of Peru Shining Path, pp. 29 to 31, available in Spanish at www.cverdad.org.pe/ifinal/index.php.

[95] Truth and Reconciliation Commission, *Informe Final,* 2003, Volume II, Chapter 1.1, the Communist Party of Peru Shining Path, p. 127, available in Spanish at www.cverdad.org.pe/ifinal/index.php. www.cverdad.org.pe/ifinal/index.php.

[96] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume II, chapter 1.4, Túpac Amaru Revolutionary Movement, pp. 385 to 387, available in Spanish at www.cverdad.org.pe/ifinal/index.php.

[97] The MRTA conducted such actions as "seizing" radio stations, schools, markets and low-income neighborhoods, theft of delivery trucks belonging to major commercial companies, attacks on trucks filled with essential goods, attacks on water and electric companies, attacks on police stations and the homes of members of government, selective assassination of high-level public officials and business leaders, execution of indigenous leaders, and several deaths due to the sexual orientation or gender identity of the victims, with the string of terror in these cases continuing over a considerable length of time. They also kidnapped journalists and businesspeople to obtain large sums of ransom money. The hostages were kept hidden during their captivity in so-called "people's prisons" (small, unhealthy spaces). *Cf.* Truth and Reconciliation Commission, *Informe Final*, 2003, volume II, chapter 1.4, Túpac Amaru Revolutionary Movement, and volume VIII, General conclusions, p. 320, available in Spanish at www.cverdad.org.pe/ifinal/index.php. See also, *Case of Espinoza Gonzáles v. Peru, supra*, paras. 52 and 53.

[98] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VI, chapter 1.7, Kidnapping and hostage-taking, p. 547, available in Spanish at www.cverdad.org.pe/ifinal/index.php. See also, *Case of Espinoza Gonzáles v. Peru, supra*, paras. 52 and 53.

142. The acts of violence ushered in by Shining Path and the MRTA cost many lives and much loss of property and subjected Peruvian society as a whole to considerable suffering. According to the CVR, the domestic armed conflict in Peru caused the death or disappearance of an estimated 69,280 people, distributed as follows: "46% by the PCP-Shining Path[,] 30% by agents of the State […] and 24% by other agents or circumstances (local farmer patrols, self-defense committees, MRTA, paramilitary groups, unidentified agents, and victims of clashes or situations of armed combat)."[99]

143. Police and military forces engaged in the fight against the Shining Path and the MRTA also committed serious human rights violations. State security agents committed acts of arbitrary arrest, torture, rape, extrajudicial killing and forced disappearance, often against persons who had no connection with the irregular armed groups.[100] This Court in earlier cases has recognized that as the conflict heightened, the systematic practice of human rights violations spread, including extrajudicial executions and forced disappearance of persons suspected of belonging to armed groups operating outside the law, such as Shining Path and the MRTA, and these practices were carried out by State agents following orders of military and police commanders.[101]

B. The "seizing" of the residence of the Japanese ambassador to Peru by members of the Túpac Amaru Revolutionary Movement (MRTA)

144. An activity was held on the night of December 17, 1996 to commemorate the birthday of Japanese Emperor Akihito with a reception at the residence of the then Japanese ambassador to Peru, Morihisa Aoki, located in the Lima district of San Isidro.[102] Approximately six hundred people were in attendance, including Supreme Court judges, members of Congress, ministers of state, high commanders of the Armed Forces and National Police of Peru, diplomats, politicians and members of the business community.[103]

145. While the gathering was underway, 14 members of the MRTA, wearing "Medic Alert" badges, emerged from an ambulance parked outside a building adjacent to the residence of

---

[99] Truth and Reconciliation Commission, *Informe Final,* 2003, annex 2, Estimate of total victims, p. 13, available in Spanish at www.cverdad.org.pe/ifinal/index.php.

[100] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VIII, General conclusions, pp. 322 and 323, available in Spanish at www.cverdad.org.pe/ifinal/index.php.

[101] *Cf. Case of Loayza Tamayo v. Peru. Merits, supra*, para. 46; *Case of Castillo Páez v. Peru. Merits.* Judgment of November 3, 1997. Series C No. 34, para. 42; *Case of Cantoral Benavides v. Peru. Merits.* Judgment of August 18, 2000. Series C No. 69, para. 63; *Case of the Gómez Paquiyauri Brothers v. Peru. Merits, Reparations and Costs.* Judgment of July 8, 2004. Series C No. 110, para. 67(a); *Case of Baldeón García v. Peru, supra*, para. 72.2; *Case of the Miguel Castro Castro Prison v. Peru, supra*, para. 197.1; *Case of La Cantuta v. Peru, supra*, para. 80.1 and 80.2; *Case of Osorio Rivera and Family v. Peru, supra*, para. 53; *Case of J. v. Peru, supra*, para. 59, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 51. See also, Truth and Reconciliation Commission, *Informe Final,* 2003, volume VI, chapter 1.2. Forced disappearance of persons by agents of the State, and Chapter 1.3. Arbitrary executions and massacres by agents of the State, available in Spanish at www.cverdad.org.pe/ifinal/index.php.

[102] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 720 (evidence file, volume I, annex 1 to the case submission brief, folio 6). See also: ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13411).

[103] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 720 (evidence file, volume I, annex 1 to the case submission brief, folio 6), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13411).

the Japanese ambassador.[104] The MRTA members were: Néstor Fortunato Cerpa Cartolini, alias "Evaristo", commander of the operation; Roli Rojas Fernández, alias "Árabe"; Eduardo Nicolás Cruz Sánchez, alias "Tito"; Luz Dina Villoslada Rodríguez, alias "Gringa"; Alejandro Huamaní Contreras; Adolfo Trigoso Torres; Víctor Luber Luis Cáceres Taboada; Iván Meza Espíritu, alias "Pitin" or "Bebé"; Artemio Shingari Rosque, alias "Alex" or "Coné"; Herma Luz Meléndez Cueva, alias "Cynthia" or "Melissa"; Bosco Honorato Salas Huamán; Víctor Salomón Peceros Pedraza; Edgar Huamaní Cabrera, and an unidentified person.[105]

146. The MRTA group, equipped with such military gear as rifles, machine guns, rocket launchers, pistols, revolvers, hand grenades, explosives and gas masks,[106] entered the building next door to the Japanese ambassador's residence and, after blowing open a hole in the wall, entered the residence, overpowered the security personnel, and took all the guests hostage.[107]

C. Negotiations between the government and the guerrillas

147. The government responded to the situation that same day, December 17, 1996, issuing Executive Order 063-96-DE-CCFFAA to declare a state of emergency in the Lima district of San Isidro.[108] Then President of Peru Alberto Fujimori Fujimori called an emergency midnight meeting with his cabinet of ministers. Minister of Education Domingo Palermo was appointed to negotiate with the MRTA rebels.[109] One hour later, the International Committee of the Red Cross (ICRC) succeeded in making contact with the guerrillas and offered its services of

---

[104] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 720 (evidence file, volume I, annex 1 to the case submission brief, folio 6), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13411).

[105] *Cf.* Ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14667). See also, Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 720 (evidence file, volume I, annex I to the case submission brief, folio 6), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13411 and 13412).

[106] According to Peru's judicial authorities, they were carrying "firearms such as Kalashnikov rifles (AK-47), AKM 5.56 mm, UZI 9 mm machine pistols, RPG-7 rocket launchers (Rocket Propelled Grenades), Russian anti-tank bazookas, 9mm handguns, revolvers, "pineapple" and "avocado" grenades, explosives and gas masks (see three top images and 34 lower images from photograph album II), walkie-talkie communication devices, door sealing mines, improvised booby-traps for windows, and other military equipment." Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13412).

[107] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 720 (evidence file, volume I, annex 1 to the case submission brief, folio 6), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13412 and 13413).

[108] *Cf.* Ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folios 14681 to 14682). The ruling clarifies that this was the first of a sequence of executive orders extending the state of emergency in the Lima district of San Isidro for the whole time the residence of the Japanese ambassador to Peru was in the hands of the MRTA.

[109] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 721 (evidence file, volume I, annex 1 to the case submission brief, folio 7).

humanitarian intermediation.[110] Finally, a Commission of Guarantors was set up, headed by Domingo Palermo and also including foreign representatives, to find a peaceful solution through dialog.[111]

148. Chief among the guerrillas' demands was that jailed MRTA members be released and transferred to the central jungle along with the group members who were occupying the residence,[112] and calling for several changes to economic policy and the payment of a "war tax".[113] The MRTA rebels also demanded the release of their leaders being held in the Yanamayo prison and the Callao Naval Base.[114]

149. Between December 17, 1996 and January, 1997, the guerrillas released most of the hostages, until only 72 people remained in the residence.[115] Numerous negotiations took place between the government and the MRTA from that date until the launch of the rescue operation on April 22, 1997 (*infra* para. 161).[116]

150. President Fujimori Fujimori visited Cuba and other countries in early March, looking for places willing to receive the guerrillas.[117] Néstor Fortunato Cerpa Cartolini, leader of the MRTA group (*supra* para. 145), announced on March 6, 1997 that security forces had been discovered digging a tunnel underneath the residence, and suspended further talks.[118] Negotiations

---

110 *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 721 (evidence file, volume I, annex 1 to the case submission brief, folio 7).

111 *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 721 (evidence file, volume 1 annex 1 to the case submission brief, folio 7), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13414).

112 *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 720 (evidence file, volume I, annex 1 to the case submission brief, folio 6). See also, "order to open investigation" issued on June 11, 2002 by the Third Special Criminal Chamber (evidence file, volume I, annex 3 of the case submission brief, folio 70).

113 *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13411 and 13412).

114 *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 721 (evidence file, volume I, annex 1 to the case submission brief, folio 7).

115 *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 722 and 723 (evidence file, volume 1 annex 1 to the case submission brief, folio 8 to 9), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13413 to 13414).

116 *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 721 to 723 (evidence file, volume 1 annex 1 to the case submission brief, folio 7 to 9), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13414 to 13416).

117 *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 723 (evidence file, volume 1 annex 1 to the case submission brief, folio 9), and ruling by by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13414).

118 *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 723 (evidence file, volume 1 annex 1 to the case submission brief, folio 9), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October

reopened on March 12, 1997 in a meeting between the Peruvian government spokesman and representatives of the MRTA.[119] The Commission of Guarantors issued a call to the government and the MRTA on March 21, 1997, stating that it "had nearly reached its limit."[120] Néstor Fortunato Cerpa Cartolini did not accept the proposal to take asylum in Cuba and reiterated his demands.[121] He also announced again that talks were suspended and accused the government of preparing an assault on the residence through a tunnel.[122] In a final effort, in April, 1997, President Fujimori Fujimori attempted to push negotiations forward by agreeing to release three subversives, later adding three more, but his proposal was not accepted by top MRTA leaders.[123]

D. Planning the "Nipón 69 Plan of Operation" or "Operation Chavín de Huántar"

151. Even as negotiations were underway, President Fujimori Fujimori issued orders to develop a hostage rescue plan involving the Armed Forces and the *Servicio de Inteligencia Nacional* (SIN), National Intelligence Service.[124] He ordered then Commander General of the Army and Chairman of the Joint Command of the Armed Forces Nicolás de Bari Hermoza Ríos, as well as then advisor to the SIN Vladimiro Montesinos Torres and the top military commanders to develop contingency plans for a military operation to free the hostages and take back the residence of the Japanese ambassador in case negotiations should fail.[125]

152. A *Centro de Operaciones Tácticas* (COT), Tactical Operations Center was established to draw up the plan. The ranking officer, Brigadier General Augusto Jaime Patiño, Commander General of the First Division of the Army Special Forces and also chief of the COT, was assigned to develop the plan.[126] He charged the planning and execution to Army Infantry Colonel José

15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13415 to 13416).

[119] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 723 (evidence file, volume I, annex 1 to the case submission brief, folio 9).

[120] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 723 (evidence file, volume I, annex 1 to the case submission brief, folio 9).

[121] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 723 (evidence file, volume I, annex 1 to the case submission brief, folio 9).

[122] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 723 (evidence file, volume I, annex 1 to the case submission brief, folio 9).

[123] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13416).

[124] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 723 (evidence file, volume I, annex 1 to the case submission brief, folio 9).

[125] *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 723 (evidence file, volume I, annex 1 to the case submission brief, folio 9). See also, Plan of operation A. "NIPON" 96 (1st Div FFEE), January, 1997, p. 2 (evidence file, volume I, annex 2 to the case submission brief, folio 26), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13417).

[126] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima on October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios

Daniel Williams Zapata, of the First Division of Special Forces.[127] The Plan of Operation was written in January, 1997 and dubbed "Operation Nipón 96". This rescue operation would later come to be known as "Operation Chavín de Huántar".[128]

153. The goal of "Plan of Operation Nipón 96" (also known as Plan Nipón 96 or rescue operation Chavín de Huántar) was to take control of the building, "capture or eliminate the MRTA terrorists and rescue the hostages, and thus restore the rule of law and contribute to consolidating national pacification."[129] According to the plan, this would be done by developing "measures and actions to prevent or neutralize terrorist actions […], not committing excesses of any kind, observing unrestricted respect for [human rights], all of this without failing to take energetic action."[130]

154. The Plan of Operation was structured along a three-tiered military chain of command. The first tier was assigned to Army Brigadier General Augusto Jaime Patiño, and the second was divided among Army Infantry Colonel Alfredo Reyes Tavera, Army Infantry Major Jaime Muñoz Oviedo, Army Infantry Colonel Paul da Silva Gamarra, Army Infantry Colonel Edmundo Díaz Calderón and Army Captain of Communications Major José Fernández Fernández. A third tier was set up, the Counterterrorist Unit or Counterterrorist Intervention Patrol, known as the "*Tenaz* Patrol", under the command of Army Infantry Colonel José Daniel Williams Zapata; also attached to this unit were Army Infantry Colonel Luis Alatrista Rodríguez and Navy Frigate Captain Carlos Alberto Tello Aliaga,[131] and it was made up of approximately 142 military commandos, officers and junior offices.[132] The commandos began training and exercises on December 20, 1996, first, using a wooden model, and later, a full replica of the residence that

---

13417 to 13418), and ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14673).

[127] *Cf.* Statement by José Daniel Williams Zapata before a federal attestor, January 29, 2014 (evidence file, volume XXX, affidavits, folios 20719 to 20731); ruling by the Third Special Criminal Chamber of the Superior Court of Lima on October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13417 to 13418), and ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14673).

[128] The name is taken from an archaeological site located in the Department of Ancash, where underground stone galleries form tunnels.

[129] Plan of Operation A. "NIPON" 96 (1st Div FFEE), January 1997, p. 2 (evidence file, volume I, annex 2 to the submission brief, folio 26). See also, Report 01/1a Div FFEE Operation "Chavín de Huántar" (hostage rescue operation), April 30, 1997, p. 5 (evidence file, volume I, annex 2.a to the case submission brief, folio 46); statement given by Carlos Alberto Tello Aliaga before a public attestor on January 29, 2014 (evidence file, volume XXX, affidavits, folios 20734 to 20744), and expert opinion delivered by Jean Carlo Mejía Azuero in the public hearing before the Court on February 3 and 4, 2014.

[130] Plan of Operation A. "NIPON" 96 (1st Div FFEE), January 1997, pp. 3 to 5 (evidence file, volume I, annex 2 to the case submission brief, folios 27 to 28). Note also that the Plan of Operation stated, "execution of the operation should take place within the framework of the law and unrestricted respect for [human rights]". Plan of Operation A. "NIPON" 96 (1st Div FFEE), January 1997, p. 2 (evidence file, volume I, annex 2 to the case submission brief, folio 26).

[131] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima on October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13417 to 13418), and ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14673).

[132] *Cf.* Statement given before a public attestor by Daniel Williams Zapata, January 29, 2014 (evidence file, volume XXX, affidavits, folios 20719 to 20731), and ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14673).

had been built for this purpose on the military base on Las Palmas Avenue, in the Chorrillos district.[133]

155. The "*Tenaz* Patrol" was divided into two teams, each one in turn divided into four groups. Under Plan Nipón 96, the first team, "Alpha Strike Force," was assigned to take over the first floor of the residence and rescue any hostages being held there.[134] This team was headed by Army Infantry Colonel Benigno Leonel Cabrera Pino, assisted by Army Infantry Lieutenant Colonel Jorge Orlando Fernández Robles.[135] The second team, "Delta Strike Force", was assigned to take control of the second floor of the residence and rescue any hostages being held there.[136] This team was led by Army Infantry Colonel Hugo Víctor Robles del Castillo, assisted by Army Infantry Majors Víctor Hugo Sánchez Morales and Renán Miranda Vera.[137]

156. The "Alpha Strike Force" was divided into four squads:[138] (1) Alpha One was under the command of Army Infantry Major César Augusto Astudillo Salcedo; (2) Alpha Two was under the command of Army Engineering Captain Héctor García Chávez; (3) Alpha Three was under the command of Army Infantry Major Carlos Vásquez Ames, and (4) Alpha Four was under the command of Army Engineering Major Raúl Pajares del Carpio. The "Delta Strike Force" was also divided into four squads:[139] (5) Delta Five was under the command of Army Infantry Major Luis Alberto Donoso Volpe; (6) Delta Six was under the command of Army Infantry Captain Ciro Alegría Barrientos; (7) Delta Seven was under the command of Army Infantry Captain Armando Takac Cordero, and (8) Delta Eight was under the command of Army Infantry Captain Raúl Huarcaya Lovón.

157. The execution of "Plan Nipón 96" would also be backed by seven support units:[140] (1) the snipers, under the command of Army Engineering Major José Bustamante Albújar, who

---

[133] *Cf.* Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation), April 30, 1997, pp. 5 to 10 (evidence file, volume I, annex 2.a to the case submission brief, folios 46 to 51); statement given by Carlos Alberto Tello Aliaga before a public attestor on January 29, 2014 (evidence file, volume XXX, affidavits, folios 20734 to 20744), and ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 of July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14673).

[134] *Cf.* Plan of Operation B. "NIPON" 96 / "TENAZ" (*"Tenaz"* Patrol), January 1997, p. 5 (evidence file, volume I, annex 2 to the case submission brief, folio 36); statement given by Carlos Alberto Tello Aliaga to a public attestor on January 29, 2014 (evidence file, volume XXX, affidavits, folios 20734 to 20744), and ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 of July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14674).

[135] *Cf.* Ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14674).

[136] *Cf.* Plan of Operation B. "NIPON" 96 / "TENAZ" (*Patrulla "Tenaz"*), January 1997, p. 5 (evidence file, volume I, annex 2 to the case submission brief, folio 36); statement given by Carlos Alberto Tello Aliaga to a public attestor on January 29, 2014 (evidence file, volume XXX, affidavits, folios 20734 to 20744), and ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 of July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14674).

[137] *Cf.* Ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14674).

[138] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima on October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13438 to 13439), and ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14674).

[139] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima on October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13438 to 13439), and ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14674).

[140] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima on October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios

would provide protection for the strike force and stand ready to fire if any guerrilla endangered the lives of hostages or commandos during the operation; (2) the security unit, under the command of Army Lieutenant Colonel Juan Alfonso Valer Sandoval, subdivided into two subgroups, "whose mission was to provide cover to the strike forces that would be entering the residence through the main tunnel and rescuing the hostages";[141] (3) the support and evacuation unit, under the command of Army Lieutenant Colonel Juan Chávez Núñez, subdivided into three subgroups: (a) team one, under the command of Army Infantry Lieutenant Colonel César Díaz Peche; (b) team two, under the command of Army Infantry Lieutenant Colonel Roger Zevallos Rodríguez, and (c) team three, under the command of Army Artillery Major José Flor Marca; their task was primarily to provide emergency medical care and evacuation for wounded hostages, commandos, and MRTA guerrillas, evacuate uninjured hostages and, in coordination with the strike forces, deliver the property into the hands of the proper authorities;[142] (4) a unit of personnel located in neighboring houses, under the command of Army Lieutenant Colonel Jesús Salvador Zamudio Aliaga, whose mission was to provide protection for the different properties surrounding the residence, which had been rented out for the rescue operation by orders of Army Lieutenant Colonel and member of the SIN, Roberto Edmundo Huamán Ascurra;[143] (5) a unit of local neighborhood security personnel, under the command of Police Colonel Jesús Artemio Konja Chacón, responsible for providing protection to Marconi Street, Burgos Street and Barcelona Street;[144] (6) the unit of SIN personnel, under the command of the President's intelligence advisor Vladimiro Montesinos Torres, and (7) the unit of personnel from the *Servicio de Inteligencia Nacional-Dirección de Inteligencia Estratégica* (SIN-DIE) National Intelligence Service-Directorate of Strategic Intelligence, responsible for transferring wounded hostages and commandos to the hospitals of the National Police of Peru and the Peruvian Army.

158. "Plan Nipón 96" called for maneuvers to take place in three stages.[145] The first stage, "approach," called for a secret motorized movement from the base of the First Division of the Army Special Forces to the buildings located on Marconi Street and Tomas Edison Street, which would be used as mustering points. The second stage, "action on the target", was divided into three phases. In the first phase, strike forces would move from the mustering points to strategic positions on the building. In the second phase, dynamite would be placed at strategic places on the building to open access to the residence. In the third phase, the countdown would begin from "5" to "0" and the commandos would initiate "violent, simultaneous ingress" to take control of the building. The third stage would begin as soon as the building was under

---

13420 to 13421), and ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14674).

[141] *CF.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13420).

[142] *Cf.* Plan of Operation B. "NIPON" 96 / "TENAZ" (*Tenaz* Patrol), January 1997, p. 6 (evidence file, volume I, annex 2 to the case submission brief, folio 37).

[143] The judgment from the domestic courts held that Roberto Huamán Ascurra had been "directly assigned […] to rent neighboring houses, build the tunnels and pay the miners, and build the mock-ups and the replica." He had other duties as well, such as taking "charge of intelligence personnel managing communications with hostages inside the residence, filming, photographing, and transcribing conversations, and overseeing personnel responsible for transferring wounded hostages and commandos to the hospitals of the National Police of Peru and the Central Military Hospital of the Army of Peru." Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13494).

[144] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13465).

[145] *Cf.* Plan of Operation B. "NIPON" 96 / "TENAZ" (*Tenaz* Patrol), January, 1997, pp. 1 to 7 (evidence file, volume I, annex 2 to the case submission brief, folios 31 to 38), and Statement by Carlos Alberto Tello Aliaga before a public attestor, January 29, 2014 (evidence file, volume XXX, affidavits,folios 20734 to 20744).

control, to evacuate the wounded, first the hostages and members of participating security forces, and later the MRTA guerrillas. Finally, any remaining uninjured persons would be evacuated. The action would be backed by the support and evacuation unit, providing treatment and triangulating and evacuating the hostages and MRTA rebels. During this stage, prosecutors appointed by *Consejo Supremo de Justicia Militar* (CSJM) Supreme Council of Military Justice would join the action and enter the residence of the Japanese ambassador with a warrant.[146]

159. Intelligence work for the operation was under the charge of Vladimiro Montesinos Torres (*supra* para. 157) by order of the President. Vladimiro Montesinos Torres assigned Army Lieutenant Colonel Roberto Edmundo Huamán Ascurra the task of activating information obtained secretly from inside the residence, setting up wiretaps, introducing microphones and recording the activities of the MRTA guerrillas and hostages, designing the replica of the the Japanese ambassador's residence, taking pictures and films, and providing logistic support to the participants in the military operation,[147] while Army Lieutenant Colonel Jesús Salvador Zamudio Aliaga was assigned to build the tunnels and provide security for houses neighboring the ambassador's residence.[148]

E. Execution of "Plan of Operation Nipón 96" or Operation "Chavín de Huántar"

160. Executive Order 020-DE-CCFFAA was issued on April 16, 1997, extending the state of emergency in the Lima district of San Isidro, where the residence of the Japanese ambassador to Peru was located (*supra* para. 147).[149]

161. The President of Peru issued an order on April 22, 1997 to initiate Rescue Operation "Chavín de Huántar",[150] which began that same day at 3:23 p.m.[151] Hostages Army Lieutenant Colonel Roberto Rosendo Fernández Frantzen and Navy Vice-Admiral Luis Giampietri Rojas had recently sent messages to the intelligence team using high-technology devices secretly placed

---

146 *Cf.* Plan of Operation B. "NIPON" 96 / "TENAZ" (*Tenaz* Patrol), January 1997, p. 6 (evidence file, volume I, annex 2 to the case submission brief, folio 37).

147 *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13420 to 13421).

148 *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 724 (evidence file, volume I, annex 1 to the case submission brief, folio 10).

149 *Cf.* Ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folios 14681 to 14682).

150 Two conditions were required before the operation could begin: (1) that no fewer than seven or eight guerrillas and 50% of those who held command positions be occupied playing foosball in the living room on the ground floor, and no hostage be on the ground floor, and (2) that the door to the patio, giving access to the second floor, could be opened easily. *Cf.* Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 30, 1997, p. 15 (evidence file, volume I, annex 2.a to the case submission brief, folio 56); Annex 02, Report on Operation "*Tenaz* Patrol", April 30, 1997, p. 6 (merits file, volume II, annex 7 offered by the State for planning the exercise of "reconstruction of the facts," folio 1022), and declaration by Carlos Alberto Tello Aliaga before a federal attestor, January 29, 2014 (evidence file, volume XXX, affidavits, folios 20734 to 20744).

151 *Cf.* Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 30, 1997, p. 16 (evidence file, volume I, annex 2.a to the case submission brief, folio 57), and Annex 02, Report on Operation "*Tenaz* Patrol", April 30, 1997, p. 6 (merits file, volume II, annex 7 offered by the State for planning the exercise of "reconstruction of the facts", folio 1022). See also, Declaration by José Daniel Williams Zapata before a public attestor, January 29, 2014 (evidence file, volume XXX, affidavits, folio 20723), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13505).

inside the building during the hostage-taking, alerting them when the time was right to enter the residence. According to their communication, a lone MRTA guerrilla was on the second floor of the building guarding the hostages while the rest of the group were playing foosball on the ground floor, and only one guerrilla was guarding the main door.[152]

162. Several underground explosions initiated the operation, after which around 80 commandos divided into the different strike forces (*supra* paras. 155 and 156) entered the ambassador's residence through the access ways opened in doors and walls.[153] The detonation was the signal for the eight squads of the Alpha and Delta strike forces to enter the residence and take control of their assigned areas.

163. The technique used by the commandos was to take control of the buildings and rescue hostages by entering two-by-two into each closed room and searching each successive area until they had taken full control of them all, using "selective instinctive shooting" (SIS).[154]

164. The rescue operation successfully freed the hostages.[155] One hostage, then judge Carlos Ernesto Giusti Acuña, lost his life.[156] Other fatalities included the commandos Army Lieutenant

---

[152] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13505).

[153] *Cf.* Annex 02, Report of Operations of the "*Tenaz* Patrol", April 30, 1997, p. 6 (merits file, volume II, annex 7 offered by the State for planning the exercise of "reconstruction of the facts", folio 1022); statement by José Daniel Williams Zapata before a public attestor, January 29, 2014 (evidence file, volume XXX, affidavits, folios 20719 to 20731), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13506).

[154] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13509). With respect to SIS, the ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14692), offers a description of this technique as provided in the Peruvian Army Manual for Selective Instinctive Shooting:

> […] The Army of Peru, prior to the events of the case, had approved the Manual for Selective Instinctive Shooting, under resolution […] of May eighteenth, nineteen ninety-four. According to the manual, commandos must be fully instructed and trained, as indeed was done for a four-month period, first as dry runs (the gun is unloaded but the exercise is done realistically to perfect every movement), followed by training with live ammunition and loaded weapons: light arms, machine pistol, assault rifle). SIS is the ideal method for rapid fire and has proven highly effective in both open fields and closed areas. Sights on the firearm are used as the point of reference, and two cartridges can be shot in an average of two seconds, eliminating enemies even if they are in a crowd by using the selective method. Two rapid-fire shots can be directed at the target in a maximum of two seconds; the shots are aimed at the head at short distances (six, eight and ten meters) and at the body at longer distances. To check the aiming sights on the weapon, it is important to shoot at a reference guide (chest with three cartridges), then proceed to align the weapons' sights if the bullets did not strike the target correctly.
>
> The so-called "safety shot" is used only in a combat operation, during a face off. When terrorists or criminals are hit, the commando must make certain that they are no longer a threat or danger, and then continue with the operation. […]

[155] *Cf.* Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 30, 1997, p. 11 (evidence file, volume I, annex 2.a to the case submission brief, folio 52), and Annex 02, Report on Operation "*Tenaz* Patrol", April 30, 1997, p. 15 (merits file, volume II, annex 7 offered by the State for planning the exercise of "reconstruction of the facts", folio 1022).

[156] *Cf.* Autopsy protocol 97-1969 of Carlos Ernesto Giusti Acuña, April 22, 1997 (evidence file, volume II, annex 14 to the case submission brief, folios 720 to 723); Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 30, 1997, p. 11 (evidence file, volume I, annex 2.a to the case submission brief, folio 52), and Annex 02, Report on Operation "*Tenaz* Patrol", April 30, 1997, p. 15 (merits file, volume II, annex 7 offered by the State for planning the exercise of "reconstruction of the facts", folio 1022).

Raúl Gustavo Jiménez Chávez and Army Lieutenant Colonel Juan Alfonso Valer Sandoval,[157] as well as the 14 members of the MRTA.[158] Injuries were sustained by several hostages and government officials.[159]

165. According to the report prepared by the Commander General of the First Division of the Special Forces after the operation had ended, the 14 MRTA members had died during the clash with military personnel.[160] However, based on certain statements to the press in December 2000[161] and a letter subsequently sent to the judiciary in 2001[162] by former hostage Hidetaka Ogura, who at the time the hostages were taken by the MRTA at the Japanese ambassador's residence was serving as first secretary to the embassy of Japan in Peru,[163] there were questions about the circumstances surrounding the death of MRTA members Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, and whether they had been subject to extrajudicial execution, which is the matter under analysis in this judgment (*infra* Chapter IX).

---

[157] *Cf.* Autopsy protocol 97-1967 of Infantry Colonel Juan Alfonso Valer Sandoval, April 22, 1997 (evidence file, volume II, annex 14 to the case submission brief, folios 710 to 714); autopsy protocol 97-1968 of Lieutenant Gustavo Jiménez Chávez, April 22, 1997 (evidence file, volume II, annex 14 to the case submission brief, folios 715 to 719); Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 30, 1997, p. 11 (evidence file, volume I, annex 2.a to the case submission brief, folio 52), and Annex 02, Report on Operation "*Tenaz* Patrol", April 30, 1997, p. 15 (merits file, volume II, annex 7 offered by the State for planning the exercise of "reconstruction of the facts", folio 1022).

[158] *Cf.* Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 30, 1997, p. 11 (evidence file, volume I, annex 2.a to the case submission brief, folio 52); report on identification and removal of the bodies of MRTA members found in the residence of the Japanese ambassador, April 23, 1997 (evidence file, volume I, annex 6 to the case submission brief, folios 116 to 124), and Annex 02, Report on Operation "*Tenaz* Patrol", April 30, 1997, p. 15 (merits file, volume II, annex 7 offered by the State for planning the exercise of "reconstruction of the facts", folio 1022). See also, Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 725 (evidence file, volume 1 annex 1 to the case submission brief, folio 11), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13532).

[159] *Cf.* List of patients hospitalized at the Central Military Hospital, April 23, 1997 (evidence file, volume II, annex 13 to the case submission brief, folios 706 to 707); list of commando personnel deceased and wounded in Operation Chavín de Huántar (evidence file, volume XXIV, helpful evidence, folio 16878); Truth and Reconciliation Commission,, *Informe Final,* 2003, Volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 725 (evidence file, volume 1 annex 1 to the case submission brief, folio 11), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13532 to 15533).

[160] *Cf.* Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 30, 1997, p. 10 (evidence file, volume I, annex 2.a to the case submission brief, folio 51), and Annex 02, Report on Operation "*Tenaz* Patrol", April 30, 1997, p. 15 (merits file, volume II, annex 7 offered by the State for planning the exercise of "reconstruction of the facts", folio 1022).

[161] *Cf.* A press report, "MRTA members captured live," ran in the *El Comercio* newspaper on December 18, 2000, reporting statements by Hidetaka Ogura (evidence file, volume VIII, annex 9 to the pleadings, motions and evidence brief, folio 5279). These statements were referenced in a column published in the Spain-based newspaper *ABC* on December 19, 2000, under the title "Three terrorists executed in the Japanese embassy in Peru" (evidence file, volume VIII, annex 9 to the brief with pleadings, motions and evidence, folio 5280).

[162] *Cf.* Letter from Hidetaka Ogura to the judiciary of Peru, August 20, 2001 (evidence file, volume I, annex 5 to the case submission brief, folios 112 to 113).

[163] *Cf.* Sworn statement by Hidetaka Ogura taken and certified by a public attestor on January 28, 2014 (evidence file, volume XXX, affidavits, folios 20620 to 20624).

166. The entire operation lasted 16 minutes. Additional time was needed to evacuate the wounded, gather and move the hostages, search the resident and quench a fire that had ignited during the operation, so that the total action took approximately 33 minutes.[164]

F. Actions subsequent to the operation

167. When the rescue operation was finished, President Fujimori Fujimori visited the site.[165] Military authorities, members of the SIN and officers appointed by the Supreme Council of Military Justice (*supra* para. 158) initiated follow-up actions to the operation.[166] Wounded hostages and commandos were taken to the Central Military Hospital.[167] The bodies of commandos Juan Alfonso Valer Sandoval and Raúl Gustavo Jiménez Chávez, who had died in the operation, and the body of Judge Carlos Ernesto Giusti Acuña, who died after being evacuated, were autopsied that night, April 22, 1997.[168]

168. The same day, April 22, 1997, the special military judge identified as C-501 and the special military prosecutor identified as C-222-C went to the ambassador's residence but were unable to visit the entire facility "for reasons of security, as it was known that certain strategic spots in the [r]esidence had been mined, [which] was a threat to the safety of the intervening personnel; it was therefore decided that the procedure of identifying and removing the bodies of the [MRTA guerrillas] [would] take place the following day."[169]

169. The next day, the special military judge and the special military prosecutor returned to the site and instructed a group from the explosives deactivation unit of the National Police of Peru to detect and deactivate explosives[170] and ordered that the bodies of the MRTA members

---

[164] *Cf.* Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 30, 1997, p. 17 (evidence file, volume I, annex 2.a to the case submission brief, folio 58). See also: ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13425 and 13531).

[165] *Cf.* Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 30, 1997, p. 17 (evidence file, volume I, annex 2.a to the case submission brief, folio 58); police operation report in compliance with Operation Chavín de Huántar, April 22, 1997 (evidence file, volume II, annex 15 to the case submission brief, folio 730), and statement by Morihisa Aoki at the site of the Peruvian embassy in Tokyo, Japan, June 18, 2012 (evidence file, volume XVIII, annex 18 to the State's answering brief, folio 11876).

[166] *Cf.* Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 30, 1997, p. 11 (evidence file, volume I, annex 2.a to the case submission brief, folio 52), and Annex 02, Report on Operation "*Tenaz* Patrol", April 30, 1997, p. 19 (merits file, volume II, annex 7 offered by the State for planning the exercise of "reconstruction of the facts", folio 1022). See also, Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 725 (evidence file, volume I, annex 1 to the case submission brief, folio 11).

[167] *Cf.* List of patients hospitalized at the Central Military Hospital on April 23, 1997 (evidence file, volume II, annex 13 to the case submission brief, folios 706 to 707).

[168] *Cf.* Autopsy report 97-1967 of Infantry Colonel Juan Alfonso Valer Sandoval, April 22, 1997 (evidence file, volume II, annex 14 to the case submission brief, folios 710 to 714); autopsy report 97-1968 of Lieutenant Gustavo Jiménez Chávez, April 22, 1997 (evidence file, volume II, annex 14 to the case submission brief, folios 715 to 719), and autopsy report 97-1969 of Carlos Ernesto Giusti Acuña, April 22, 1997 (evidence file, volume II, annex 14 to the case submission brief, folios 720 to 723).

[169] Record of intervention by law enforcement under Plan of Operation Chavín de Huántar, April 22, 1997 (evidence file, volume II, annex 15 to the case submission brief, folio 730).

[170] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13535 to 13540).

be removed[171] and transferred to the Central Hospital of the National Police of Peru,[172] where they were underwent partial autopsies under orders of Police Medical Commander Herbert D. Ángeles Villanueva.[173] The 14 MRTA members were assigned identification numbers at the hospital: NN1, NN2, NN3, NN4, NN5, NN6, NN7, NN8, NN9, NN10, NN11, NN12, NN13 and NN14 (John Doe 1-14).[174]

170. The April 23, 1997 *Report on identification and removal of the bodies*, signed by the special military judge and the special military prosecutor, recorded that:[175] body NN9, later identified as Víctor Salomón Peceros Pedraza, presented "three perforations on the right side of the abdomen, two other bullet wounds to the right side of the face, and three perforations in the head;" body NN10, later identified as Herma Luz Meléndez Cueva, was found one-half meter away from the body of Víctor Salomón Peceros Pedraza and presented "six bullet perforations [and one] bullet wound under the right eye," and the body of Eduardo Nicolás Cruz Sánchez had been found on the ground floor toward the back of the residence and presented "a large opening on the right side of the head, above the ear, […] and his right hand was holding a grenade he had not yet thrown."

171. The partial selective autopsies found that the 14 MRTA fighters had died of "hypovolemic shock" as a consequence of gunshot wounds.[176] More specifically, the autopsy of Eduardo Nicolás Cruz Sánchez describes a "severe gunshot wound to the right side of the head with exposed fractures and loss of encephalic mass" and "bilateral pachypleuritis" in the thorax.[177] Víctor Salomón Peceros Pedraza presented gunshot "wounds to the head, thorax and extremities,"[178] and Herma Luz Meléndez Cueva presented gunshot "wounds to the head,

---

[171] *Cf.* Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 30, 1997, p. 11 (evidence file, volume I, annex 2.a to the case submission brief, folio 52).

[172] *Cf.* Record of identification and removal of the bodies of MRTA guerrillas found in the residence of the Japanese ambassador, April 23, 1997 (evidence file, volume I, annex 6 to the case submission brief, folio 123).

[173] *Cf.* Partial selective autopsies of the 14 MRTA guerrillas (evidence file, volume II, annex 16 to the case submission brief, folios 750 to 764), and Report 02-2001.sap-DAD.HCPNP.602122 of January 26, 2001 (evidence file, volume XXVI, CVR evidence, folio 18917). See also, Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 725 (evidence file, volume I, annex I to the case submission brief, folio 11); ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13575); and ruling by the Transitory Criminal Law Chamber of the Supreme Court of Justice on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folios 14703 to 14704).

[174] *Cf.* Partial selective autopsies of the 14 MRTA guerrillas (evidence file, volume II, annex 16 to the case submission brief, folios 750 to 764), and Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66. Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 725 (evidence file, volume I, annex 1 to the case submission brief, folio 11).

[175] Record of identification and removal of the bodies of MRTA guerrillas found in the residence of the Japanese ambassador, April 23, 1997 (evidence file, volume I, annex 6 to the case submission brief, folios 120 a 122).

[176] *Cf.* Partial selective autopsies of the 14 MRTA guerrillas, April 23, 1997 (evidence file, volume II, annex 16 to the case submission brief, folios 750 to 764) See also, Police Report 04-DIRPOCC-DIVAMP-PNP prepared by the National Police of Peru, May 2, 2002 (evidence file, volume XXVI, CVR evidence, folios 18087 to 18093).

[177] Partial selective autopsies of the 14 MRTA guerrillas, April 23, 1997 (evidence file, volume II, annex 16 to the case submission brief, folios 750 to 764)

[178] Partial selective autopsies of the 09 MRTA guerrillas, April 23, 1997 (evidence file, volume II, annex 16 to the case submission brief, folios 750 to 759)

thorax and left arm."[179] Fingerprint experts were ordered to identify the bodies, and orders were given to register the death certificates.[180]

172. The bodies of the MRTA members were buried on April 24, 1997 by officers of the National Police of Peru in various cemeteries around the city of Lima,[181] without notifying their families.[182] All but three were buried as John Doe; Eduardo Nicolás Cruz Sánchez was among those identified.[183] Death certificates were registered.[184]

173. The Commander General of the First Division of the Special Forces prepared a report on April 30, 1997 on the execution of Plan of Operation "Chavín de Huántar".[185]

G. Investigation of the facts and beginning of criminal proceedings in the ordinary courts

174. The Peruvian press, more specifically, the *El Comercio* newspaper, ran a story on December 18, 2000, containing statements by former hostage Hidetaka Ogura that he had seen three members of the MRTA captured alive, but the government had later claimed that all the guerrillas had died in combat.[186] As a result of these statements, criminal complaints of extrajudicial execution of some of the MRTA members were lodged in December, 2000 and January, 2001.[187]

---

[179] Partial selective autopsies of the 10 MRTA guerrillas, April 23, 1997 (evidence file, volume II, annex 16 to the case submission brief, folios 750 to 760)

[180] *Cf.* Record of identification and removal of the bodies of MRTA members found in the residence of the Japanese ambassador, April 23, 1997 (evidence file, volume I, annex 6 to the case submission brief, folios 123 to 124), and fingerprint reports 168-ND-DIVIPO, 169-ND-DIVIPO and 170-ND-DIVIPO of April 24, 1997 (evidence file, volumes XXVI and XXVII, CVR evidence, folios 18935 to 18948). See also, Record of release of body, death certificate and autopsy report for Eduardo Nicolás Cruz Sánchez (evidence file, volume II, annex 17 to the case submission brief, folios 770 to 773).

[181] *Cf.* Police report 04-DIRPOCC-DIVAMP-PNP by the National Police of Peru, May, 2, 2002 (evidence file, volume XXVI, CVR evidence, folios 18093 to 18095); initial statement by William Augusto Philips Sánchez to the Specialized Provincial Prosecutor, March 6, 2001 (evidence file, volume XXVI, CVR evidence, folios 18793 to 18798), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13577 to 13578).

[182] The other two identified bodies, Roli Rojas Fernández and Néstor Fortunato Cerpa Cartolini, were released to family members. *Cf*. Police Report 04-DIRPOCC-DIVAMP-PNP prepared by the National Police of Peru, May 2, 2002 (evidence file, volume XXVI, CVR evidence, folio 18094).

[183] These three persons were Roli Rojas Fernández, Néstor Fortunato Cerpa Cartolini and Eduardo Nicolás Cruz Sánchez. See Police Report 04-DIRPOCC-DIVAMP-PNP prepared by the National Police of Peru, May 2, 2002 (evidence file, volume XXVI, CVR evidence, folios 18093 to 18095); fingerprint reports 168-ND-DIVIPO, 169-ND-DIVIPO and 170-ND-DIVIPO of April 24, 1997 (evidence file, volumes XXVI and XXVII, CVR evidence CVR, folios 18935 to 18948), and record of the 2001 verification of burial sites of MRTA members (evidence file, volume II, annex 18 to the case submission brief, folios 777 to 788).

[184] *Cf.* Record of identification and removal of the bodies of MRTA guerrillas found in the residence of the Japanese ambassador, April 23, 1997 (evidence file, volume I, annex 6 to the case submission brief, folios 123 a 124); initial statement by William Augusto Philips Sánchez to the Specialized Provincial Prosecutor, March 6, 2001 (evidence file, volume XXVI, CVR evidence, folios 18793 to 18798) and record of release of body, death certificate and autopsy report for Eduardo Nicolás Cruz Sánchez (evidence file, volume II, annex 17 to the case submission brief, folios 770 to 773).

[185] *Cf.* Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 1997, pp. 1 to 26 (evidence file, volume I, annex 1 to the case submission brief, folios 41 to 67).

[186] *Cf.* A press report, "MRTA members captured live," ran in the *El Comercio* newspaper on December 18, 2000, reporting statements by Hidetaka Ogura (evidence file, volume VIII, annex 9 to the pleadings, motions and evidence brief, folio 5279).

[187] *Cf.* Complaint lodged by inmates at the Yamayo Prison, December 28, 2000 (evidence file, volume XXXI, annex 1 to the State's brief of closing arguments, folio 21059), complaint lodged by María Genara Fernández Rosales,

175. Upon receiving the criminal complaint, the Office of the Public Prosecutor on January 4, 2001 ordered a police investigation to be opened and sent the files to the special investigation team of the National Police of Peru to initiate procedures as necessary to clear up the claims.[188] The Specialized Provincial Prosecutor ordered exhumation of the bodies of the MRTA members,[189] and medical exams to determine the cause and means or mechanism of death, and to identify each body.[190] The prosecutor also sent the *División Central de Exámenes Tanatológicos y Auxiliares*, (DICETA), Central Division of Thanatology and Auxiliary Exams of the *Instituto de Medicina Legal del Peru* (hereinafter also IML), Peruvian Institute of Forensic Medicine, the reports of the partial autopsies on the fourteen MRTA members who had died in Operation "Chavín de Huántar", to determine "whether the autopsies were performed in accordance with medical and legal standards for violent deaths in effect at the time."[191] The reports from the forensic examinations were delivered on February 28, 2001, stating that legally required conditions had not been met for the mandatory opening of the cranial, pectoral and abdominal cavities.[192] They also found that anthropomorphic data had not been recorded and that the diagnoses of the cause of death were "very general" and "lacked a scientific basis".[193]

176. The exhumations began on March 12, 2001 and were completed the following March 16.[194] Each of the deceased was exhumed and the bodies were removed and taken to the Lima Central Morgue. Autopsies were performed as ordered (external and internal studies of each

---

January 3, 2001 (evidence file, volume XXXI, annex 1 to the State's brief of closing arguments, folios 21062 to 21065), and complaint lodged by Eligia Rodríguez de Villoslada, January 18, 2001 (evidence file, volume XXXI, annex 1 to the State's brief of final closing arguments, folios 21060 to 21061). See also, Police Report 04-DIRPOCC-DIVAMP-PNP prepared by the National Police of Peru, May 2, 2002 (evidence file, volume XXVI, CVR evidence, folios 18081 to 18085), and Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66. Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 727 (evidence file, volume I, annex 1 to the case submission brief, folio 13). Edgar Cruz Acuña joined the criminal complaint on March 16, 2001. *Cf.* Brief filed the next day, March 15, 2001, before the Specialized Provincial Prosecutor (evidence file, volume XXVII, CVR evidence, folios 19521 to 19523).

[188] *Cf.* Order by the Specialized Provincial Prosecutor on January 4, 2001 to open the police investigation (evidence file, volume XXVI, CVR evidence, folio 18903), and police report 04-DIRPOCC-DIVAMP-PNP prepared by the National Police of Peru on May 2, 2002 (evidence file, volume XXVI, CVR evidence, folios 18079 to 18214).

[189] *Cf.* Order by the Specialized Provincial Prosecutor on January 4, 2001 to open the police investigation (evidence file, volume XXVI, CVR evidence, folio 18903), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13579)

[190] *Cf.* Report of forensic studies by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 131). The order was also given to designate Clyde C. Snow and José Pablo Baraybar, experts from the Peruvian Forensic Anthropology Team, to take part in the forensic procedures and perform "forensic anthropological studies to identify the [MRTA members] definitively and detect the means and causes of death." Order delivered by the Specialized Provincial Prosecutor on March 2, 2001 (evidence file, volume XXXI, annex 4 to the State's brief of final closing arguments, folio 21066).

[191] Report of forensic studies by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 128).

[192] *Cf.* Note 208-2001-MP-FN-IML/DICETA, February 28, 2001 (evidence file, volume XXVII, CVR evidence, folios 18994 to 19026).

[193] Note 208-2001-MP-FN-IML/DICETA, February 28, 2001 (evidence file, volume XXVII, CVR evidence, folios 18994 to 19026).

[194] *Cf.* Report of forensic studies by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 128).

body), along with radiographic studies and dental, anthropological, biological, anatomical-pathological and ballistics exams.[195] The thanatological and other special exams began on March 19, in the presence of a team of assistant prosecutors from the Office of the Specialized Provincial Prosecutor, official experts designated by the prosecutor (Clyde C. Snow and José Pablo Baraybar, experts from the Forensic Anthropology Team[196]), representatives of the Human Rights Association and the ad hoc ombudsman, medical experts designated by the complainants, and criminologists from the National Police of Peru.[197] The prosecution also ordered DNA exams from the Genetic Identification Laboratory at the University of Granada, Spain.[198]

177. The expert reports requested by the Specialized Provincial Prosecutor were delivered in July[199] and August,[200] 2001 (*supra* para. 175). The IML found that "the procedure of removing the body from the scene of the event and the first autopsy did not provide sufficient information to determine the manner of death."[201] The prosecutor ordered that these reports be held in reserve because "if they are publicized, it could [...] hinder the work of clearing up the facts."[202]

178. The July, 2001 report of forensic anthropologists Clyde C. Snow and José Pablo Baraybar concluded that the 14 members of the MRTA had received gunshot wounds to the head and/or neck. In particular, it found that 57 percent of the cases, that is, eight of the fourteen, presented a type of lesions that "perforated the posterior region" of the neck through "the first and third cervical vertebrae," emerging through the "first cervical vertebra in the facial region."[203] This suggested that "all these victims were in the same position with respect to the shooter and had little or no mobility."[204] The report concluded that there was evidence

---

195 *Cf.* Report of forensic studies by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 132).

196 *Cf.* Order by the Specialized Provincial Prosecutor on March 2, 2001 (evidence file, volume XXXI, annex 4 to the State's brief of final closing arguments, folio 21066).

197 *Cf.* Report of forensic expert studies performed by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folios 129 and 130). See also, Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folios 676 to 703).

198 *Cf.* Report of forensic studies by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 132).

199 *Cf.* Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folios 676 to 703).

200 *Cf.* Report of forensic studies by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folios 126 to 611).

201 Report of forensic studies by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 186).

202 Order by the Specialized Provincial Prosecutor on August 23, 2001 (evidence file, volume II, annex 23 to the State's brief of final closing arguments, folio 874).

203 Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folio 698).

204 Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folio 698).

that in at least eight cases, "the victims were likely incapacitated at the time they were shot."[205] These eight cases included NN14, Eduardo Nicolás Cruz Sánchez, but not NN9, Víctor Salomón Peceros Pedraza, or NN10, Herma Luz Meléndez Cueva. The report made particular reference to NN14, who according to the authors, "required a separate comment," as "this person received only one gunshot at the back of the neck through the first cervical vertebra. Unlike the other cases noted [NN2, NN3, NN4, NN6, NN7, NN11, NN13], this person had not first been left incapacitated by wounds on some other part of the body."[206] This led them to conclude, "the part of the body where the impact was received (the back of the neck) is not easily accessible to a shooter, especially if the target is mobile, and therefore this person must have been immobilized before being shot."[207]

179. The August, 2001 report of the Institute of Forensic Medicine specifically stated, regarding the alleged victims of this case, that Víctor Salomón Peceros Pedraza presented nine gunshot wounds: three to the head, three to the chest, two to the abdomen-pelvis, and one to the extremities. Herma Luz Meléndez Cueva presented 14: seven to the head, one to the neck and six to the thorax.[208] The IML report indicated that Eduardo Nicolás Cruz Sánchez had three gunshot wounds: one to the neck, one to the abdomen-pelvis, and one to the extremities.[209] The report also discussed the thanatological findings on the injuries, stating that the body of Eduardo Nicolás Cruz Sánchez presented "a perforating injury by gunshot, entering through the back part of the neck and exiting through the lateral right section of the head."[210] The report added that, given the characteristics of the skull wounds, it could be inferred that the victim was on a lower plane than the shooter, who was located behind him to his left.[211] This section of the report does not describe other bodily injuries to Eduardo Nicolás Cruz Sánchez. The conclusions of the autopsy report given in the report describe only the brain wounds caused by gunshot.[212]

---

[205] Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folio 701).

[206] Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folio 700).

[207] Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folio 701).

[208] *Cf.* Tables 1 and 2 of the report on forensic examinations by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folios 180 to 181); autopsy report 0921-2001 prepared by the Institute of Forensic Medicine on March 22, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 426); autopsy report 0911-2001 prepared by the Institute of Forensic Medicine on March 22, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 457).

[209] *Cf.* Tables 1 and 2 of the report on forensic examinations by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folios 180 to 181).

[210] Report of forensic examinations by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 143).

[211] *Cf.* Report of forensic examinations by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 143).

[212] *Cf.* Autopsy report 0878-2001 prepared by the Institute of Forensic Medicine on March 20, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 587).

180. The IML report stated that Florentino Peceros Farfán, father of Víctor Salomón Peceros Pedraza, Herma Luz Cueva Torres, mother of Herma Luz Meléndez Cueva, and Lucinda Rojas Landa were present for the examinations.[213] Family members were also involved in the process of identifying the bodies.[214]

181. Hidetaka Ogura sent a letter to the Peruvian judiciary on August 20, 2001, advising the authorities of his version of the facts involving three MRTA members, known as "Tito", "Cynthia", and another later identified as Víctor Salomón Peceros Pedraza[215] (*infra* paras. 297 and 326).

182. The Specialized Provincial Prosecutor filed formal charges on May 24, 2002 against Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, Roberto Edmundo Huamán Ascurra, Augusto Jaime Patiño, José Williams Zapata, Luis Alatrista Rodríguez, Carlos Tello Aliaga, Benigno Leonel Cabrera Pino, Jorge Orlando Fernández Robles, Hugo Víctor Robles del Castillo, Víctor Hugo Sánchez Morales, Jesús Zamudio Aliaga, Raúl Huaracaya Lovón, Walter Martín Becerra Noblecilla, José Alvarado Díaz, Manuel Antonio Paz Ramos, Jorge Félix Díaz, Juan Carlos Moral Rojas and Tomás César Rojas Villanueva for allegedly committing the crime of murder against Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza.[216] The prosecutor decided not to file criminal charges "for the time being" for the death of the other MRTA members,[217] "as in any case, more evidence needs to be gathered on the means and circumstances of their deaths."[218] He also processed a formal complaint against Juan Fernando Dianderas Ottone, Martín Solari de la Fuente and Herbert Danilo Ángeles Villanueva for allegedly violating the government's administration of justice, that is, a crime against the judicial system in the form of aggravated concealment,[219] and agreed to send certified copies of his actions to the national prosecutor for use in the investigation of former President Alberto Fujimori Fujimori.[220]

183. The Third Special Criminal Chamber on June 11, 2002 ordered the ordinary jurisdiction to open a criminal investigation of Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, Roberto Edmundo Huamán Ascurra, Augusto Jaime Patiño, José Williams Zapata, Luis Alatrista Rodríguez, Carlos Tello Aliaga, Hugo Víctor Robles del Castillo, Víctor Hugo Sánchez Morales, Raúl Huaracaya Lovón, Walter Martín Becerra Noblecilla, José Alvarado Díaz, Manuel Antonio Paz Ramos, Jorge Félix Díaz, Juan Carlos Moral Rojas and Tomás César Rojas Villanueva for

---

[213] *Cf.* Report of forensic examinations by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folios 445, 478 and 601).

[214] *Cf.* Statement rendered before a public attestor by Herma Luz Cueva Torres, January 30, 2014 (evidence file, affidavits, volume XXX, folio 20636), statement rendered before a public attestor by Nemecia Pedraza de Peceros, January 24, 2014 (evidence file, affidavits, volume XXX, folio 20643), and statement rendered before a public attestor by Edgar Odón Cruz Acuña, January 28, 2014 (evidence file, affidavits, volume XXX, folio 20629).

[215] *Cf.* Letter from Hidetaka Ogura to the judiciary of Peru, August 20, 2001 (evidence file, volume I, annex 5 to the case submission brief, folios 112 to 113).

[216] *Cf.* Complaint 001-2001 formalized by the Specialized Provincial Prosecutor on May 24, 2002 (evidence file, volume II, annex 20 to the case submission brief, folios 794 to 838).

[217] Adolfo Trigoso Torres or Adolfo Trigozo Torres, Roli Rojas Fernández, Néstor Fortunato Cerpa Cartolini, Iván Meza Espíritu, Bosco Honorato Salas Huamán, Luz Dina Villoslada Rodríguez, NN-4 and NN-13.

[218] Complaint 001-2001 formalized by the Specialized Provincial Prosecutor on May 24, 2002 (evidence file, volume II, annex 20 to the case submission brief, folio 838).

[219] *Cf.* Complaint 001-2001 formalized by the Specialized Provincial Prosecutor on May 24, 2002 (evidence file, volume II, annex 20 to the case submission brief, folio 794).

[220] *Cf.* Complaint 001-2001 formalized by the Specialized Provincial Prosecutor on May 24, 2002 (evidence file, volume II, annex 20 to the case submission brief, folio 838).

the alleged crime of murder against Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, and of Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, Roberto Edmundo Huamán Ascurra, Augusto Jaime Patiño, José Williams Zapata, Luis Alatrista Rodríguez, Carlos Tello Aliaga, Benigno Leonel Cabrera Pino, Jorge Orlando Fernández Robles and Jesús Zamudio Aliaga, for the alleged crime of murder against Eduardo Nicolás Cruz Sánchez.[221] The judge also ordered house arrest for most of the suspects and issued an arrest warrant for Zamudio Aliaga.[222] He found no grounds for investigation of Juan Fernando Dianderas Ottone, Martín Solari de la Fuente and Herbert Danilo Ángeles Villanueva for crimes against the administration of justice, specifically a crime against the judiciary in the form of aggravated concealment in injury of the State.[223]

H. The jurisdictional dispute and the military courts

184. That same day, May 24, 2002, when the Specialized Provincial Prosecutor filed his charges before Third Special Criminal Chamber (*supra* para. 182), the Solicitor General of the Ministry of Defense responsible for judicial affairs of the Peruvian Army lodged a complaint with the War Chamber of the military justice council, CSJM, against the commandos who had taken part in the Chavín de Huántar operation for allegedly committing the crime of abuse of authority, codified in Articles 179 and 180 of the code of military justice, the crime of human rights violation as defined and criminalized under Article 94 of the code, and the crime of murder defined and criminalized in Book Two, Section One, Chapter 1 of the criminal code, applicable under Article 744 of the code of military justice, in injury of several members of the MRTA.[224]

185. The chief prosecutor of the investigative justice department admitted the complaint on May 28, 2002,[225] and the next day, the War Chamber decided to open an investigation against the military personnel who took part in the operation for the alleged commission of crimes of abuse of authority, human rights violation and murder against Roli Rojas Fernández, Luz Dina Villoslada Rodríguez, Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva.[226] This investigation did not expressly include Eduardo Nicolás Cruz Sánchez as a victim (*infra* para. 225).[227]

186. The chief prosecutor of the investigative justice department asked the president of the War Chamber on June 20, 2002 to send an official note asking the Third Chamber to recuse

---

[221] *Cf.* Order to open investigation issued on June 11, 2002 by the Third Special Criminal Chamber (evidence file, volume I, annex 3 of the case submission brief, folios 103 to 104).

[222] *Cf.* Order to open investigation issued on June 11, 2002 by the Third Special Criminal Chamber (evidence file, volume I, annex 3 of the case submission brief, folio 107).

[223] *Cf.* Order to open investigation issued on June 11, 2002 by the Third Special Criminal Chamber (evidence file, volume I, annex 3 of the case submission brief, folio 110).

[224] *Cf.* Complaint lodged by the Solicitor General of the Ministry of Defense before the Supreme Council of Military Justice, May 24, 2002 (evidence file, volume XVIII, annex 20 to the State's answering brief, folios 12027 to 12038).

[225] *Cf.* Prosecutorial complaint 03-2002 submitted to the military prosecutor of the investigative justice department, May 28, 2002 (evidence file, volume XXII, helpful evidence, folios 14746 to 14749).

[226] *Cf.* Order to open investigation, issued by the War Chamber of the Supreme Council of Military Justice, May 29, 2002 (evidence file, volume XXII, helpful evidence, folios 14758 to 14766).

[227] *Cf.* Final report 008-2nd Sec- V.I. CSJM, June 6, 2003 (evidence file, volume XVIII, annex 21 to the State's answering brief, folios 12079 to 12108).

itself from hearing the case and to send all the files to the military courts "which are competent to hear this case."[228]

187. The War Chamber decided on June 26, 2002, to request the Third Special Criminal Chamber of the Superior Court of Lima to recuse itself from the investigation tagged as 19-2002.[229]

188. María Genara Fernández, mother of victim Roli Rojas Fernández, filed a brief on August 1, 2002, asking to appear in the proceedings before the military courts as a plaintiff.[230] The decision was made the next day to admit her appearance.[231] A preliminary statement was issued on August 13, 2002 in the framework of this case, and she was granted access to the case file.[232]

189. The investigative justice department of the CSJM submitted to the Supreme Court a jurisdictional challenge motion which was adjudicated by the Transitory Criminal Chamber of the Supreme Court on August 16, 2002.[233] The Supreme Court settled the jurisdictional dispute in favor of the military courts for the commandos involved in the operation and issued orders for the investigation to continue in the ordinary courts only for the "participants who were not part of the commandos"—Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, Roberto Huamán Ascurra and Jesús Zamudio Aliaga. Their reasoning went as follows:

> […] That the military operation […] was planned and executed by then President Alberto Fujimori Fujimori, Supreme Chief of the Armed Forces, to preserve domestic order and national security which had been severely undermined by the armed attack of a terrorist group […], and the intervention of military commandos can therefore be understood as an action that occurred in a zone under declared state of emergency; therefore, Article 10 of Law 24,150 should apply, according to which, in-service members of the Armed Forces in zones under a declared state of emergency are subject to the provisions of the code of military justice, and any infractions committed by such personnel in the course of their work, codified under military justice, are under the jurisdiction of the military courts, with the exception of those that may be unrelated to their service, as in the case of the persons not included in the order [to open] investigation issued by the military jurisdiction;
>
> […] That if the military group that was assembled and trained for this purpose, having conducted the operation to rescue the hostages in obedience to superior orders in a scenario of clear military confrontation, committed punishable offenses or excesses as defined in the code of military justice during their intervention, such eventuality should be considered as having occurred in the exercise of their duties, and therefore those

---

228 Note sent to the president of the War Chamber of the Supreme Council of Military Justice, June 20, 2002 (evidence file, volume XXII, helpful evidence, folios 14865 to 14866).

229 *Cf.* Order sent by the alternate investigating judge of the War Chamber on June 26, 2002 (evidence file, volume XXII, helpful evidence, folios 14917 to 14920), and note 1024-VI-CSJM/2002 received on June 27, 2002 (evidence file, volume XXII, helpful evidence, folios 14921 to 14922).

230 *Cf.* Brief addressed to the resident of the War Chamber of the Supreme Council of Military Justice, August 1, 2002 (evidence file, volume XVIII, annex 22 to the State's answering brief, folio 12263).

231 *Cf.* Decision by the alternate investigating judge of the Supreme Council of Military Justice, August 2, 2002 (evidence file, volume XVIII, annex 22 to the State's answering brief, folio 12264).

232 *Cf.* Preliminary statement rendered by María Genera Fernández, August 13, 2002 (evidence file, volume XVIII, annex 22 to the State's answering brief, folios 12266 to 12268), and record of August 13, 2002 (evidence file, volume XVIII, annex 22 to the State's answering brief, folio 12269).

233 *Cf.* Ruling by the Transitory Criminal Chamber of the Supreme Court on August 16, 2002 (evidence file, volume XXIII, helpful evidence, folios 15778 to 15783).

> responsible should be brought before the military jurisdiction in keeping with the legal system contained in the code of military justice; that Article 173 of the Peruvian Constitution also serves as an essential argument and is fully applicable and mandatory when it stipulates that in cases of in-service offenses by members of the Armed Forces and the National Police, they are to be subject to the relevant jurisdiction and the code of military justice, and this provision is also applicable to civilians for crimes of treason and terrorism; it is further the case that punishable acts under this jurisdiction are set forth in the code of military justice as crimes against human rights […];
>
> […] That the provisions of Article 324 of the code of military justice must be consistent with the provisions of Article 173 of the Peruvian Constitution, as the objects of the alleged offenses were acting as an armed group belonging to the "Túpac Amaru" terrorist organization […], and therefore it would be wrong to hold them as civilians;
>
> […] That the decision on which jurisdiction should investigate and try any excesses that may have been committed, considering that the hostage rescue operation was completed with the involvement of military personnel, members of the group of commandos and personnel not belonging to that group, must be made in strict subjection to the provisions of Articles 342 and 343 of the code of military justice; thus, both the military jurisdiction and the civilian jurisdiction should independently hear the crime corresponding to it under applicable criminal law;
>
> […] That […the] members of the commando team had taken part in a military operation, obeying orders issued under the terms of the Constitution by those with authority to do so, and any criminal offenses they may have committed should be heard by the military courts; by contrast, those who were not members of the commandos, who may have committed offenses or crimes established in the law, should therefore be subject to the jurisdiction of the ordinary courts.
>
> […] That the defendants in the ordinary court proceedings, Vladimiro Montesinos Torres, Nicolás de Bari Hermo[z]a Ríos, Roberto Huamán A[s]curra and Jesús Zamudio Aliaga, were not part of the military operation and are included in the investigation of possible cases of extrajudicial execution against captured terrorists, and this would be a case of human rights violation codified as a crime against humanity, similar to other cases that have been reopened in the ordinary courts, and therefore the processes should be joined […] especially as they also derived from the same criminal intent […].[234]

190. The investigating judge, having examined certain evidence, issued a final report addressed to the President of the CSJM War Chamber, presenting an analysis of the facts and their relationship to the evidence. He concluded, among other things: (i) that it has not been proven that orders had been given during the phase prior to the execution of "Plan Nipón 96", whether verbally, in writing, or by any other means, to indiscriminately eliminate or kill all the members of the MRTA; (ii) that the members of the Delta Eight squad were tasked with taking control of room "I" and verifying and evacuating the hostages found there, most of whom were employees of the Japanese embassy in Peru and Japanese business owners; (iii) that the bodies of the MRTA members Peceros Pedraza and Meléndez Cueva were found in that room with signs of having received multiple gunshot wounds, leading to death; (iv) that these deaths were probably inflicted by shooters Alvarado Díaz and Paz Ramos, and (v) that the evidence did not convincingly show that the gunshots causing these deaths had been fired under circumstances in which they had first been rendered defenseless by capture or injury. The investigating judge therefore held that there was no evidence of the commission or

---

[234] Ruling by the Transitory Criminal Chamber of the Supreme Court on August 16, 2002 (evidence file, volume XXIII, helpful evidence, folios 15778 to 15781).

participation of the accused in the death of MRTA members Peceros Pedraza, Meléndez Cueva, Villoslada Rodríguez and Rojas Fernández.[235]

191. The CSJM War Chamber decided on October 15, 2003 to dismiss the case of crimes of human rights violations, abuse of authority and murder, "as there was no evidence to support the commission of the crime under investigation."[236] It held, in this regard:

> […] the Armed Forces having taken on the task of ensuring […] control of domestic order, […] the intervention by the military commandos can qualify as an act that occurred in a zone under declared state of emergency, and the events were therefore the consequence of acts of service or duty, and any illegal action that may have derived from the exercise thereof qualifies as an in-service crime, as there is a cause-and-effect relationship between the duty and any alleged offenses, and the military criminal justice system, in view of the standards set forth in […] the Constitution of Peru, must apply in the presence of the following requirements: (a) the accused were military personnel on duty at the time, (b) they acted in the discharge of duties assigned as part of a military operation, (c) the discipline and protection of the values that underlie military life are themselves the legally protected right in question, and (d) the facts being alleged are criminalized under Articles 94, 107, 109 and 180 of the code of military justice; that the events […] occurred as the result of a confrontation between the commandos […] and a subversive group […] organized and fitted out as a military force […] in a clash with the features of a military encounter, in which both sides experienced death and injury and where the conditions necessary for legitimate defense must come under analysis, along with the circumstances surrounding the confrontation, the dangerous nature of the subversive agents who were equipped with gear and weapons of war […] and who at all times displayed the kind of belligerent attitude common in terrorist groups, and in which the lives of the hostages were seriously endangered, […] as Carlos Giusti Acuña and two other participating commandos had already died, and several hostages and commandos were seriously wounded, all of which reveals that the clash was severe […], so that any objective assessment must examine the conditions necessary to safeguard the physical integrity and lives of the hostages[…];
>
> […] that the claims of extrajudicial execution […] are based only on a sworn statement by […] Hidetaka Ogura […], that these assertions have not been verified or recorded by the declarant in the courts […];
>
> […] the commandos […] acted in legitimate defense of human life and in strict compliance with their service duties as protected by the Constitution […];
>
> […] due to the nature of the event, it is impossible to know with certainty which of the many gunshots caused the death of each MRTA member, and even less, who fired it; that this being the case, there is no evidence of the commission of the crimes of human rights violation, abuse of authority and murder of the MRTA agents, as the deaths of the rebels took place in the midst of the confrontations, and it has not been demonstrated that the alleged executions occurred, given the absence from the case files of incontrovertible, reliable evidence to demonstrate the contrary, particularly since the events took place in a setting of fighting and cross fire […];
>
> […] that the most conscientious and complete expert reports on the thanatological studies of the bodies […] were performed more than four years after the events took place, and

[235] *Cf.* Final report 008-2nd Sec- V.I. CSJM, June 6, 2003 (evidence file, volume XVIII, annex 21 to the State's answering brief, folios 12079 to 12108), and expanded final report 014-2nd Sec-V.I. CSJM of the investigating judge, August 21, 2003 (evidence file, volume XXIV, helpful evidence, folios 17523 to 17526).

[236] Ruling by the War Chamber of the Supreme Council of Military Justice, October 15, 2003 (evidence file, volume XVIII, annex 21 to the State's answering brief, folio 12143 to 12121).

> this meant, for example, that the gunshot residue tests, which make it possible to determine the distance of the weapon being shot […], were not available […].[237]

192. The decision by the War Chamber was upheld on April 5, 2004, by an order of the CSJM Review Chamber, approving the order to dismiss the case "given the lack of evidence to verify the commission of the crime under investigation."[238] The case was permanently dismissed by an order dated September 23, 2004.[239]

I. Continuation of the criminal case in the ordinary courts

193. An order issued on July 11, 2002 by the Third Special Criminal Chamber of Lima admitted Edgar Odón Cruz Acuña, brother of victim Eduardo Nicolás Cruz Sánchez, as a plaintiff in the criminal proceedings against Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, Roberto Huamán Ascurra and Jesús Zamudio Aliaga for the crime of murder of Eduardo Nicolás Cruz Sánchez.[240] It also admitted an appeal lodged on June 11, 2002 against the ruling (*supra* para. 183) that ordered house arrest as a precautionary measure and against the decision not to open an investigation of Fernando Dianderas Ottone, Martín Solari de la Fuente and Herbert Danilo Ángeles Villanueva.[241] The Specialized Criminal Prosecutor proposed that this order under challenge be upheld.[242]

194. An order issued on July 15, 2002 admitted Herma Luz Cueva Torres, mother of victim Herma Luz Meléndez Cueva, as a plaintiff in the criminal proceedings. The Third Special Criminal Chamber required her to verify her kinship, and she submitted the birth certificate, which was received in a brief on December 26, 2002. The above order, however, did not make her a plaintiff in the ordinary jurisdiction. In view of the procedural sequence and in the interest of ensuring judicial protection, the Transitory Criminal Law Chamber of the Supreme Court found in favor of holding her as a plaintiff in the case in its decision to vacate on July 24, 2013.[243]

195. The Third Special Criminal Chamber issued an order on September 4, 2002 admitting Nemecia Pedraza Chávez, mother of victim Víctor Salomón Peceros Pedraza, as a plaintiff in the same criminal proceedings.[244]

196. Once the jurisdictional dispute between the military courts and the ordinary courts had been settled, the Third Special Criminal Court continued on September 9, 2002 to hear the

---

[237] Ruling by the War Chamber of the Supreme Council of Military Justice, October 15, 2003 (evidence file, volume XVIII, annex 21 to the State's answering brief, folios 12143 to 12121).

[238] Ruling by the Review Chamber of the Supreme Council of Military Justice, April 5, 2004 (evidence file, volume XXV, helpful evidence, folios 17888 to 17908).

[239] *Cf.* Ruling by the War Chamber of the Supreme Council of Military Justice, September 23, 2004 (evidence file, volume XVIII, annex 21 to the State's answering brief, folios 12152 to 12151).

[240] *Cf.* Order by the Third Special Criminal Chamber, July 11, 2002 (evidence file, volume II, annex 24 to the case submission brief, folio 877).

[241] *Cf.* Order by the Third Special Criminal Chamber, July 11, 2002 (evidence file, volume II, annex 24 to the case submission brief, folio 877).

[242] *Cf.* Order by the Specialized Criminal Prosecutor, November 25, 2002 (evidence file, volume II, annex 25 to the case submission brief, folios 885 to 887).

[243] *Cf.* Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14670).

[244] *Cf.* Order by the Third Special Criminal Chamber, September 04, 2002 (evidence file, volume II, annex 24 to the case submission brief, folio 889).

facts attributed to accused Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, Roberto Huamán Ascurra and Jesús Zamudio Aliaga.[245]

197. The Special Criminal Chamber of the Superior Court of Lima acted on April 2, 2003 to partially overturn the June 11, 2002 order (*supra* para. 183) and agreed to open investigation of Juan Fernando Dianderas Ottone, Martín Solari de la Fuente and Herbert Danilo Ángeles Villanueva to be charged as accessories to a crime.[246]

198. The Third Special Criminal Chamber ordered the opening of a summary investigation on June 30, 2003 and issued a warrant for house arrest against Juan Fernando Dianderas Ottone, Martín Solari de la Fuente and Herbert Danilo Ángeles Villanueva.[247]

199. The process underway for the crime of serving as an accessory in injury of the State was joined with the ongoing murder process against Vladimiro Montesinos Torres et al., on August 12, 2003.[248]

200. Based on the expert reports and testimonies, the Specialized Provincial Prosecutor held on April 14, 2003 that criminal liability had been established for Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos and Roberto Huamán Ascurra for the crime of murder of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza. He also found that they were criminally liable, along with Jesús Zamudio Aliaga, for the same crime against Eduardo Nicolás Cruz Sánchez.[249]

201. The State was held as a third party holding civil liability in the process in the ordinary courts, based on a motion by the plaintiffs on October 3, 2003.[250]

202. The Third Special Criminal Chamber responded on October 15, 2004 to the motions lodged by the defendants and ordered the immediate release of Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos and Roberto Edmundo Huamán Ascurra, finding that "the usual period of detention […] had fully lapsed, not due to any negligence of action by this court, but because the records were forwarded with the final reports to the Special Superior Criminal Chamber on November [3], 2003, and remained eight months in that stage before being returned on July [7], 2004."[251]

203. The First Special Criminal Chamber of the Superior Court of Lima filed a motion on March 21, 2005 with the Criminal Chamber of the Supreme Court, asking it to determine which court should hear the case, given the changes in the legal status of one of the people being

---

245 *Cf.* Order by the Third Special Criminal Chamber, September 9, 2002 (evidence file, volume II, annex 30 to the case submission brief, folios 919 to 920).

246 *Cf.* Ruling by the Special Criminal Chamber of the Superior Court of Lima, April 2, 2003 (evidence file, volume II, annex 27 to the case submission brief, folios 891 to 894).

247 *Cf.* Order by the Third Special Criminal Chamber, June 30, 2003 (evidence file, volume II, annex 28 to the case submission brief, folios 906 to 910).

248 *Cf.* Order by the Third Special Criminal Chamber, August 12, 2003 (evidence file, volume II, annex 29 to the case submission brief, folio 917).

249 *Cf.* Prosecution hearing, April 14, 2003 (evidence file, volume I, annex 8 to the case submission brief, folio 634).

250 *Cf.* Order by the Third Special Criminal Chamber, October 03, 2003 (evidence file, volume II, annex 31 to the case submission brief, folio 922).

251 Orders by the Special Criminal Chamber, October 15, 2004 (evidence file, volume II, annex 33 to the case submission brief, folios 928 to 933).

held in detention in a process undertaken by a different court.[252] The Transitory Criminal Law Chamber of the Supreme Court found on September 22, 2005 that the case should be heard by the Third Special Criminal Chamber of the Superior Court of Lima.[253]

204. The Third Special Criminal Chamber of the Superior Court of Lima resolved on August 31, 2006 to uphold the objection lodged by the defense team of Juan Fernando Dianderas Ottone and Martín Fortunato Luis Solari de la Fuente and found that the criminal proceedings against them for complicity as accessories to the crime against the State had lapsed under the statute of limitations. It therefore ordered that the process be closed.[254]

205. The Third Superior Prosecutor, on September 22, 2006, charged Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos and Roberto Edmundo Huamán Ascurra as instigators for commanding the murder of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza. He also charged them and Jesús Zamudio Aliaga as instigators of the crime of murder against Eduardo Nicolás Cruz Sánchez.[255] He filed formal charges against Herbert Danilo Ángeles Villanueva as a direct perpetrator and against Martín Fortunato Luis Solari de la Fuente and Juan Fernando Dianderas Ottone as instigators of the crime of concealment, or accessories after the fact, in injury of the State.[256]

206. The Third Special Criminal Chamber ruled on its own motion, on October 20, 2006, that the criminal action against Herbert Danilo Ángeles Villanueva for the crime of concealment had lapsed under the statute of limitations.[257]

207. The Third Special Criminal Chamber of the Superior Court of Lima issued an order for trial on November 21, 2006, holding that there were grounds to try Nicolás de Bari Hermoza Ríos, Vladimiro Montesinos Torres and Roberto Edmundo Huamán Ascurra as criminal instigators of the crime of murder against Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza; and against Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos, Roberto Edmundo Huamán Ascurra and Jesús Salvador Zamudio Aliaga as criminal instigators in the murder of Eduardo Nicolás Cruz Sánchez[258]. It also declared defendant Jesús Salvador Zamudio Aliaga in contempt, because although he was "fully aware of the process against him [and] had engaged his attorney to appear […], he was displaying evasive procedural conduct."[259]

---

[252] *Cf.* Order by the First Special Criminal Chamber, March 21, 2005 (evidence file, volume II, annex 34 to the case submission brief, folios 951 to 952).

[253] *Cf.* Ruling by the Transitory Criminal Chamber of the Supreme Court on the jurisdictional dispute, September 22, 2005 (evidence file, volume II, annex 34 to the case submission brief, folios 857 to 960).

[254] *Cf.* Order 143-06 by the Third Special Criminal Chamber of the Superior Court of Lima, August 31, 2006 (evidence file, volume II, annex 35 to the case submission brief, folios 962 to 966).

[255] *Cf.* Opinion 13-2006 issued by the Third Specialized Prosecutor for Crimes of Corruption by Public Officials, on September 22, 2006 (evidence file, volume II, annex 44 to the case submission brief, folios 1043 to 1315).

[256] The opinion states for the record that a motion to vacate lodged by the public prosecutor on the decision to apply the statue of limitations was still pending. *Cf*. Opinion 13-2006 issued by the Third Specialized Prosecutor for Crimes of Corruption by Public Officials, on September 22, 2006 (evidence file, volume II, annex 44 to the case submission brief, folios 1043 to 1315).

[257] *Cf.* Order 187-06 by the Third Special Criminal Chamber of the Superior Court of Lima, November 21, 2006 (evidence file before the Commission, volume IV, folio 2575).

[258] *Cf.* Order 187-06 by the Third Special Criminal Chamber of the Superior Court of Lima, November 21, 2006 (evidence file before the Commission, volume IV, folios 2575 to 2579).

[259] Order 187-06 by the Third Special Criminal Chamber of the Superior Court of Lima, November 21, 2006 (evidence file before the Commission, volume IV, folio 2577).

208. An order on April 3, 2007 declared that the oral process would begin on May 18, 2007, following a motion by the defense to postpone the opening of the criminal trial.[260]

209. The criminal trial began on May 18, 2007 before the Third Special Criminal Chamber of the Superior Court of Lima, empaneled by superior judges José Antonio Neyra Flores, Manuel Alejandro Carranza Paniagua and Carlos Augusto Manrique Suárez, who presided over the debate.[261]

210. The membership of the panel of judges on the Third Special Criminal Chamber changed on January 7, 2009 when Judge José Antonio Neyra Flores was promoted to the Supreme Court.[262] Judge Iván Sequeiros Vargas was appointed presiding judge of the chamber. The Third Special Criminal Chamber was therefore comprised of superior judges Iván Sequeiro Vargas, Manuel Alejandro Carranza Paniagua and Carlos Augusto Manrique Suárez, who continued to preside over the debate.

211. The National Council of the Judiciary resolved on July 23, 2009 not to confirm Carlos Augusto Manrique Suárez to the position of criminal judge. He appealed this decision on August 31, 2009, and but the appeal was denied on September 30, 2009.[263] Nevertheless, because one of the judges had been changed, the Third Special Criminal Chamber of the Superior Court of Lima ruled on October 15, 2009 that "the public hearing has broken down, although the evidence files served in the criminal trial remain current," and it ordered a date to be set for beginning a new trial "as soon as possible".[264]

212. The Third Special Criminal Chamber, empaneled by superior judges Iván Sequeiros Vargas, Manuel Alejandro Carranza Paniagua—now presiding over debate—and Sonia Liliana Téllez Portugal,[265] issued a ruling on January 7, 2010 that the new criminal trial would begin on March 19, 2010.[266]

213. The process was declared "complex" in an order on July 5, 2010, "in view of its significance and difficulty."[267]

---

260 *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, April 3, 2007 (evidence file, volume II, annex 36 to the case submission brief, folio 972).

261 *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13180).

262 *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13180).

263 *Cf.* Order 199-2009-PCNM by National Council of the Judiciary en banc, September 30, 2009 (evidence file, volume II, annex 41 to the case submission brief, folios 1023 to 1035).

264 Order 182-09 by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2009 and judicial notification November 6, 2009 (evidence file, volume II, annex 42 to the case submission brief, folios 1037 and 1038).

265 *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13181).

266 *Cf.* Order by the Third Special Criminal Chamber of the Superior Court of Lima, January 7, 2010 and judicial notification, January 13, 2010 (evidence file, volume II, annex 43 to the case submission brief, folios 1040 and 1041).

267 Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14671). See also: ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13180).

214. Order 001-2011-P-CSJL/PJ established judicial appointments for judicial year 2011. Judge Ramiro Salinas Siccha was assigned as president of the Third Special Criminal Chamber, replacing Judge Iván Sequerios Vargas. Thus, the chamber was now made up of superior judges Ramiro Salinas Siccha, Manuel Alejandro Carranza Paniagua and Sonia Liliana Téllez Portugal.[268]

215. The trial was interrupted again on May 20, 2011 during the criminal proceedings. Judge Téllez Portugal had applied for sick leave and, with this change to the panel, the laws in effect held that the trial should be suspended but that "documentary and expert evidence should remain current, as well as evidence difficult to replicate that had been under examination in the trial."[269]

216. The executive council of the judiciary ordered on May 25, 2011 that the Third Special Criminal Chamber of the Superior Court of Lima should take exclusive responsibility for the criminal trial of the "Chavín de Huántar" case and two other processes.[270]

217. The entire membership of the Third Special Criminal Chamber changed on May 16, 2011.[271] The chamber, now made up of superior judges Carmen Liliana Rojjasi Pella, Carolina Lizárraga Houghton and Adolfo Fernando Farfán Calderón, issued an order on May 20, 2011, that the final criminal trial should begin on June 1, 2011.[272]

218. The debate finalized on October 5, 2012, following 109 sessions.[273]

219. The Third Special Criminal Chamber of the Superior Court of Lima decided on October 15, 2012 to acquit Nicolás de Bari Hermoza Ríos, Vladimiro Montesinos Torres and Roberto Edmundo Huamán Ascurra of the charges against them for criminal instigation of the crime of murder of Herma Luz Meléndez Cueva, Víctor Salomón Peceros Pedraza and Eduardo Nicolás Cruz Sánchez. The court also decided to withhold judgment of fugitive defendant Jesús Salvador Zamudio Aliaga, until he had been apprehended, and orders were given nationwide to find him immediately and arrest him, and also to prevent him from leaving the country. His case was therefore set aside provisionally.[274]

220. The Third Special Criminal Chamber of the Superior Court of Lima ruled on whether an order had been issued to kill the MRTA members indiscriminately. Specifically, the Court found:

---

[268] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13181).

[269] Order by the Third Special Criminal Chamber, May 20, 2011 (evidence file, volume VIII, annex 13 to the brief of pleadings, motions and evidence, folios 5557 to 5559).

[270] *Cf.* Administrative order 146-2011-CE-PJ by the executive board of the judiciary, May 25, 2011 (case file before the Commission, volume V, folio 4091).

[271] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13182).

[272] *Cf.* Order by the Third Special Criminal Chamber, May 20, 2011 (evidence file, volume VIII, annex 13 to the brief of pleadings, motions and evidence, folios 5557 to 5559).

[273] *Cf.* Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14672).

[274] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13177 to 13692).

> [… i]t has been shown that the order given by the chairman of the Joint Command of the Armed Forces, Division General Nicolás de Bari Hermoza Ríos, under whom the plan of operations to be called "Nipón 96" was developed, called for absolute respect for human rights, and that provisions had been made to evacuate the subversives, which therefore meant that there was a possibility of injury or arrest of the latter, in other words, there was no order whatsoever to kill the hostage-takers indiscriminately […].[275]

221. The chamber found that this was not a case of crimes against humanity. It held:

> […] we do not find this to be a case of a crime against humanity, which is a concept of criminology, basically because it was not committed as part of a state policy for selective or systematic elimination of a subversive group; this court has not seen proof that it was designed, planned or overseen by the highest levels of state power, or executed by public agents, that is, military intelligence officers, or in the framework of a state policy under orders by the intelligence service.[276]

222. The majority judgment by the Third Special Criminal Chamber concerning the MRTA members was that the deaths of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza had taken place in combat.[277] The chamber reached this conclusion based on the following considerations: (i) the statement by two commandos who had admitted killing Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza in combat when the two had entered armed into room "I" at the time when the Japanese hostages were being evacuated; (ii) that all the dead MRTA members had been shot many times, as had Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, because the commandos were moving two by two through the rooms of the residence and shooting when they saw subversives; (iii) that the expert opinions were unable to identify what the effect of the gunshots had been because it was impossible to determine which one had been fatal; (iv) that the only incriminating information was the statement by Hidetaka Ogura, who had been unable to obtain a good enough sight line to see whether the two victims had surrendered, because the metal ladder placed on the balcony for the freed hostages to climb down blocked his view of the alleged facts.[278]

223. The court drew the following conclusions about the death of Eduardo Nicolás Cruz Sánchez:

> [T]he majority of the expert opinions examined throughout the process […] demonstrate that the guerrilla known as "Tito" died from a single bullet to the head at a distance ranging from 60 centimeters to six or seven meters, that the body may have been almost completely immobilized or the head may have been inclined slightly downward at the time of impact, and finally, that the head was hit by a a nine-millimeter projectile. This leads the majority to believe, […] in principle, that the subversive was killed after being detained, and the final proven fact is that he was in the power of the police from the national intelligence service under the command of Zamudio Aliaga (a circumstance that

---

[275] Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13498).

[276] Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13677).

[277] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13682).

[278] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13682 and 13683).

> will need to be explained further in the criminal process), either at the time of detention or subsequently […].[279]

224. In section F of the judgment, "Extrajudicial execution," the court first noted that this was not codified as an autonomous crime in the Peruvian criminal code,[280] and held that:

> The criminal proceedings have proven the death of Eduardo Nicolás Cruz Sánchez, who was detained or apprehended by two police officers from the National Intelligence Service after the rooms of the residence had already been brought under control and the hostages had been evacuated to neighboring houses near the residence of the Japanese ambassador; he was then found prone in an area located between House 01 and the residence itself, with a single bullet wound that entered from the left side of the neck and was necessarily fatal, and he was seen in this area under the guard of personnel from the National Intelligence Service. Also relevant are the opinions concerning the distance at which the shot was fired, the position of Cruz Sánchez' body at the time of impact, and the caliber of the projectile able to cause a wound of this kind. However, it has not been possible to determine whether this happened by order or command from any the defendants present in what has been called the "parallel chain of command", that is, the commission of the crime as the direct consequence of a policy of state.[281]

225. The Third Chamber also ruled on the scope of the judicial decisions issued by the military courts and held that the decision for dismissal handed down in that jurisdiction included the case for the death of Eduardo Nicolás Cruz Sánchez, even though the order to open investigation that was delivered by that court did not include him as a victim. Specifically, the court maintained:

> These judicial rulings from the military courts are based on the alleged extrajudicial execution of four members of the subversive group known as the Túpac Amaru Revolutionary Movement, identified as Roli Rojas Fernández, Víctor Salomón Peceros Pedraza, Herma Luz Meléndez Cueva and Luz Dina Villoslada Rodríguez, when they had surrendered at the end of the military operation; that is, the order to open investigation in the military jurisdiction did not hold Eduardo Nicolás Cruz Sánchez as a victim. Nonetheless, in the majority view of the judicial panel, bearing in mind that the ordinary courts yielded jurisdiction to the military courts so they could also hear the cases of Augusto Jaime Patiño, José Williams Zapata, Luis Alatrista Rodríguez, Carlos Tello Aliaga, Benigno Leonel Cabrera Pino and Jorge Orlando Fernández Robles, who came under investigation in the ordinary courts for the death of Eduardo Nicolás Cruz Sánchez, it may be inferred that the order for dismissal in the military courts also includes this victim, and indeed, the supreme military ruling, in the judgment dated [April 5, 2004], takes jurisdiction based on the yielding of jurisdiction for Cruz Sánchez […], which does not prevent this criminal court from examining this matter in the context of the criminal investigation to shed light on the case of the defendants at trial.[282]

226. The Third Chamber also reasoned on whether the military courts had jurisdiction to hear crimes of this kind. It held:

---

[279] Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13684).

[280] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13680).

[281] Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13681).

[282] Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13669 to 13670).

> While we may disagree concerning the power of military justice to hear crimes of this nature, we must admit that there is a judgment delivered by those courts that has remained on the books because it has never been overruled by any authority; moreover, the jurisdiction over the military personnel involved was upheld by the highest judicial authority, the Supreme Court of Peru.[283]

227. The court, in operative paragraph five of its judgment, concluded that the circumstances of the death of Eduardo Nicolás Cruz Sánchez were different from those of MRTA members Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, because it had been established with great clarity in his case that personnel from the National Intelligence Service, not members of the "*Tenaz* Patrol", had been involved in his death, and it decided, based on domestic law, to forward a certified copy of its proceedings to the Superior Criminal Prosecutor to order the relevant investigations.[284]

228. The judgment of the Third Special Criminal Chamber was appealed on October 29, 2012 by the Assistant Prosecutor General from the Second Specialized Office of Prosecution for Crimes of Corruption by Public Officials,[285] on behalf of the plaintiffs representing victims Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva and by the plaintiff representing victim Eduardo Nicolás Cruz Sánchez.[286]

229. The prosecution argued in its appeal that sufficient evidence existed to demonstrate the criminal liability of defendants Vladimiro Montesinos Torres, Nicolás de Bari Hermoza Ríos and Roberto Edmundo Huamán Ascurra. The prosecution based its motion to vacate on the following arguments:[287] (i) that "the chamber should not admit any irregularities in the investigation stage, such as to cover up fingerprints, evidence or traces"; (ii) that "the partial selective autopsies on the bodies of the MRTA members at the Central Hospital of the National Police of Peru were performed contrary to the laws in place at the time of the facts"; (iii) that "the criminal chamber held that the forensic opinions given in the autopsies performed on the osseous remains of MRTA members, conducted by the Forensic Institute in 2001, were still valid"; (iv) that there were "flagrant flaws in the production of the record of identification and removal of the bodies […]"; (v) that "the military operation used the shooting technique known as SIS, Selective Instinctive Shooting"; (vi) that "the head of the '*Tenaz* Patrol' held that the deaths of only 13 terrorists had been reported, but no one had reported on the means and circumstances of the death [of Eduardo Nicolás Cruz Sánchez]"; (vii) that the "counterterrorist unit that conducted the military operation […] did not include members of the National Intelligence Service"; (viii) that "the criminal chamber did not acknowledge that Peruvian Army Lieutenant Colonel Jesús Salvador Zamudio Aliaga was subordinate to Peruvian Army

---

[283] Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13672).

[284] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13690 to 13691). Superior court judge Carolina Lizárraga Houghton attached a separate opinion to this ruling, stating that the investigation should not have been limited to members of the National Intelligence Service, and she believed that the judgment delivered in the military jurisdiction did not cover facts regarding the death of Eduardo Nicolás Cruz Sánchez (volume XXI, folios 13692 to 13710).

[285] *Cf.* Motion to vacate lodged by the Assistant Superior Prosecutor from the Second Specialized Office of Prosecution for Crimes of Corruption by Public Officials, October 29, 2012 (evidence file, helpful evidence, volume XXI, folios 14617 a 14665).

[286] *Cf.* Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14678).

[287] Motion to vacate lodged by the Assistant Superior Prosecutor from the Second Specialized Office of Prosecution for Crimes of Corruption by Public Officials, October 29, 2012 (evidence file, helpful evidence, volume XXI, folios 14617 to 14665).

Lieutenant Colonel Roberto Edmundo Huamán Ascurra"; (ix) that "the criminal chamber found that human rights [had been respected], [but], nonetheless, it had been proven that Eduardo Nicolás Cruz Sánchez […] was first captured and then executed"; (x) that "it had been confirmed that there was communication between Jesús Zamudio Aliaga and Colonel José Williams Zapata"; (xi) that the criminal chamber held that the perimeter of the residence was also […] an area of military presence; (xii) regarding "the presence of Roberto Huamán Ascurra inside the residence of the Japanese ambassador, carrying a firearm"; (xiii) regarding "the classification of the facts at trial as crimes against humanity"; (xiv) that "the Constitution in effect in the 1990s empowered former President Alberto Fujimori Fujimori to direct the country's domestic and foreign wars"; (xv) regarding "Huamán's order to Manuel Himerón Ramírez Ortiz to join the *Tenaz* Patrol, per se, at the time the military operation took place, [and] he would fight and record on film"; (xvi) regarding the "participation of Vladimiro Montesinos Torres, before, during and after the military operation […] and his responsibility in the facts "; (xvii) that "Vladimiro Montesinos Torres ordered Fernando Gamero Febres to bury the bodies of the MRTA members"; (xviii) that "Vladimiro Montesinos Torres was de facto head of the SIN, not an advisor […]";(xix) that "Roberto Huamán Ascurra should be acknowledged as a trusted advisor to Vladimiro Montesinos Torres"; (xx) that "given the nature and characteristics of the facts, it [was] impossible to demand direct evidence, and therefore, indirect evidence needed to be used"; (xxi) that "the attorney of Nicolás Bari Hermoza Ríos […] recognize[d] that a murder had been committed [in] the case of Eduardo Nicolás Cruz Sánchez"; (xxii) regarding "the order by Roberto Huamán Ascurra for members of the […] 'SIN' to enter and take part in executing the military operation."

230. The plaintiffs for victims Herma Luz Meléndez Cueva, Víctor Salomón Peceros Pedraza, and Eduardo Nicolás Cruz Sánchez based their motions to vacate on the claim that sufficient evidence existed to uphold a conviction.[288]

231. An executive order on November 13, 2012 transferred the case file to the Prosecutor General for an opinion, which was delivered on April 26, 2013, holding that that the verdict would not be overruled.[289]

232. At the request of several parties to the criminal proceedings, the Transitory Criminal Chamber of the Supreme Court ruled on May 25, 2013 that a hearing would take place on July 10, 2013. The hearing was attended by counsel for victims Herma Luz Meléndez Cueva, Víctor Salomón Peceros Pedraza and Eduardo Nicolás Cruz Sánchez, and defendant Nicolás de Bari Hermoza Ríos, as well as the Solicitor General of the Ministry of Defense, and the Solicitor General for the chairman of the Council of Ministers.[290]

233. The Transitory Criminal Chamber of the Supreme Court delivered its decision on July 24, 2013, ruling on the motions to vacate. Its judgment found the following concerning the deaths of MRTA members Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza:

> [… I]n the instant case, the statement by Hidetaka Ogura concerning victims Meléndez Cueva and Peceros Pedraza is not credible and has not been corroborated on any point. This means it cannot be held as proven or conclusive evidence, nor can it be considered consequential. The evidence for the defense detracts from the plausibility of his story. At

---

[288] *Cf.* Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14679).

[289] *Cf.* Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14679).

[290] *Cf.* Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14680).

the same time, forensic evidence points to crossfire in combat, not to a summary execution of overpowered, unarmed MRTA guerrillas.[291]

234. The judgment also discussed the death of Eduardo Nicolás Cruz Sánchez as follows:

> [… W]ith respect to the death of Cruz Sánchez, the only unfinished matter is to determine whether the extrajudicial execution of this victim, based on the facts held as proven in the trial judgment, was ordered by defendants Hermoza Ríos, Montesinos Torres and Huamán Ascurra.
>
> The suggestion of an alleged parallel line of command has already been discarded. Police officers Torres Arteaga and Robles Reynoso named only Zamudio Aliaga, who indeed denies it.
>
> It is true that Army Lieutenant Colonel Zamudio Aliaga was a member of the SIN and Army Lieutenant Colonel Huamán Ascurra and presidential advisor Montesinos Torres were in his line of command, and that the latter was part of the COT, as were Army General Hermoza Ríos, Head of CCFFAA, and several others. This assertion can thus be considered oblique evidence—the fact alluded to is not highly probable—and, indeed, contingent or immaterial. The military operation unfolded very quickly, it was precise and effective, and as has been established, it was conducted under orders for cases of injured and captured MRTA members. […]
>
> [… I]t can therefore be asserted only that the extrajudicial execution, as held by the trial court, and which was not included in the appeal, was an isolated crime and not part of the operation or the plans developed by higher-ranking authorities.[292]

235. Finally, the Transitory Criminal Chamber of the Supreme Court found no need to vacate the judgment of the Special Criminal Chamber of Lima.[293]

236. The lead prosecutor of the Second Criminal Prosecutor General agreed on January 10, 2014 that "sufficient copies be forwarded to the relevant provincial prosecutor [to] investigate the facts"[294] surrounding the death of Eduardo Nicolás Cruz Sánchez, in accordance with the provisions of operative paragraph five of the judgment of October 15, 2012 (*supra* para. 227).

J. Criminal proceedings against Alberto Fujimori Fujimori and Manuel Tullume Gonzáles

237. The Prosecutor General, upholding the right of former president Alberto Fujimori Fujimori to have a preliminary hearing, filed a complaint against him with the National Congress on August 4, 2003 for the alleged crime of murder against Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, so that his constitutionally permissible charge could be approved and he could be tried. The complaint suggested two different hypotheses about the alleged execution of the MRTA members: first, that the act had been ordered in advance as part of the design of the operation, or second,

---

[291] Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14711).

[292] Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14721).

[293] *Cf.* Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14723).

[294] Opinion 018-2014 by the Second Criminal Prosecutor General, January 10, 2014 (evidence file, volume XXXI, annex 5 to the State's final written arguments, folios 21068 to 21069).

that it had been the result of a decision made by President Alberto Fujimori Fujimori immediately after they were captured.[295]

238. The Specialized Provincial Prosecutor for Human Rights Crimes lodged criminal charges on June 12, 2007 against Alberto Fujimori Fujimori as alleged co-perpetrator in the murder of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, and against Manuel Tullume Gonzáles as alleged accomplice to the murder of Eduardo Nicolás Cruz Sánchez.[296]

239. The Third Criminal Chamber opened an investigation of Fujimori Fujimori on July 16, 2007 and found that there were insufficient grounds to investigate Tullume Gonzáles.[297] The prosecution appealed the decision not to investigate Manuel Tullume Gonzáles on August 1, 2007, along with the warrant for house arrest of Alberto Fujimori Fujimori.[298]

240. The Republic of Chile was requested on October 29, 2007 to protract the extradition of former President Alberto Fujimori Fujimori, and the Permanent Criminal Chamber of the Supreme Court found on February 18, 2008 that the request was admissible and ordered that the extradition papers be sent.[299]

241. The prosecutor requested the Third Special Criminal Chamber on January 31, 2008 to lengthen the term for investigation, and the request was granted on February 5, 2008.[300]

242. The plaintiffs filed a motion with the prosecutor, who issued an opinion on April, 30, 2008 requesting that the order to initiate investigations be widened to hold the State of Peru as a third party with civil liability.[301]

243. The Sixth Special Criminal Chamber of the Superior Court of Lima ruled on August 28, 2008 to vacate the decision of the Third Special Criminal Court and ordered that criminal proceedings be opened against Manuel Tullume Gonzáles, as an alleged accessory to the murder of Herma Luz Meléndez Cueva, Víctor Salomón Peceros Pedraza and Eduardo Nicolás Cruz Sánchez and issued an arrest warrant against Alberto Fujimori Fujimori.[302] The Third

---

[295] *Cf.* Opinion by the Prosecutor General, August 4, 2003 (evidence file, volume XXVII, CVR evidence, folios 19801 to 19808), and Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), pp. 728, 729 and 734 (evidence file, volume I, annex I to the case submission brief, folios 14, 15 and 20).

[296] *Cf.* Criminal charge lodged by the Specialized Provincial Prosecutor for Human Rights Crimes, June 12, 2007 (evidence file, volume II, annex 38 to the case submission brief, folios 977 to 993).

[297] *Cf.* Judicial Notice of the order by the Third Special Criminal Chamber, July 16, 2007 (evidence file, volume II, annex 39 to the case submission brief, folios 995 to 1006). See also, report 001-2008-JSA-FPECDDHH of the Head of the Specialized Provincial Prosecution for Human Rights Crimes (evidence file, volume II, annex 37 to the case submission brief, folios 974 to 975).

[298] *Cf.* Report 001-2008-JSA-FPECDDHH of the Head of the Specialized Provincial Prosecution for Human Rights Crimes (evidence file, volume II, annex 37 to the case submission brief, folios 974 to 975).

[299] *Cf.* Report 001-2008-JSA-FPECDDHH of the Head of the Specialized Provincial Prosecution for Human Rights Crimes (evidence file, volume II, annex 37 to the case submission brief, folios 974 to 975).

[300] *Cf.* Report 001-2008-JSA-FPECDDHH of the Head of the Specialized Provincial Prosecution for Human Rights Crimes (evidence file, volume II, annex 37 to the case submission brief, folios 974 to 975).

[301] *Cf.* Report 001-2008-JSA-FPECDDHH of the Head of the Specialized Provincial Prosecution for Human Rights Crimes (evidence file, volume II, annex 37 to the case submission brief, folios 974 to 975).

[302] *Cf.* Judicial notification of the ruling by the Sixth Special Criminal Chamber of the Superior Court of Lima, August 28, 2008 (evidence file, volume VIII, annex 14 to the pleadings, motions and evidence brief, folios 5560 to 5563).

Special Criminal Chamber issued an order on March 30, 2009, in compliance with the decision of the Sixth Special Criminal Chamber, to widen the order to open investigation to include Manuel Tullume Gonzáles and issued a warrant of house arrest against him.[303]

244. The Third Specialized Prosecutor for Crimes of Corruption by Public Officials found on October 5, 2011 that there were grounds for bringing Alberto Fujimori Fujimori and Manuel Tullume Gonzáles to trial.[304] The Fourth Chamber for Criminal Prosecution found on November 15, 2011 that there were grounds for bringing the accused to trial, issued an order to set the opening date on December 12, 2011, and provisionally suspended the trial for the accused Fujimori Fujimori until the request for extradition could be settled.[305]

245. No information or documentation has been submitted to clarify the current status of this process.

IX
THE RIGHT TO LIFE, READ IN CONJUNCTION WITH THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS

246. The Court will proceed in this chapter to analyze the alleged violation of the right to life in injury of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, bearing in mind the following contextual factors surrounding this case: the presence of a non-international armed conflict, a situation in which force was used against the members of the MRTA as part of a hostage rescue operation, and the fact that the alleged victims were not civilians, but members of the MRTA, who had taken an active part in the hostilities. The Court will first summarize the arguments of the parties and the Commission and will clarify the cause of action that it is called upon to adjudicate. The Court will also discuss general principles concerning the duties to respect and guarantee the right to life and principles applicable to the use of force by agents of the state in such a setting as this, and then proceed to address the specific circumstances in which each death took place so as to determine whether this is a case of international State responsibility for the alleged violation of the right to life in injury of these persons.

A. Arguments of the parties and of the Commission

247. The ***Commission*** "recognize[d] that the operations served the legitimate purpose of protecting hostages whose lives and personal integrity had been exposed to constant danger." It therefore did not challenge the legitimacy of the operation as a mechanism to rescue the hostages or its successful outcome in meeting that objective. Based on its review of the available evidence, however, the Commission framed a legal definition of the deaths of MRTA members Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza as extrajudicial executions, thus arbitrary violation of the right to life, because these deaths had occurred "in circumstances under which it can be affirmed that they had been removed from combat, and therefore their lives were protected by Article 4 of the American Convention, interpreted in light of the standards of international humanitarian law that set minimum guarantees for persons *hors de combat.*"

---

[303] *Cf.* Judicial notification of the ruling by the Third Special Criminal Chamber of the Superior Court of Lima, March 30, 2009 (evidence file, volume VIII, annex 15 to the pleadings, motions and evidence brief, folios 5564 to 5566).

[304] *Cf.* Opinion of the Third Specialized Prosecutor for Crimes of Corruption by Public Officials, October 5, 2011 (evidence file, volume VIII, annex 16 to the pleadings, motions and evidence brief, folios 5567 to 5605).

[305] *Cf.* Ruling by the Fourth Criminal Chamber of the Superior Court of Lima, November 15, 2011 (evidence file, volume VIII, annex 18 to the pleadings, motions and evidence brief, folios 5610 to 5618).

248. The Commission held that the MRTA members who had captured the residence of the Japanese ambassador "were legitimate military targets during the time they were actively participating in the confrontation" and that those who "had surrendered, or had been captured o wounded and had ceased hostile acts were effectively in the power of agents of the Peruvian State, who from the legal standpoint, were now barred from attacking them or subjecting them to other acts of violence," because once they were *hors de combat*, they were "holders of the non-derogable guarantees of humane treatment stipulated in Common Article 3 of the Geneva Conventions and Article 4 of the American Convention." It added, "while police officers may legitimately use lethal force in the conduct of their duties, it should be an exceptional measure[,] […] planned and limited proportionally by the authorities, such that they proceed to the 'use of force or instruments of coercion only after all other forms of control have been attempted and have failed.'"

249. The Commission commented, with regard to the death of Eduardo Nicolás Cruz Sánchez, alias "Tito", that "the testimonies of former hostage Hidetaka Ogura, as well as statements by police officers Raúl Robles Reynoso and Marcial Teodorico Torres Arteaga, heads of security in the house contiguous to the ambassador's residence, [were] consistent in claiming that […] he had left the premises hiding among a group of hostages, but was found out. The officers in charge therefore […] tied his hands, pushed him to the floor and notified their commanding officer, Colonel Zamudio Aliaga, about his presence, upon which a commando appeared and took him back inside the ambassador's residence. [A]t the time he was turned over to the military officer and taken back into the ambassador's residence, Eduardo Nicolás Cruz Sánchez was alive." The Commission added that his body had appeared that same night inside the ambassador's residence "with a bullet to the lower part of the neck and, as stated in the report on removal of the body, with 'a grenade [in his hand] that he had not thrown.'" The Commission pointed to the partial selective autopsy performed the day after the confrontation, which found that Eduardo Nicolás Cruz Sánchez "had received a 'severe injury' from the projectile of a firearm to the right side of the head"; the 2001 autopsies then conducted a trajectory analysis of the wound and posited that Cruz Sánchez "had to have been immobile and then shot at" and that he was "on a lower plane than the shooter, who was behind him and to [his] left." According to the Commission, "[t]he forensic test on the wounds of Eduardo Nicolás Cruz Sánchez are consistent with extrajudicial execution."

250. To this should be added the fact that, according to the Commission, "there were grounds to believe that the scene of his death had been tampered with" and that the military team had "blocke[d] the timely performance of the first procedures following the deaths of the MRTA members[, which] undermined the subsequent investigations, because even though new, more complete expert reports were prepared four years after the facts, the passage of time and the flaws in the first autopsies hindered the completion of a full analysis."

251. The Commission discussed the deaths of Meléndez Cueva and Peceros Pedraza and pointed to several items of evidence suggested that both had been victims of extrajudicial execution, such as (i) the testimony of Hidetaka Ogura, who claimed that he had seen these MRTA members alive and surrounded by military personnel; (ii) the report on the removal of the bodies, which made no mention of whether the MRTA guerrillas were armed, or whether weapons had been found near the bodies; (iii) the fact that a member of the Explosive Deactivation Unit who later entered the room where the bodies of the MRTA members were found said that they had been killed without putting up any resistance, as he did not see "any weapons around them, and the positions in which they were found bore this out;" (iv) these members of the MRTA had received multiple bullets to vital parts of the body, as would be consistent with the technique of selective shooting, the purpose of which is to "eliminate the enemy, and not neutralize him, even if he has surrendered;" (v) testimonies delivered by

military personnel involved were inconsistent as to the person or persons who had shot the MRTA members, and moreover, they could not explain how these guerrillas had entered through the hallway, which had already been brought under the control of the commandos; (vi) the State did not perform timely, complete autopsies immediately after the incident, nor did it conduct a conscientious, impartial, effective investigation of what had happened. The Commission added that forensic evidence "suggest[ed] extrajudicial execution [of these two MRTA fighters]" and that, as in the case of Cruz Sánchez, "the circumstances of death [had likely been] covered up through actions and omissions at the crime scene." The Commission added that the State had not given a consistent explanation of the way these MRTA members had died or about the necessity and proportionality of the use of force.

252. The ***representatives*** agreed with the Commission, adding that they "found it more than proven that at the time of [his alleged execution], Eduardo Nicolás Cruz Sánchez had been unarmed and posed no threat, and therefore the use of lethal force against him could not be justified in any sense." They added that to date, "the State ha[d] not offered any convincing explanation to the contrary." They concluded, "[t]here could be no doubt, then, that Mr. Cruz Sánchez had been rendered *hors de combat*", and thus, "the use of lethal force against him was absolutely illegal and the same conclusion obtains even if, by analogy, we were to draw on the provisions of Common Article 3 of the Geneva Conventions." They asserted, "the State has given no convincing explanation as to how, after he had been captured unarmed, he could have gained access to a grenade, and has not shown any evidence that he may have attempted to use it; [they have also failed] to give any explanation as to why, if he was allegedly in combat, he received just one bullet, which could have been possible only if the victim had been immobilized."

253. The representatives also made reference to the deaths of Meléndez Cueva and Peceros Pedraza, agreeing substantially with the arguments of the Commission, and stating that "there [was] abundant evidence […] showing that they [had been] executed arbitrarily by agents of the State." They pointed to "the testimony of former hostage Hidetaka Ogura, who had observed two members of the MRTA, Ms. Meléndez Cueva and a man he could not recognize, surrounded by military personnel." He then heard her saying "don't kill him" or "don't kill me" or "don't kill us." That is, both were *hors de combat*, and therefore it was not necessary to use force, much less, lethal force." Although military personnel from the Delta Eight squad who were responsible for taking control of Room "I" had made statements that "these [persons] were armed and died in a confrontation", the representatives found that such statements contained serious contradictions. They commented that "the forensic evidence [was] not consistent with the existence of an alleged confrontation." The representatives concluded that "the theory that Mr. Peceros Pedraza and Ms. Meléndez Cueva died in an armed clash [is] false, and affirmed that "they [were] executed after being captured in the circumstances described by former hostage Hidetaka Ogura, after they had ceased to be a threat and were pleading for their lives, and this should be considered a form of surrender."

254. The ***State*** said that Eduardo Nicolás Cruz Sánchez was one of the MRTA members "who [had] put up the most resistance at the time of the hostage rescue" and that "he was the one who [threw] grenades into the hallway at the commandos." This was why, according to the State, Cruz Sánchez "had no intention whatsoever of surrendering." The State of Peru also denied that Cruz Sánchez had received just one bullet during the hostage rescue operation, and it did not "understand why such important information had been omitted from the forensic anthropology report by Clyde Snow and José Pablo Baraybar." It pointed out that the report by the Forensic Medical Institute "showed that 'Tito', NN14, also ha[d] been struck by a projectile in the area of the abdomen-pelvis." The State therefore believed that the forensic anthropology report contained "unfortunate errors". The State also made reference to the testimony by Hidetaka Ogura, noting that "no other hostage, even the ones named by Ogura,

has confirmed his story." The State then discussed the statements made by officers Robles Reynoso and Torres Arteaga of the National Police of Peru, maintaining that "there [we]re several contradictions in the statements made by these officers." The State concluded that the arguments by the Commission and the representatives "did not meet the necessary threshold to be able to assert that there had been an extrajudicial execution in the case of [Cruz Sánchez], resulting from a single bullet preceded by a situation of immobilization." In the State's view, therefore, "the evidence and expert statements brought forward by the State of Peru in the process before the Inter-American Court show that other alternatives or hypotheses could explain the death of [Eduardo Nicolás Cruz Sánchez]."

255. The State asserted that it was essential to recognize "the circumstances of armed conflict to understand that the taking of lives of the terrorist combatants was not arbitrary […] [and to recall] that the illegal violence practiced by the terrorists, which was [...] 'imminent, immediate and left neither alternatives nor time to reflect or deliberate,' had made it necessary; thus the intervention and their deaths in combat were not arbitrary; indeed, they had occurred in obedience to an even higher standard than that required by international instruments [themselves]." It noted, "[wi]th regard to the statement by Ogura, several declarations had been taken from the commandos who rescued the hostages and from hostages themselves to the effect that visibility at the time of the rescue was negligible and they could not even see the palms of their own hands." To this should be added, in the view of the State, that "from the site where the ladder had been set up to evacuate the Japanese hostages, the angle of vision made it impossible to see inside the room, or even into the hallway." The statements by Hidetaka Ogura, added the State, "[we]re not consistent over the course of the criminal process in the domestic courts, and later, internationally."

256. The State also allowed for the contradictions between statements by the commandos and the events that occurred in the room labeled "I", noting that this could have been due "to the poor visibility" in the room at the time of the facts. The State concluded, therefore, that based on "[t]he evidence and circumstances as described, it is clear that Hidekata Ogura was not telling the truth and [that Meléndez Cueva and Peceros Pedraza] died in combat when they entered the room with firearms to stop the evacuation of the group of hostages present there."

B. Considerations of the Court

B.1 The right to life and analysis of the use of force in the circumstances and context of the facts in this case.

257. The Court recalls Article 4(1) of the American Convention,[306] that everyone has the right to have his or her life respected. The Court has held repeatedly that the right to life holds a central position in the American Convention as the essential precondition for the exercise of all the other rights.[307] Article 27(2) of the Convention further states that this right is one of the fundamental rights that cannot be derogated insofar as it is enshrined as one of the rights that may not be suspended in time of war, public danger or other emergency that threatens the independence or security of States Parties.[308]

---

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

307 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits.* Judgment of November 19, 1999. Series C No. 63, para. 144, and *Case of Landaeta Mejías Brothers et al. v. Venezuela. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 27, 2014. Series C No. 281, para. 122.

308 *Cf. Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs.* Judgment of January 31, 2006. Series C No. 140, para. 119, and *Case of Zambrano Vélez et al. v. Ecuador. Merits, Reparations and Costs.* Judgment of July 4, 2007. Series C No. 166, para. 78.

258. Compliance with Article 4 in conjunction with Article 1(1) of the American Convention not only presumes that no person shall be deprived of his life arbitrarily (negative obligation), but also requires the States to take all necessary measures to protect and preserve the right to life (positive obligation),[309] as part of the duty to guarantee full and free exercise of the rights of all persons under their jurisdiction.[310]

259. This is why States have the obligation to guarantee the creation of the conditions required for violations of this inalienable right not to occur, and in particular, the duty to prevent its agents from violating it. This active protection by the State of the right to life involves not only lawmakers, but also every government institution and all those whose job is to safeguard security, whether the police or the armed forces.[311]

260. Consequently, States must adopt all necessary measures to create a legal framework that deters any possible threat to the right to life; establish an effective system of justice to investigate, punish, and redress deprivation of life by state officials or private individuals,[312] and guarantee the right to unimpeded access to conditions for a dignified life.[313] Especially, States must see that their security forces, which are entitled to use legitimate force, respect the right of life of the people under their jurisdiction.[314]

261. Article 4(1) of the American Convention also states that no one shall be arbitrarily deprived of life. This means that not all deprivation of life can be be found contrary to the Convention, but only when it takes place in a way that is arbitrary, as for example, the result of illegitimate, excessive or disproportionate use of force.[315]

262. This Court has established that the State has the obligation to ensure security and maintain public order in its territory and, therefore, has the legitimate right to use force to re-establish this when necessary.[316] Although agents of the state may use force, and in certain circumstances, the use of even lethal force may be needed, the state's power is not unlimited for achieving its purposes regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes.[317]

---

309 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 144, and *Case of Landaeta Mejías Brothers et al. v. Venezuela, supra*, para. 122.

310 *Cf. Case of the Pueblo Bello Massacre v. Colombia, supra*, para. 120, and *Case of Landaeta Mejías Brothers et al. v. Venezuela, supra*, para. 122.

311 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits*, *supra,* paras. 144 y 145, and *Case of the Santo Domingo Massacre v. Colombia Preliminary Objections, Merits and Reparations.* Judgment of November 30, 2012. Series C No. 259, para. 190.

312 *Cf. Case of the Pueblo Bello Massacre v. Colombia, supra*, para. 120, and *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 81.

313 *Cf. Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Merits, supra*, para. 144, y *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 81.

314 *Cf. Case of Montero Aranguren et al. (Detention Center of Catia). Merits, Reparations and Costs.* Judgment of July 5, 2006. Series C No. 150, para. 66, and *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 81.

315 *Cf. Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 68, y *Case of Nadege Dorzema et al. v. Dominican Republic. Merits, Reparations and Costs.* Judgment of October 24, 2012. Series C No. 251, para. 92.

316 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 154, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 78.

317 *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 154, and *Case of Durand and Ugarte v. Peru. Merits.* Judgment of August 16, 2000. Series C No. 68, para. 69.

263. The Court had held in this regard that the exceptional circumstances under which firearms and lethal force may be used shall be determined by the law and restrictively construed, so that they are used to the minimum extent possible in all cases, but never exceeding that use "absolutely necessary" in relation to the force or threat to be repelled.[318]

264. The American Convention does not provide a catalog of cases or circumstances in which a death caused by the use of force may be considered justified because it is absolutely necessary in the circumstances of the specific case; therefore, the Court has drawn on a variety of international instruments on this subject, particularly the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials[319] and the Code of Conduct for Law Enforcement Officials[320] to provide content to the obligations deriving from Article 4 of the Convention.[321] The Basic Principles on the Use of Force state, "Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life."[322] Unquestionably, international standards and this Court's case law have established that "state agents must distinguish between persons who, by their actions, constitute an imminent threat of death or serious injury and persons who do not present such a threat, and use force only against the former."[323]

265. In consideration of all this, the Court has stated that ensuring appropriate measures for action if it should prove essential to use force requires upholding the principles of legality, absolute necessity and proportionality, in the following terms:[324]

> *Legality*: the use of force must be targeted at achieving a legitimate goal, within an existing regulatory framework that guides the form of action in a given situation.[325]
>
> *Absolute necessity*: the use of force should be limited to situations in which no other means exist or are available for safeguarding the life and safety of the person or situation being protected, depending on the circumstances of the case.[326]

---

318 *Cf. Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 68, and *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 84.

319 *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.* Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

320 *Code of Conduct for Law Enforcement Officials*. Adopted by United Nations General Assembly resolution 34/169 of 17 December 1979.

321 *Cf. Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, paras. 68 and 69, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, paras. 78 and 84.

322 *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, Principle No. 9.

323 *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 85.

324 *Cf. Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 85. See also, *Case of Landaeta Mejías Brothers et al. v. Venezuela, supra*.

325 *Cf. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,* Principles No. 1, 7, 8 and 11.

326 *Cf. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,* Principle No. 4.

Proportionality: the means and methods used must be consistent with the presence of resistance and the present danger.[327] Thus, agents must apply standards of differentiated and progressive use of force, determining the degree of cooperation, resistance or aggression by the target of the intervention so as to employ negotiating tactics and either restrain the use of force or adopt it, as required.[328]

266. Indeed, while the Court has adopted these standards for the use of force in earlier cases, it has equally held that the use of force must be examined through the lens of all the surrounding circumstances and context of the facts.[329] The Court finds in the case at hand that three particular circumstances must be taken into account to determine what criteria should apply in analyzing the State's obligations on the use of lethal force in Operation Chavín de Huántar in light of Article 4 of the American Convention: one, the presence of a non-international armed conflict; two, a context in which force was used against members of the MRTA, that is, in the framework of a hostage rescue operation, and three, unlike the situation in earlier cases, the alleged victims were not civilians, but members of the MRTA who had taken an active part in the hostilities.

(i) Applicability of international humanitarian law

267. The parties and the Inter-American Commission have agreed that the Court should interpret the scope of the provisions of the American Convention in the instant case in light of the applicable provisions of international humanitarian law, considering that the facts took place in the context of a non-international armed conflict. Based on the final report of the Truth and Reconciliation Commission of Peru (*supra* para139), the Court has recognized in previous Peruvian cases that, starting in the early 1980s and until the end of 2000, the country experienced a conflict between armed groups and members of the police and the military forces.[330]

268. One of the armed groups in the Peruvian conflict was the MRTA, which entered the armed struggle in 1984 (*supra* paras. 140 and 141). The Truth and Reconciliation Commission of Peru said specifically:

> The MRTA sought to distinguish itself from the Shining Path, or PCP SL, organizing a "guerrilla army", the self-styled Tupacamarista People's Army, following the conventional Latin American model of guerrilla warfare. It organized columns of uniformed fighters equipped with weapons of war, gathered in camps outside of population centers. Alongside this military structure, it also had specialized detachments called "Special Forces" that took action in urban and rural areas starting in the late 1980s. In its armed actions and treatment of prisoners, it claimed to follow the guidelines of the Geneva Conventions.
>
> […]
>
> In the late 1980s and early 1990s, the MRTA was facing an environment unfavorable to its aspirations. […] The MRTA was also facing its own internal crisis. The MIR VR broke away in 1992. The chief MRTA leaders had been caught by the police, while other

---

327 *Cf. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* Principles No. 5 and 9.

328 *Cf. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials,* Principles No. 2, 4, 5 and 9.

329 *Cf. Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 82, and *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 89.

330 *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume I, chapter 1.1, Periods of violence, pp. 54 and 55, available in Spanish at www.cverdad.org.pe/ifinal/index.php. See also, *Case of the Miguel Castro Castro Prison v. Peru*, *supra*, para. 197.1, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 51.

> members had dropped out and taken refuge under the Law of Surrender, facilitating the capture of other MRTA members. This led to the breakdown of the MRTA Northeastern Front, leaving the remaining members isolated in the Central Front (province of Chanchamayo, department of Junín). Working from there, the National MRTA Directorate designed its final action: seizing the residence of the Japanese ambassador, [with] the intention of swapping the hostages for its prisoners. A commando made up of 14 MRTA guerrillas assaulted the residence on December 17 and took 72 hostages who, after being held for 126 days, were rescued in an operation known as "Chavín de Huantar". All the guerrillas died. This outcome marked the beginning of the end of the MRTA.[331] [emphasis added]

269. The Court would note, in this connection, that the actions of the MRTA entailed the taking of hostages, the inappropriate use of an ambulance to evade police control (*supra* para. 145), entering the residence of the Japanese ambassador, and holding the guests, some of whom would spend four months in captivity, in exchange for certain counterpart demands they were making of the State (*supra* para. 148). It should be recalled, in this regard, that such actions are illegal "wherever and by whoever committed".[332] It is equally relevant to emphasize that the ambassador's residence where the hostage-taking occurred was under international protection,[333] as were the diplomatic[334] and consular[335] officials.

270. In short, the Court agrees with the parties and the Commission and finds that, given that the hostages were taken on the occasion and in the midst of a domestic armed conflict,[336] it will proceed as it has on other occasions.[337] Because Common Article 3 of the Geneva

---

331 Truth and Reconciliation Commission, *Informe Final,* 2003, volume II, chapter 1.4, Túpac Amaru Revolutionary Movement, pp. 430 to 431, available in Spanish at www.cverdad.org.pe/ifinal/index.php.

332 Common Article 3 of the four Geneva Conventions, 1949. See also, International Committee of the Red Cross, *Customary International Humanitarian Law*, vol. I, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007, Rule 96, available at https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf

333 See Articles 22 and 30(1) of the Vienna Convention on Diplomatic Relations, done on April 18, 1961, and entered into force on April 24, 1964. Peru has been a party to the Convention since December 18, 1968. These provisions state, "The premises of the mission shall be inviolable. [...] The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity. [...] The private residence of a diplomatic agent shall enjoy the same inviolability and protection as the premises of the mission."

334 See Article 29 of the Vienna Convention on Diplomatic Relations: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity."

335 See Article 40 of the Vienna Convention on Consular Relations, done on April 24, 1963, and entered into force on March 19, 1967: "The receiving State shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity." Peru has been a party to the Convention since February 17, 1978.

336 It should be recalled that international humanitarian law must be applied by the parties in the context of non-international armed conflicts, provided that the facts correspond to situations that occur because of and during the conflict. *Cf. Case of the Santo Domingo Massacre v. Colombia, supra*, footnote 254.

337 *Cf. Case of the Ituango Massacres v. Colombia. Preliminary Objection, Merits, Reparations and Costs.* Judgment of July 1, 2006. Series C No. 148, para. 179, and *Case of the Santo Domingo Massacre v. Colombia, supra*, paras. 21 to 25 and 187.

Conventions[338] and customary international humanitarian law[339] specifically address this subject, it will be useful and appropriate to consider them.

271. Nonetheless, there is no question that the provisions of the American Convention on the right to life are fully applicable and relevant in situations of armed conflict. As was mentioned before, this right pertains to the core set of Convention-based rights that may not be suspended under any circumstances, even when the independence or security of a State Party appears to be under serious challenge (*supra* para. 257). The Court has already found that the presence of a domestic armed conflict at the time of the facts, as in the instant case, rather than exonerating the State from its obligations to respect and guarantee human rights, instead obliged it to act in accordance with such obligations.[340]

272. Consequently, and for the purposes of this case, the Court notes that international humanitarian law does not displace the applicability of Convention Article 4, but instead enhances the interpretation of the Convention clause that prohibits arbitrary deprivation of life when facts occur in the framework and on the occasion of an armed conflict. Similarly, the International Court of Justice has held, "[i]n principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities […]"[341]. The European Court of Human Rights has found, "Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian

---

[338] Common Article 3 of the four Geneva Conventions of August 12, 1949, ratified by Peru on February 15, 1956, states:

"Conflicts not of an international character: In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

[339] *Cf.* International Committee of the Red Cross, *Customary International Humanitarian Law*, vol. I, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007, available at: https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdfps://www.icrc.org/spa/assets/files/other/icrc_003_pcustom.pdf

[340] *Cf. Case of Bámaca Velásquez v. Guatemala. Merits.* Judgment of November 25, 2000. Series C No. 70, para. 207.

[341] International Court of Justice, *Legality of the use by a state of nuclear weapons in armed conflict*, Advisory opinion issued on July 8, 1996, para. 25. See also International Court of Justice, *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, Advisory opinion issued on July 9, 2004, paras. 105 to 113.

law which play an indispensable and universally-accepted role in mitigating the savagery and inhumanity of armed conflict."[342]

273. Therefore, given that the American Convention does not explicitly define the scope that the Court must attach to the concept of arbitrariness in order for deprivation of life to be held as contrary to the Convention in situations of armed conflict, it is proper to draw on the *corpus juris* of applicable international humanitarian law (*supra* para. 270) to determine the extent of a State's obligations to respect and guarantee the right to life in such situations. The analysis of whether Article 4 of the American Convention has been violated must therefore consider several principles, including distinction (*infra* para. 276), proportionality[343] and precaution.[344]

(ii) Necessity for the use of force in the framework of a hostage rescue operation

274. Under this heading, the Court recognizes that the State's use of force took place in the setting of an operation by security forces with a precise target: to free the hostages who had been held by the members of the MRTA in the residence of the Japanese ambassador in Peru since December 17, 1996. It was therefore legitimate for the State to make use of force under the circumstances of the specific case, and indeed, neither the Inter-American Commission nor the representatives in the instant case has questioned the legitimacy of the operation,[345] which was undertaken in response to the need to free the hostages alive (*supra* paras. 147 to 150 and *infra* para. 284).

275. It is therefore acceptable to hold that the State needed to adopt all necessary measures to relieve the situation of the hostages and, in particular, to ensure their release, so long as applicable provisions of international humanitarian law and human rights were respected.

(iii) Safeguards of Common Article 3 of the four Geneva Conventions

276. The principle of distinction connotes a customary rule applicable to international and non-international armed conflicts and reads, "[t]he parties to the conflict must at all times distinguish between civilians and combatants," such that "[a]ttacks may only be directed

---

[342] ECtHR, *Varnava and Others v. Turkey* [GS], Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90. Judgment of September 18, 2009, para. 185.

[343] According to the tenets of international humanitarian law, the principle of proportionality refers to a customary rule for both international and non-international armed conflicts that stipulates that "[l]aunching an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, is prohibited." Henkaerts, Jean – Marie, Doswald – Beck Louise, *Customary International Humanitarian Law,* volume I, rules, ICRC, CICR, Cambridge, 2009, p. 46, Rule 14. See also, *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 214.

[344] According to international humanitarian law, the principle of precaution refers to a customary rule for both international and non-international armed conflicts which establishes that "[i]n the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects", and that "a]ll feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects." It also stipulates that "[e]ach party to the conflict must take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects." Henkaerts, Jean – Marie, Doswald – Beck Louise, *Customary International Humanitarian Law,* volume I, rules, ICRC, CICR, Cambridge, 2009, p. 51, Rules 15 and 15. See also, *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 216.

[345] The representatives said that they "had no intention whatsoever of challenging Operation Nipón 96 per se, also known as Operation Chavín de Huántar, and the way it was conducted overall." The Commission assured that "the design of Operation Chavín de Huántar served a legitimate purpose and met the also legitimate end of rescuing hostages who were in danger[; thus,] so long as a situation of combat remained, the members of the MRTA terrorist group were, in principle, legitimate targets under international humanitarian law."

against combatants" and "[a]ttacks must not be directed against civilians."[346] International humanitarian law contains specific rules to determine who qualifies to come under the fundamental safeguards of Common Article 3 of the four Geneva Conventions. The scope of personal application of safeguards is also addressed in Common Article 3 of the four Geneva Conventions, which covers: "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause".

277. The alleged victims in the case before the Court were not civilians, but members of the MRTA, actively involved in the hostilities.[347] Even so, they could potentially be beneficiaries of the safeguards contained in Common Article 3 of the four Geneva Conventions, so long as they had ceased to take part in the hostilities and could be identified as *hors de combat*. The Court notes that, according to customary international humanitarian law, three types of persons could be considered *hors de combat*: "(a) anyone who is in the power of an adverse party; (b) anyone who is defenseless because of unconsciousness, shipwreck, wounds or sickness; or (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape."[348] The Court finds that these criteria were indeed applicable at the time of the facts to determine whether a person was *hors de combat* and should thus have fallen under the protection of Common Article 3 of the four Geneva Conventions.

278. Thus, as stipulated in Common Article 3 of the four Geneva Conventions, the State should have extended humane treatment to those were not participating directly in the hostilities or who were out of combat for any reason, without any unfavorable distinction. More particularly, international humanitarian law prohibits attacks on the life or personal integrity of the persons listed above, at any time and in any place.[349] The International Committee of the Red Cross (ICRC) has examined the rule that no person out of combat may come under attack, holding it to be a standard of customary law applicable to armed conflict whether of international or non-international scope.[350] Peru's practice demonstrates the domestic application of this rule.[351]

279. In short, as the Court considers the claim that the right to life was violated in this case, it must examine the facts in light of the circumstances already described and the most specific

---

[346] International Committee of the Red Cross, *Customary International Humanitarian Law*, vol. I, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007, Rule 1, available at: https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf

[347] *Cf.* International Committee of the Red Cross, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, Nils Melzer, legal adviser, ICRC, CICR, 2009, available at https://www.icrc.org/en/doc/assets/files/other/icrc-002-0990.pdf

[348] International Committee of the Red Cross, Customary International Humanitarian Law, vol. I, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007, Rule 47, available at https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf

[349] *Cf. Case of Bámaca Velásquez v. Guatemala. Merits, supra*, para. 207. See also, ECtHR, *Varnava and Others v. Turkey* [GS], Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90. Judgment of September 18, 2009, para. 185.

[350] *Cf.* International Committee of the Red Cross, *Customary International Humanitarian Law*, vol. I, edited by Jean-Marie Henckaerts and Louise Doswald-Beck, 2007, Rule 47, available at https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf

[351] Peru, *Derechos Humanos: Decálogo de las Fuerzas del Orden,* Joint Command of the Armed Forces, Ministry of Defense, Army of Peru, 1991, pp. 6 and 7, and Peru, *Código Militar de Justicia*, 1980, Article 94, available in Spanish at http://www.icrc.org/customary-ihl/eng/docs/v2_cou_pe_rule47

applicable principles, so as to determine whether or not acts by the agents of the state were consistent with the American Convention, in the terms outlined below.

B.2 Matters to be examined and verified by the Inter-American Court

280. The Court recalls that it is not a criminal tribunal in which the criminal responsibility of the individual can be determined [352] and that "courts of the State are expected to examine the facts and evidence submitted in particular cases,"[353] and therefore, State responsibility under the Convention should not be confused with the criminal responsibility of private individuals.[354] Unlike domestic criminal law, it is not necessary to determine the perpetrators' culpability or intentionality in order to establish that the rights enshrined in the Convention have been violated, nor is it essential to identify individually the agents to whom the acts of violation are attributed.[355] It is sufficient that the State has an obligation and that it has failed to comply with it.[356]

281. Thus, the instant case does not establish the innocence or guilt of the members of the "Chavín de Huántar" command, of the security forces who took part in the hostage rescue operation, or of the MRTA members. Rather, the case addresses whether the acts of the State conformed to the American Convention and whether or not extrajudicial execution took place in the process of the hostage rescue operation at two different times and in different places: first, for Eduardo Nicolás Cruz Sánchez, and second, for Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza. The State's international responsibility derives from acts or omissions by any government branch or agency, regardless of hierarchy, that violates the American Convention. It is a principle of international law that the State responds for the acts and omissions of any of its agents carried out in their official capacity, even if they are acting outside the limits of their competence.[357]

282. International jurisprudence has recognized the power of international courts to weigh the evidence freely, although it has always avoided a rigid rule regarding the amount of proof necessary to support the judgment,[358] and it is incumbent on the judicial body to pay close attention to the circumstances of the specific case and bear in mind the limits imposed by respect for legal certainty and procedural balance among the parties.[359] The Court cannot disregard the special significance of attributing to a State Party to the Convention the charge

---

[352] *Cf. Case of Suárez Rosero v. Ecuador. Merits.* Judgment of November 12, 1997. Series C No. 35, para. 37, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 162.

[353] *Case of Nogueira de Carvalho et al. v. Brazil. Preliminary Objections and Merits.* Judgment of November 28, 2006. Series C No. 161, para. 80, and *Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 20, 2013. Series C No. 270, para. 225.

[354] *Cf. Case of the Pueblo Bello Massacre v. Colombia, supra*, para. 122, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 162.

[355] *Cf. Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits, supra*, para. 91, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 162.

[356] *Cf. Case of the Pueblo Bello Massacre v. Colombia, supra*, para. 112, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 162.

[357] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 173, and *Case of Gutiérrez and family v. Argentina. Merits, Reparations and Costs.* Judgment of November 25, 2013. Series C No. 271, para. 76.

[358] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 127, and *Case of Gutiérrez and family v. Argentina, supra*, para. 79.

[359] *Cf. Case of Bámaca Velásquez v. Guatemala. Merits, supra*, para. 96, and *Case of Gutiérrez and family v. Argentina, supra*, para. 79.

of having executed or tolerated practices on its territory such as those described in the instant case. This is why it will now proceed to examine the evidence and, notwithstanding what has already been said, be able to establish the truth of the allegations in a convincing manner.[360]

283. In the instant case, because the use of lethal force occurred as part of an operation designed specifically for particular circumstances, the Inter-American Court finds it appropriate, as the European Court of Human Rights has done, to examine the process of planning and control of the operations, to find whether the State sought to "minimise, to the greatest extent possible, recourse to lethal force and human losses, and whether all feasible precautions in the choice of means and methods of a security operation were taken."[361]

284. The Court finds it significant for the purpose of examining this case to emphasize that even under trying circumstances, the State: (i) designed a rescue operation, (ii) selected qualified personnel to conduct it, (iii) built a replica of the place where the hostages were being held,[362] (iv) provided intensive training for the officers selected, to ensure that the operation would be effective, and (v) planned Operation "Nipón 96" based on circumstances in which "daily life" was taking place inside the ambassador's residence (*supra* paras. 151 to 159). The Court reiterates that the primary objective of the operation was to safeguard the lives of the hostages.

285. The representatives and the Commission assured in their closing arguments that they did not challenge the design and planning of the operation, but the representatives also claimed in the hearing that the possibility that MRTA members might be captured alive was neither anticipated nor put into practice. The State questioned this line of reasoning, claiming that such a statement actually made reference to the technique used to take control of the property, known as selective instinctive shooting; thus, in the State's view, it was clearly contradictory to suggest that the representatives had not questioned the design and planning of the operation. The State did not deny that it had used this technique but did note that "it is not an action prohibited under international law."

286. The Court notes that, at least at the operational level, some of the planning had indeed considered the possibility of capturing the MRTA members.[363] Similarly, most of the commandos stated that the planning phase of the operation did in fact consider the capture of MRTA members, who were to be searched, disarmed, neutralized, and evacuated, upon which commandos were to immediately notify their ranking officers and await further instructions. Nonetheless, the priorities were, first, to rescue the hostage, second, to evacuate wounded commandos, and third, to evacuate MRTA members. These declarants also said consistently that they had received no orders, instructions or comments from their commanding officers to eliminate all the MRTA members.[364] To the contrary, they said that their only mission was to rescue the hostages alive.

---

[360] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 129, and *Case of Gutiérrez and family v. Argentina, supra*, para. 79.

[361] ECtHR, *Ergi v. Turkey*, No. 23818/94. Judgment of July 28, 1998, para. 79, and *Finogenov and Others v. Russia*, Nos. 18299/03 and 27311/03. Judgment of December 20, 2011, para. 208.

[362] Even though it was not perfectly identical to the original residence, as explained in the "procedure to "reconstruct the facts."

[363] *Cf.* Plan of Operations A. "NIPON" 96 (1st Div FFEE), January 1997, pp. 2 to 5 (evidence file, volume I, annex 2 to the case submission brief, folios 26 to 29) and Plan of Operations B. "NIPON" 96 / "TENAZ" ("*Tenaz*" Patrol), January 1997, pp. 4 and 6 (evidence file, volume I, annex 2 to the case submission brief, folios 35 and 37).

[364] *Cf.* Statements contained in the case file of the military courts (evidence file, further helpful evidence, volumes XXII to XXV).

287. The Court finds, therefore, that the dispute is not centered around necessity, proportionality and precaution in the use of force. Rather, in the case now before the Court, the relevant dispute, which will inevitably have an impact on the legal analysis to determine whether Article 4 of the American Convention has been violated, is to understand whether Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza died as a consequence of acts by agents of the state after they had gone out of combat and could therefore have been defined as *hors de combat* under the terms of international humanitarian law, or whether instead, they died while actively engaged in hostilities. This is why it is crucial in this case for the Court to learn whether Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza had ceased their participation in the hostilities at the time they were killed and thus had come under the protection of Common Article 3 of the four Geneva Conventions (*supra* paras. 276 to 278). This requires an examination of the relevant facts regarding each alleged victim and a determination, in each particular circumstance, of whether each one was actively involved in hostilities at the time of the facts.[365]

288. When the "Plan Nipón 96" was launched, the scenario of the operation was under the control of the MRTA, but once the operation had finished, the area was fully controlled by the State, specifically, the armed forces, police, and intelligence agents. The Court received several statements acknowledging the presence on the scene of people wearing ski masks and photographing and taping the events, who apparently belonged to the National Intelligence Service.[366] In any case, it is important to clarify for the purposes of this international process that, as a consequence of the operation, the State unquestionably took full control of the ambassador's residence.

289. The final concluding report on execution of "Plan Nipón 96" says that all the MRTA fighters died in the clash with security forces (*supra* para. 173). The commandos who took part in the operation also stated that they had not seen any MRTA member surrendering or being captured alive, nor had they witnessed extrajudicial executions.[367]

290. With respect to the positions of the bodies of MRTA members, the commandos' statements assured that the bodies had not been moved inside the residence.[368] There is also the official record of the identification and removal of the bodies of the MRTA members, *"Acta de identificación y levantamiento de cadáveres de los delincuentes terroristas pertenecientes al Movimiento Revolucionario 'Túpac Amaru' encontrados en la residencia del embajador de*

---

365 *Cf.* ICTY, *Case of The Prosecutor v. Tadić ("Dule")*, No. IT-94-1-T. Judgment of May 7, 1997, paras. 215 and 216. See also, ECtHR, TEDH, *Korbely v. Hungary* [GS], No. 9174/02. Judgment of September 19, 2008, paras. 90 and 91.

366 *Cf., inter alia,* statement by Infantry Colonel Gualberto Roger Zevallos Rodríguez, September 17, 2002 (evidence file, volume XXIII, further helpful evidence, folios 16047 to 16052); statement by Technician Three, Marine Roland Odon Llaulli Palacios, November 29, 2002 (evidence file, volume XXIII, further helpful evidence, folios 16607 to 16610); statement by Lieutenant Colonel of Communications Manuel Himeron Ramírez Ortiz, January 10, 2003 (evidence file, volume XXIII, further helpful evidence, folios 16808 to 16813); statement by Technician Two, Communications Operator Pedro Jaime Tolentino García, January 27, 2003 (evidence file, volume XXIV, further helpful evidence, folios 16837 to 16842), and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annex to the representatives' observations on the State's preliminary objections, folios 13473 to 13476 and 130608).

367 *Cf.* Statements contained in the case file of the military courts (evidence file, further helpful evidence, volumes XXII to XXV).

368 *Cf.* Statements contained in the case file of the military courts (evidence file, further helpful evidence, volumes XXII to XXV).

Japón", as conducted by the Special Military Judge, Special Military Prosecutor, and National Intelligence Service,[369] and the subsequent transfer of the bodies to the Central Hospital of the National Police of Peru (supra paras. 169 and 170). The content of this record, however, has been challenged by domestic judicial authorities, who do not deny the possibility that the scene of the events could have been altered, especially considering that the removal of the bodies of the MRTA members took place the following day after the operation was completed, and the evidence had not been properly secured.[370]

291. In its examination of the evidence in the case file, the Court will determine whether the hypotheses put forward by the Commission and the representatives of the alleged victims provide an explanation reasonable enough to hold *prima facie* that the alleged victims died in circumstances in which they had ceased participation in the hostilities and, moreover, were in State custody. This Court has found in similar circumstances that the burden of proof is reversed, and it falls to the State to provide a satisfactory, convincing explanation of the incident and refute any arguments about its responsibility, by means of acceptable evidentiary material.[371]

B.3 Circumstances surrounding the death of Eduardo Nicolás Cruz Sánchez and the alleged international responsibility of the State

292. The evidence in the case file indicates that Eduardo Nicolás Cruz Sánchez, alias "Tito", was found dead on a concrete slab in the outside hallway of the residence of the Japanese ambassador, contiguous to the house of the neighboring NGO known as "house No. 1".[372] The body presented a gunshot wound that had entered into the back left area of the neck and

---

[369] *Cf.* Report 01/1st Div FFEE Operation "Chavín de Huántar" (hostage rescue operation) April 30, 1997, p. 11 (evidence file, volume I, annex 2.a to the case submission brief, folio 52).

[370] For example, the verdict by the Third Special Criminal Chamber of the Superior Court held for the record that "[…] there was a possibility of moving the bodies and lethal objects prior to the ingress of personnel from UDEX [Explosives Deactivation Unit]". Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13540).

[371] *Cf. Case of Juan Humberto Sánchez v. Honduras. Preliminary Objection, Merits, Reparations and Costs.* Judgment of June 7, 2003. Series C No. 99, para. 111, y *Case of Landaeta Mejías Brothers et al. v. Venezuela, supra*, para. 183.

[372] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13604 to 13614).

exited through the right side of the head,[373] a wound in the abdomen-pelvic area,[374] and a pre-existing leg wound.[375]

293. Nevertheless, questions about the circumstances of his death and whether it can be attributed to the State are in dispute. The Commission and the representatives have argued, based on statements by Hidetaka Ogura and two police officers, as well as other evidence, that the last time he was seen alive, he was unarmed and in the custody of military personnel after he had laid down his arms. The State's explanation is that he died while taking part in hostilities. The State pointed specifically to the report on identification and removal of the bodies (*Acta de identificación y levantamiento de cadáveres*, *supra* para. 170) and witness statements,[376] according to which, Eduardo Nicolás Cruz Sánchez was holding a grenade in his right hand at the time of his death. The State's defense also centered around refuting evidence brought before this international proceeding in support of the position held by the Commission and the representatives.

294. The Court will now analyze the plausibility of the hypotheses brought, first, by the Commission and the representatives of the alleged victims, and second, by the State, in light of evidence in the case file and bearing in mind the Court's particular role, as this is not a

---

[373] *Cf.* Partial selective autopsies of the 14 MRTA members, April 23, 1997 (evidence file, volume II, annex 16 to the case submission brief, folio 764); report of forensic examinations by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 143), and report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folio 697). See also, expert testimony delivered by Derrick John Pounder and certified before a public attestor, January 23, 2014 (evidence file, affidavits, volume XXX, folios 20855 to 20857 and 20860); expert testimony delivered by Luis Antonio Loayza Miranda before a public attestor, January 29, 2014 (evidence file, affidavits, volume XXX, folios 20880 to 20881), and expert testimony delivered by Juan Manuel Cartagena Pastor in a public hearing before the Inter-American Court, February 3 and 4, 2014.

[374] *Cf.* Tables 1 and 2 of the report on forensic examinations by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folios 180 to 181). Despite the information in these tables, the Third Special Criminal Chamber found, based on statements by the forensic examiners, that this notation in the tables was a "typographical error", and this was later corroborated by the autopsy reports. *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13614 to 13624).

[375] Note, in this regard, that Eduardo Nicolás Cruz Sánchez presented a gunshot wound on the right tibia due to an injury sustained prior to the hostage rescue operation. *Cf.* Report of forensic examinations by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 143), and report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folio 697). The judgment by the Third Special Criminal Chamber says that this wound had been sustained at the time the hostages were taken, and the Red Cross had set it in a cast. *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13617). Carlos Tsuboyama Matsuda said in his statement, "The day the hostages were taken […] the subversive Cruz Sánchez had shot himself in the leg." *Cf.* Statement by Carlos Tsuboyama Matsuda before the Third Special Criminal Chamber, proceedings of session 36, December 28, 2011 (evidence file, volume XIII, annex 17 to the State's answering brief, folios 8798 to 8799). See also, statement by Luis Alejandro Giampietri Rojas before a public attestor, January 30, 2014 (evidence file, volume XXX, affidavits, folio 20715).

[376] The State cited the statement by police officer Gama Flores from the UDEX about Eduardo Nicolás Cruz Sánchez' body, saying that "his right hand was open and in the palm of this hand was a green pineapple-type war grenade with full accessories, that is, with safety devices." *Cf.* Statement by Freddy Gerardo Gama Flores before the Specialized Provincial Prosecutor, May 10, 2001 (evidence file, volume XXVI, CVR evidence, folios 18331 to 18337). The State also singled out the statement by police officer López Mori from the UDEX, that "he had a war grenade in his right hand." *Cf.* Statement by Heycenover López Mori before the Specialized Provincial Prosecutor, May 8, 2001 (evidence file, volume XXVI, CVR evidence, folios 18317 to 18323).

criminal court nor does it hold to the same standards of evidence as criminal proceedings (*supra* paras. 280 and 282).

A) Eyewitness evidence

295. The view of the Commission and the representatives is based primarily on the eyewitness statements of (a) Hidetaka Ogura, then first secretary of the Japanese embassy in Lima and former hostage; (b) Raúl Robles Reynoso, an officer of the National Police of Peru who guarded house No. 1; (c) Marcial Teodorico Torres Arteaga, an officer of the National Police of Peru who guarded house No. 1; and (d) hearsay testimony from former hostage Máximo Félix Rivera Díaz, then director of the National Counterterrorism Directorate (DINCOTE).

296. It is important, first of all, to examine statements by witnesses who saw Eduardo Nicolás Cruz Sánchez leaving the residence hidden among the hostages, who had reported him. The police officers in charge of security in the sector where the group was being evacuated had then captured him, bound his hands, placed him on the ground, and after they had notified their commanding officer, a soldier had arrived and taken him back inside the ambassador's residence.

297. Former hostage Hidetaka Ogura, who was evacuated from the room tagged "I" on the second floor of the residence, explained the situation in a letter sent to the Peruvian courts on August 20, 2001, as follows:

> When we went down to the ground floor, we waited a few minutes together with the ten men […] beside the residence building to go out to the neighboring house. […] A soldier led us through a short tunnel into the yard of the neighboring house. […] I saw a member of the MRTA in that yard, called 'Tito'. His hands were bound behind his back, and his body was lying face-down on the ground. He was moving, so I could tell he was alive. […] When 'Tito' tried to raise his head, an armed policeman who was guarding him kicked his head, and he began to bleed. I know it was a police officer because the police were guarding the house next door. A few minutes later, a soldier came out of the tunnel, made 'Tito' get up, and took him into the residence through the tunnel. So 'Tito' left the yard, and I have not seen the person 'Tito' since then.[377]

298. The State has repeatedly challenged this witness, claiming that he is not objective and that he had developed a friendship with the MRTA guerrillas during his time of captivity. The Court would note that Mr. Ogura reiterated his version of the facts before the Peruvian courts,[378] the Inter-American Commission,[379] and the Inter-American Court of Human Rights.[380] The Court would further emphasize that the record contains other independent, unrelated evidence corroborating his description of the facts.

299. Police officer Raúl Robles Reynoso, in a statement before the Specialized Provincial Prosecutor, said:

---

[377] Letter from Hidetaka Ogura to the judiciary of Peru, August 20, 2001 (evidence file, volume I, annex 5 to the case submission brief, folios 112 to 113).

[378] *Cf.* Statement by Hidetaka Ogura before the Third Special Criminal Chamber, proceedings of session 68, April 23, 2012 (evidence file, volume XV, annex 17 to the State's answering brief, folios 10300 to 10330).

[379] *Cf.* Testimony rendered by Hidetaka Ogura to the Inter-American Commission in a public hearing on February 28, 2005 (evidence file, volume II, annex 46 to the case submission brief, folio 1326).

[380] *Cf.* Sworn statement by Hidetaka Ogura taken and certified by a public attestor on January 28, 2014 (evidence file, volume XXX, affidavits, folios 20620 to 20624).

> [A] hostage […] was signaling me with hand gestures, accusing the supposed hostage who was wearing a gray-green polo shirt (he was the only one wearing a gray-green polo shirt and he was the same one who had come in holding the arm of another hostage), that he was supposedly a terrorist criminal, when this person saw that he had been spotted, he tried to run into house No. 1, so I intervened, neutralized him and placed him in the dorsal decubitus position in the yard of house No. 1, right then he started to stammer that he could tell us where the rest of the 'comrades' were and what their next plans were, and he was pleading for his life, so I told him not to worry, that nothing was going to happen to him there, and immediately I told my commanding officer, who was Army Lieutenant Colonel ZAMUDIO, over the walkie talkie, that he was captured and that he had a wound (we were under his orders), Lieutenant Colonel ZAMUDIO told me to stand by and he would have the captive picked up in a few minutes, not to do anything to him, after about five minutes, a commando came into house No. 1 through the tunnel in the yard, and we turned the captured MRTA agent over to him, and he made him go through the tunnel back into the residence, the MRTA fighter tried to resist, but the commando forced him to go, I never saw the MRTA fighter again, I thought that this captured rebel would be paraded before the public as a prisoner, and then questioned or made to provide valuable information, but it was a surprise to me to see on the news that all the MRTA members had died in combat, but I kept quiet and didn't tell anyone for fear of some kind of reprisal from the system […][381].

300. Police officer Marcial Teodorico Torres Arteaga also made a statement before the Specialized Criminal Prosecutor:

> One of the hostages was by house No. 1, he looked Latin, tall, bearded, wavy hair, graying, […], wearing a polo shirt, he made some signs to my partner, indicating that one of the men who had come out with the hostages was from the MRTA, and so we took him away to one side of the yard, then we made a radio call to Lieutenant Colonel ZAMUDIO ALIAGA, Jesús, who answered that we should keep him there, in house No. 1; but right after that, about two or three minutes later, circumstances in which a commando entered by the tunnel from the Japanese residence to house No. 1, he was wearing a uniform and had his face covered and he took the MRTA man alive and made him go back in through the small tunnel to the inside of the Japanese residence.[382]

301. Likewise, Máximo Félix Rivera Díaz, former hostage who at the time was director of the National Counterterrorism Directorate (DINCOTE), stated before the Peruvian courts that other hostages, including Hugo Sivina Hurtado, had told him at the Central Military Hospital and in later meetings that Cruz Sánchez had been captured alive in the yard of house No. 1.[383] José

---

[381] Statement by Raúl Robles Reynoso before the Specialized Provincial Prosecutor, December 28, 2001 (evidence file, volume II, annex 11 to the case submission brief, folio 670). See also, expanded eyewitness statement by Raúl Robles Reynoso before the Third Special Criminal Chamber, August 29, 2002 (evidence file, volume XXVII, CVR evidence, folio 19746), and statement by Raúl Robles Reynoso before the Third Special Criminal Chamber, proceedings of session 57, June 6, 2008 (evidence file, volume VIII, annex 11 to the brief of pleadings, motions and evidence, folios 5362 to 5365 and 5394 to 5399).

[382] Statement by Marcial Teodorico Torres Arteaga before the Specialized Provincial Prosecutor, December 28, 2001 (evidence file, volume II, annex 11 to the case submission brief, folio 662). See also, eyewitness testimony by Marcial Teodorico Torres Arteaga before the Third Special Criminal Chamber, March 13, 2003 (evidence file, volume XXVII, CVR evidence, folios 19421 to 19429), and statement by Marcial Teodorico Torres Arteaga before the Third Special Criminal Chamber, proceedings of session 59, June 20, 2008 (evidence file, volume VIII, annex 11 to the brief of pleadings, motions and evidence, folios 5417 to 5420, 5424 to 5429, 5434 to 5436).

[383] *Cf.* Statement by Máximo Félix Rivera Díaz before the Specialized Provincial Prosecutor, March 19, 2001 (evidence file, volume XXVI, CVR evidence, folios 18215 to 18224); eyewitness testimony by Máximo Félix Rivera Díaz before the Third Special Criminal Chamber, September 6, 2002 (evidence file, volume XXVII, CVR evidence, folios 19771 to 19778), and statement by Máximo Félix Rivera Díaz before the Third Special Criminal Chamber, proceedings of session 24, November 14, 2011 (evidence file, volume VIII, annex 11 to the brief of pleadings, motions and evidence, folios 5472 and 5479 to 5480).

Gerardo Garrido Garrido, who was in the same room as Judge Sivina, said he had seen Cruz Sánchez enter the room tagged "H" and then come out to continue fighting.[384] Even though these hostages were evacuated by the same route as the Japanese hostages from room "I" where Ogura was, that is, through the yard of house No. 1, they said that at that point they had not seen any MRTA fighter caught or surrendered.[385]

302. Police officers Robles Reynoso and Torres Arteaga were in the area where Ogura and the other Japanese hostages were evacuated, along with a cameraman from the SIN, Manuel Tullume Gonzáles, who was assigned to film the back part of the residence contiguous with house No. 1, as well as the inside of the residence. He said in a statement that he had seen the hostages when they arrived. He claimed, however, that he knew nothing about the facts given in Ogura's statement.[386] It was not possible to question the other Japanese hostages who had been in the yard of house No. 1.[387]

303. To summarize, Mr. Ogura's statement is consistent with the eyewitness testimony of two officers from the National Police of Peru, who were guarding house No. 1 and described the circumstances of how and where Cruz Sánchez was captured. Police sergeants Raúl Robles Reynoso and Marcial Teodorico Torres Arteaga of the National Police of Peru made consistent claims that: (a) they saw a hostage pointing out an alleged member of the MRTA; (b) they were the ones who neutralized Eduardo Nicolás Cruz Sánchez after discovering that he was trying to pass for a hostage; (c) they searched him, and he had no weapons; (d) they called their commanding officer, Army Lieutenant Colonel Jesús Salvador Zamudio Aliaga, and informed him, and he ordered them to wait, as he would send someone to pick him up; and (e) a soldier who has not been identified took the MRTA fighter back through the tunnel that ran from the yard of house No. 1 to the ambassador's residence.[388] The Court notes that this

---

384 *Cf.* Statement by José Gerardo Garrido Garrido before a public attestor, January 30, 2014 (evidence file, volume XXX, affidavits, folio 20711).

385 *Cf.* Statement by José Gerardo Garrido Garrido before the Third Special Criminal Chamber, proceedings of session 23, November 9, 2011 (evidence file, volume XII, annex 17 to the State's answering brief, folios 8448 to 8478); statement before a public attestor by José Gerardo Garrido Garrido, January 30, 2014 (evidence file, volume XXX, affidavits, folio 20711); statement by Hugo Sivina Hurtado before the Third Special Criminal Chamber, proceedings of session 48, February 15, 2012 (evidence file, volume XII, annex 17 to the State's answering brief, folios 9535 to 9536); statement by Hugo Sivina Hurtado before the Inter-American Court at a public hearing, February 3 and 4, 2014; statement by Luis Alejandro Giampietri Rojas before the Third Special Criminal Chamber, proceedings of session 43, January 30, 2012 (evidence file, volume XIV, annex 17 to the State's answering brief, folios 9274 to 9276); statement by Mario Antonio Urrelo Álvarez before the Third Special Criminal Chamber, proceedings of session 42, January 27, 2012 (evidence file, volume XIV, annex 17 to the State's answering brief, folios 9241 to 9242); statement by Emilio Alipio Montes de Oca Begazo before the Third Special Criminal Chamber, proceedings of session 42, January 27, 2012 (evidence file, volume XIV, annex 17 to the State's answering brief, folios 9220 and 9222); statement by Carlos Tsuboyama Matsuda before the Third Special Criminal Chamber, proceedings of session 36, December 28, 2011 (evidence file, volume XIII, annex 17 to the State's answering brief, folios 8796 and 8800); eyewitness testimony by Luis Edmundo Serpa Segura before the Third Special Criminal Chamber, July 31, 2002 (evidence file, volume XXVII, CVR evidence, folios 19357 to 19360), and eyewitness testimony by Moisés Pantoja Rodulfo before the Third Special Criminal Chamber, August 9, 2002 (evidence file, volume XXVII, CVR evidence, folios 19699 to 19701). See also: ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13597).

386 *Cf.* Statement by Manuel Tullume Gonzáles before the Specialized Provincial Prosecutor, October 25, 2001 (evidence file, volume XXVI, CVR evidence, folios 18608 to 18612).

387 *Cf.* Note 019-02-3JPE-JBH-hjb from the Third Special Criminal Chamber, January 24, 2003, and Note 0-1A/54/03 from the Japanese embassy, May 13, 2003 (evidence file, volume XXXI, annex 6 to the State's final written arguments, folios 21072 to 21074).

388 *Cf.* Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 734 (evidence file, volume I, annex 1 to the case submission brief, folio 20). See also: ruling by the Third Special Criminal Chamber of the Superior Court of Lima,

sequence follows the mode of action called for in the plan of operation, to notify the commanding officer and await his instructions (*supra* para. 286).

304. Some hostages said they had not seen any MRTA fighters surrendered or captured when they were evacuated through the yard of house No. 1 next door to the residence (*supra* para. 301). These statements per se do not contradict the evidence described above, as the fact that they did not see Eduardo Nicolás Cruz Sánchez captured does not necessarily mean that it did not happen.

305. No statement holds up the hypothesis that Eduardo Cruz Sánchez was felled during hostilities. Nor did any commando admit to having killed or shot at Cruz Sánchez in combat, or to having been present at the time of his death, either inside or outside the residence.[389] No commando said he had seen the body during the operation, although they did observe several bodies inside the residence the next day during the reconnaissance visit.[390] Cruz Sánchez' body was found outside the residence on a concrete slab at the back of the property (*supra* para. 292).

B) Expert evidence developed in the domestic investigations

306. The expert reports indicate that Eduardo Nicolás Cruz Sánchez died of a gunshot wound to the head[391] delivered by a person located behind him and to his left.[392] Thus, the bullet entered from behind to the left and exited on the right side of the head, which would be

---

October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13552).

389 *Cf.* Statements contained in the case file of the military courts (evidence file, further helpful evidence, volumes XXII to XXV).

390 *Cf.,* among others, initial statement by Jhonnny Ronald Cabrera Rodríguez before the investigative justice department of the military jurisdiction, CSJM, July 4, 2002 (evidence file, further helpful evidence, volume XXII, folios 15013 to 15017); initial statement by Néstor José Castañeda Sánchez before the investigative justice department of the military jurisdiction, CSJM, August 13, 2002 (evidence file, further helpful evidence, volume XXII, folios 15557 to 15561); initial statement by Gustavo Alexander Segura Figueroa before the investigative justice department of the military jurisdiction, CSJM, September 4, 2002 (evidence file, further helpful evidence, volume XXIII, folios 15845 to 15850); initial statement by Carlos Alfredo Vásquez Panduro before the investigative justice department of the military jurisdiction, CSJM, September 9, 2002 (evidence file, further helpful evidence, volume XXIII, folios 15913 to 15918), and initial statement by Ciro Alegría Barrientos before the investigative justice department of the military jurisdiction, CSJM, September 10, 2002 (evidence file, further helpful evidence, volume XXIII, folios 15921 to 15926).

391 *Cf.* Autopsy report 0878-2001 prepared by the Institute of Forensic Medicine on March 20, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 587), and report on remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folio 701). See also, ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13631 to 13632), and expert opinion by Derrick John Pounder, certified before a public attestor on January 23, 2014 (evidence file, affidavits, volume XXX, folio 20855).

392 Conclusions are inconsistent as to whether the shooter was located on higher ground or lower ground than Cruz Sánchez. *Cf*. Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13631); partial selective autopsies of the 14 members of the MRTA, April 23, 1997 (evidence file, volume II, annex 16 to the case submission brief, folio 764); forensic ballistics report by the National Police of Peru 1118/01, May 10, 2001 (evidence file, volume XXVII, CVR evidence, folios 19270 to 19272); report on remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folio 698), and forensic report by forensic specialists from the Institute of Forensic Medicine on the members of the MRTA group who died in the residence of the Japanese ambassador in Peru, August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 143).

consistent with the photograph submitted to this Court during the exercise of reconstruction of the facts.

307. Unlike the other members of the MRTA, Eduardo Nicolás Cruz Sánchez bore only two injuries: one from the projectile of a firearm that entered through the back left of the neck and exited on the right side of the head, and the other in the abdomen-pelvis (*supra* para. 292). The Court would note that this pattern of injury is manifestly different from those of the other members of the MRTA. Most of them had five or more gunshot wounds, but the body of Eduardo Nicolás Cruz Sánchez had only one injury caused by a firearm.[393] This could suggest that the death of Cruz Sánchez occurred under circumstances different from those of the other guerrillas.

C) Conclusions of the Truth and Reconciliation Commission

308. Regarding the facts of the case, the Truth and Reconciliation Commission devoted a chapter of its final report to what it called "extrajudicial executions at the residence of the Japanese ambassador (1997)", in which it reported, "there are sufficient grounds to reasonably assume that during the rescue operation, actions were committed that were in violation of human rights, and an impartial, independent investigation [is therefore] essential, to determine the responsibilities for the case."[394]

309. The final report of the Truth and Reconciliation Commission particularly stated:

> The hypotheses raised by the forensic examinations are reinforced with the statements rendered to police authorities and subsequently to the investigating judge by National Police Sergeants Raúl Robles Reynoso and Marcial Teodorico Torres Arteaga. Both officers were responsible for the detention of Eduardo Nicolás Cruz Sánchez, alias 'Tito', and delivered him alive to a member of the army upon completion of the operation. These National Police officers […] have claimed that one of the subversives left through the tunnel that connected house No. 1 to the ambassador's residence, hiding among the other hostages. When they were in the yard of the house, one of the hostages signaled to them, advising them that a member of the MRTA was trying to escape. They proceeded to confront him and neutralize him, they bound his hands, placed him in a dorsal decubitus position, and then reported to their commanding officer, Army Colonel Jesús Zamudio Aliaga, who told them to keep him there and that he would have him picked up. Moments later, a uniformed, unidentified 'commando' with his face covered emerged through the tunnel from the ambassador's residence to house No. 1, took the subversive alive and led him through the tunnel into the residence. According to the witnesses, the subversive was wearing a dark green polo shirt, dark shorts, brown shoes, no socks, and was clearly seen not to be carrying a weapon. The neutralized subversive, later identified as Eduardo

[393] It should be noted that the presence of a firearm projectile in the region of the thorax is in dispute. *Cf*. Autopsy report 0878-2001 prepared by the Institute of Forensic Medicine on March 20, 2001 (evidence file, volume I, annex 7 to the case submission brief, folios 582 to 587). See the chest x-ray report by John H.M. Austin, July 16, 2012 (evidence file, volume XI, annex 14 to the State's answering brief, folio 7435), and expert statement delivered by Juan Manuel Cartagena Pastor at public hearing before the Inter-American Court, February 3 and 4, 2014. Expert witness Luis Bernardo Fondebrider and the Third Special Criminal Chamber were handled separately in the case file. *Cf.* Expert witness statement by Bernardo Fondebrider at public hearing before the Inter-American Court, February 3 and 4, 2014, and ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13614 to 13626).

[394] Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 719 (evidence file, volume I, annex 1 to the case submission brief, folio 5).

Nicolás Cruz Sánchez, alias 'Tito', was found dead on a concrete slab at the back of the outside hallway of the residence.[395]

310. The Commission concluded, regarding Eduardo Nicolás Cruz Sánchez:

> Witness statements by Hidetaka Ogura and National Police Sergeants Raul Robles Reynoso and Marcial Teodorico Torres Arteaga about how the subversive Eduardo Nicolás Cruz Sánchez, alias 'Tito', was captured and overpowered, as well as the findings from the autopsies, lead to the assumption that he was arbitrarily executed under circumstances unrelated to the armed clash while he was in the custody of military personnel and had surrendered his arms.[396]

D) Examination of the facts by the Peruvian courts

311. The ruling by the Third Special Criminal Chamber of the Superior Court of Lima on October 15, 2012 (*supra* para. 219), delivered following the submission of extensive testimonial, documentary and expert evidence, concluded:

> […] Nicolás Cruz Sánchez was outside the residence when he was detained; this panel finds it self-evident[, in this regard,] that given their police training, Sergeants [Robles Reynoso and Torres Arteaga], who had also been working with the National Intelligence Service under the orders of Jesús Zamudio Aliaga and recognized him as their immediate commanding officer and therefore, they would naturally apprise him of any contingency, as in this case a detention, and thus there is every reason to believe that this also occurred, even though we do not have a courtroom statement by the accused, who is in contempt. […] All this raises questions as to whether the MRTA member known as 'Tito' had a grenade on his person, considering that he had been detained and his hands were bound behind his back; moreover, the unfolding of the event […] would suggest that in view of the impact force of the bullet, if he had been holding a grenade, it would not have remained in his hand.
>
> […]
>
> The criminal proceedings have proven the death of Eduardo Nicolás Cruz Sánchez, who was detained or apprehended by two police officers from the National Intelligence Service [...] he was then found prone in an area located between House No. 1 and the residence itself, with a single bullet wound that entered from the left side of the neck and was necessarily lethal, and he was seen in this area under the guard of personnel from the National Intelligence Service. Also relevant are the opinions concerning the distance at which the shot was fired, the position of Cruz Sánchez' body at the time of impact, and the caliber of the projectile able to cause a wound of this kind. However, it has not been possible to determine whether this happened by order or command from any the defendants present in what has been called the "parallel chain of command", that is, the commission of the crime as the direct consequence of a policy of State.
>
> […]
>
> This leads the majority to believe, […] in principle, that the subversive [Cruz Sánchez] was killed after being detained, and the final proven fact is that he was in the power of the police from the national intelligence service under the command of Zamudio Aliaga.

---

[395] Truth and Reconciliation Commission, *Informe Final*, 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), pp. 731 and 732 (evidence file, volume I, annex 1 to the case submission brief, folios 17 to 18).

[396] Truth and Reconciliation Commission, *Informe Final*, 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 734 (evidence file, volume I, annex 1 to the case submission brief, folio 20).

> […] In keeping with Article 321 of the Criminal Procedural Code, therefore, the trial [of Zamudio Aliaga] should be declared suspended until he has been taken in and brought before the Chamber, at which time, with the guarantees of due process, he should face the charges brought by the Prosecutor General and the claims of the plaintiffs, in the presence of all parties, and a verdict should be handed down.[397]

312. This version of the facts can also be drawn from the final decision made in the domestic jurisdiction in the framework of the investigations, handed down by the Transitory Criminal Law Chamber of the Supreme Court of Justice when it ruled on motions to vacate, lodged against the verdict of the Third Special Criminal Chamber (*supra* paras. 233 and 234), which said the following about the death of Cruz Sánchez:

> The military operation unfolded very quickly, it was precise and effective, and as has been established, guidelines were set in place for cases of injured and captured MRTA members. […]
>
> [… I]t can therefore be asserted only that the extrajudicial execution, as held by the trial court, and which was not included in the appeal, was an isolated crime and not part of the operation or the plans developed by higher-ranking authorities.[398]

E) Examination of the State's international responsibility for the death of Eduardo Nicolás Cruz Sánchez based on the evidence

313. The Court has examined the evidence in the case file and the particular circumstances surrounding the facts of Eduardo Nicolás Cruz Sánchez' death and finds that at the time he died, he was in the custody of the State.

314. Statements by members of the State security forces Robles Reynoso and Torres Arteaga, corroborated by the story of former hostage Ogura, have convinced this Court that Cruz Sánchez was captured alive in the yard of house No. 1, that he was bound and neutralized, that he was not bearing arms, and that he was turned over to a member of the armed forces who took him back inside the residence. Eduardo Nicolás Cruz Sánchez was later found dead. According to the report of the forensic anthropologists, he had been immobilized at the time of death (*supra* para. 178). None of the commandos who made statements before the military courts acknowledged having shot or killed him. What happened between the time he was detained and the time he died has not yet been fully elucidated.

315. The State argued before this Court that Eduardo Nicolás Cruz Sánchez was carrying a grenade at the time of his death. Peruvian judicial authorities themselves, however, dismiss this hypothesis, as the Third Special Criminal Chamber of the Superior Court of Lima cautioned that there were "questions as to whether the MRTA member known as 'Tito' had a grenade on his person, considering that he had been detained and his hands were bound behind his back; moreover, the unfolding of the event […] would suggest that in view of the impact force of the bullet, if he had been holding a grenade, it would not have remained in his hand."[399] The Court does not see how it could be possible, after he had been captured and as he was being escorted

---

397 Judgment by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13177 to 13692).

398 Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14721).

399 Judgment by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13614).

with his hands bound, Eduardo Nicolás Cruz Sánchez would have had the opportunity to hold a grenade. It is not plausible that he could have held a grenade in his hand and remained in that position even after his death. It is thus relevant to recall that the scene of the events may have been tampered with, a possibility that cannot be fully dismissed (*supra* para. 290).

316. This leads the Court to emphasize that the last time he was seen alive, his status was *hors de combat* and to deduce that he therefore merited the protection given under applicable international humanitarian law (*supra* paras. 276 to 278). Once Eduardo Nicolás Cruz Sánchez had been captured alive, the State was under obligation to grant him humane treatment and respect and guarantee his rights, all of which is in keeping with Article 4 of the American Convention, interpreted in light of Common Article 3 of the four Geneva Conventions.

317. The burden of proof is reversed in such cases, and the State acquires the obligation of providing a satisfactory, convincing explanation of what happened and refuting arguments about its responsibility, using suitable evidentiary material to demonstrate that there was some need in this case for the officers guarding Eduardo Nicolás Cruz Sánchez to use force. However, the State in the instant case has not provided this Court with a plausible, satisfactory explanation about how Eduardo Nicolás Cruz Sánchez died in the areas under exclusive control of the State. Certain information offered by the State suggests that Cruz Sánchez had a grenade in his hand (*supra* para. 293), but this is insufficient to dispel the belief, built on multiple, convincing items of evidence, that the death of Eduardo Nicolás Cruz Sánchez occurred while he was in the hands of the State, was *hors de combat*, and resulted from a gunshot while his body was nearly immobile, all of which runs counter to applicable principles of international humanitarian law (*supra* paras. 276 to 278).

318. Peruvian judicial authorities drew the same conclusion, finding that "he died after being detained" once the rooms in the residence had come under control and the hostages had been evacuated (*supra* paras. 223, 224 and 311). It can therefore be concluded that it was an extrajudicial execution (*supra* paras. 311 and 312).

319. All this leads the Court to conclude that the State incurred international responsibility for arbitrarily depriving Eduardo Nicolás Cruz Sánchez of his life in violation of Article 4(1) of the American Convention, read in conjunction with Article 1(1) thereof.

B.4 Circumstances surrounding the deaths of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza and the State's alleged international responsibility

320. The evidence in the case file shows that Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza were found dead on the second floor of the residence in the room tagged

“I”,[400] with multiple bullet wounds.[401] During the operation, squad eight of the Delta Strike Force was responsible for rescuing hostages in that room (*supra* paras. 155 and 156).[402]

321. The circumstances under which they died, and the question of whether their deaths incurred international responsibility for the State are matters that remain in dispute. The Commission and the representatives maintain that they were in the power of agents of the State at the time they were shot in room “I”.

322. The Commission draws on the following items of evidence to reach its conclusions in Report on the Merits No. 66/11:

> (i) the testimony of Hidetaka Ogura states that these members of the MRTA were alive and surrounded by military personnel who outnumbered them; that is, they had been neutralized, and Herma Meléndez Cueva was pleading for their lives;
>
> (ii) even though the official story says that the two guerrillas were armed, the report on identification and removal of the bodies makes no mention of their being armed or that any weapons were found near the bodies;
>
> (iii) a member of the explosives deactivation unit, who later entered the room while the MRTA members’ bodies were still present, said that they had died without putting up any resistance, as he did not see “any weapons near them at all, and besides, the positions of their bodies suggest the same thing;”
>
> (iv) the many bullet wounds these members of the MRTA received to vital parts of the body bear out the use of the selective instinctive shooting technique, whose purpose is to eliminate the enemy rather than neutralize, even following surrender; it should be emphasized, in this regard, that Herma Luz Meléndez Cueva took 14 shots, seven to the head, one to the neck and six to the thorax, and Víctor Salomón Peceros Pedraza received nine bullets, six of them to the face and chest;
>
> (v) eyewitness statements by the soldiers involved are inconsistent as to which person or persons may have shot the MRTA members, nor do they explain how these guerrillas had come in through the hallway, as it was already under the control of the commandos; and
>
> (vi) the State did not proceed immediately to perform timely, complete autopsies after the incident, nor has it conducted a conscientious, impartial, effective investigation of the facts.

323. The representatives weighed the following items of evidence:

> (i) the judicial case file contains the statement by Ogura, but holds no statements by any other hostages who were present in the same room and could have seen what happened;

---

[400] *Cf.* Record of identification and removal of the bodies of MRTA guerrillas found in the residence of the Japanese ambassador, April 23, 1997 (evidence file, volume I, annex 6 to the case submission brief, folios 120 and 121). See also: ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives’ observations on the State’s preliminary objections, folios 13581 to 13582).

[401] *Cf.* Partial selective autopsies of the 14 MRTA members, April 23, 1997 (evidence file, volume II, annex 16 to the case submission brief, folios 759 and 760); report of forensic examinations by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folios 141 and 142), and report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folios 691 to 692). See also: Expert statement delivered by Derrick John Pounder and certified before a public attestor, January 23, 2014 (evidence file, affidavits, volume XXX, folios 20821 to 20826).

[402] *Cf.* Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives’ observations on the State’s preliminary objections, folio 13527).

(ii) the "serious contradictions in the explanations given by the commandos who were part of the delta eight squad in charge of room "I" concerning how the alleged confrontation had unfolded";

(iii) "the bodies of the two MRTA members presented bullet wounds whose trajectory could be traced from behind, in a forward direction, and this cannot be explained from the statements about a face-off";

(iv) forensic evidence is not consistent with the explanations about a face-to-face confrontation, and

(iv) there is no evidence that the alleged victims were armed, as the report on identification and removal of the bodies does not indicate that any weapons were found near these two bodies even though weapons found near the bodies of other MRTA members are documented. They also noted that in his statement before the domestic courts, "Luis Ernesto Gálvez Melgar, a member of the explosives deactivation unit, said that in his view, the people whose bodies he observed in room 'I' had died without putting up any resistance, as he had not seen any weapons near them at all, and besides, the positions of their bodies suggest the same thing."

324. The State held that the deaths had taken place in combat as a result of gunshots fired when the armed guerrillas had advanced through the hallway and approached the hostage evacuation area. Specifically, the State said that Hidetaka Ogura could not have seen or heard what he was reporting, as there was a great deal of noise and smoke in room "I", and from the far end of the balcony where he was evacuated, there was no line of sight into the door of the room.

325. The Court will now analyze the plausibility of the hypotheses brought, first, by the Commission and the representatives of the alleged victims, and second, by the State, in light of evidence in the case file and bearing in mind the Court's particular role, as this is not a criminal court nor does it hold to the same standards of evidence as criminal proceedings (*supra* paras. 280 and 282).

A) Eyewitness evidence

326. The August 20, 2001 letter that Hidetaka Ogura sent to the judiciary said that he saw the following at the time he was evacuated:

> About ten minutes after we heard the first explosion, members of the military command entered room 'I', one from the terrace, and the other through the main door of the room. There was much shooting of guns in the room by the military. When the shooting in room 'I' ended, we waited a few more minutes to leave the residence building until the members of the military command told us to go down the stepladder they had set up on the terrace. I was the next to last to take the ladder. […]. As I turned to take the ladder on the terrace, I was facing the main door to the room. When I turned, I saw that two MRTA members were surrounded by the military, a woman called 'Cynthia' and a man I could not recognize, but he was short in stature and surrounded by tall soldiers. Before I climbed down the ladder, I heard 'Cynthia' screaming something like: 'Don't kill him' or 'Don't kill me'.[403]

---

[403] Letter from Hidetaka Ogura to the judiciary of Peru, August 20, 2001 (evidence file, volume I, annex 5 to the case submission brief, folios 112 to 113).

327. Mr. Ogura reiterated his story before the Peruvian courts,[404] the Inter-American Commission,[405] and the Inter-American Court of Human Rights.[406]

328. The file contains no other statements to corroborate Hidetaka Ogura's story. However, it does contain statements by commandos confirming that they shot the MRTA members during the evacuation of the hostages. Walter Martín Becerra Noblecilla, whose task was to support Major Huarcaya Lovón in taking control of room "I" by entering from the balcony, said that he spotted two MRTA members at the door, and he shot at them to prevent them from entering the room, but he did not see when they were killed. He did confirm, however, that he later saw two dead MRTA members in the room—a man and a woman.[407] José Luis Alvarado Díaz also recalled having shot at a man and a woman who were crouched down, entering room "I".[408] Raúl Huarcaya Lovón, head of squad eight, said that as the last hostage was being evacuated, he heard shots from inside the room and was informed that two MRTA members had been taken down, and he reported this to the head of "Delta Strike Force" at the end of the operation.[409]

329. The Commission emphasized the contradictions among statements by the different commandos who had been assigned to take control of the same area. The Court notes that the same contradictions were discussed in the domestic jurisdiction during the criminal trial. The Court holds, in this regard, that its task is not to replace the domestic courts in weighing evidence and establishing possible individual responsibilities, a decision that pertains to the domestic criminal courts, but instead to analyze the actions or omissions of agents of the State, based on evidence brought by the parties.[410] The Court reiterates that it is not a criminal court and that, as a general rule, it is not for the Court to decide on the authenticity of the evidence produced in a domestic investigation when this has been considered valid in the competent

---

404 *Cf.* Statement by Hidetaka Ogura before the Third Special Criminal Chamber, proceedings of session 68, April 23, 2012 (evidence file, volume XV, annex 17 to the State's answering brief, folios 10300 to 10330). The 2012 verdict by the domestic courts said: "[…] there were two different moments; Hidetaka Ogura's statement about the detention of Cruz Sánchez is found plausible, as there are two other statements on the development of this one point, which makes it likely to have happened; a majority of the panel agrees, by contrast, that his story about the deaths of Peceros and Meléndez is the only such statement, which, if it is weighed together with multiple other items of evidence already described, leads to believe that it did not occur, especially if the outcome is not as to a fact per se, but rather, the possible presence of criminal liability." Ruling by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folio 13649).

405 *Cf.* Testimony rendered by Hidetaka Ogura to the Inter-American Commission in a public hearing on February 28, 2005 (evidence file, volume II, annex 46 to the case submission brief, folio 1326).

406 *Cf.* Sworn statement by Hidetaka Ogura taken and certified by a public attestor on January 28, 2014 (evidence file, volume XXX, affidavits, folios 20620 to 20624).

407 *Cf.* Initial statement by Walter Martín Becerra Noblecilla before the Third Special Criminal Chamber, August 1, 2002 (evidence file, volume XXIV, further helpful evidence, folios 16913 to 16927).

408 *Cf.* Continuation of the initial statement by José Luis Alvarado Díaz before the Third Special Criminal Chamber, August 2, 2002 (evidence file, volume XXIV, further helpful evidence, folios 16930 to 16939). See also: initial statement by Manuel Antonio Paz Ramos before the Third Special Criminal Chamber, August 5, 2002 (evidence file, volume XXIV, further helpful evidence, folios 16941 to 16953).

409 *Cf.* Expanded the statement by Raúl Huarcaya Lovón before the Specialized Provincial Criminal Prosecutor, November 28, 2001 (evidence file, volume XXVI, CVR evidence, folios 18870 to 18873), and initial statement by Raúl Huarcaya Lovón before the Third Special Criminal Chamber, August 21, 2002 (evidence file, volume XXIV, further helpful evidence, folios 16997 to 17008).

410 *Cf. Case of Cantoral Huamaní and García Santa Cruz v. Peru, supra, para. 87, and Case of Gutiérrez and family v. Argentina, supra*, para. 78.

judicial jurisdiction, unless violation of the guarantees of due process in obtaining, investigating, verifying or assessing said evidence can be verified or proved directly.[411]

330. For the purposes of finding the State internationally responsible, it is therefore irrelevant to identify specifically the commando or commandos who fired the shots that killed Meléndez Cueva and Peceros Pedraza. The Court holds, in any case, that given the circumstances in which the operation unfolded, it is reasonable that there would be no fully systematic, logical and consistent account of the chain of events, and it is not surprising that the narration of facts such as these should contain elements that could be considered a priori to be inaccurate or even contradictory. The important point, then, is that the declarants claimed to have killed them in the course of the operation and in the area where the bodies were found.

331. Both the Commission and the representatives point to another possible clue that a member of the group from the explosives deactivation unit ("UDEX") who entered room "I" the day after the operation, where the bodies of these MRTA members were found, said that he had seen no "weapons near them at all", and therefore thought that they had "been killed without putting up any resistance".[412] The Court recalls, in this regard, that it cannot fully dismiss the possibility that the scene of the events had been tampered with, and at the very least, this statement should be considered in the overall context of the evidence in the case files.

B) Evidence by expert witnesses developed in the investigations

332. The body of Herma Luz Meléndez Cueva had received fourteen gunshot wounds, and Víctor Salomón Peceros Pedraza, nine.[413] The report on human remains NN1-NN14 by Clyde C. Snow and José Pablo Baraybar expressly excluded the cases of Meléndez Cueva (NN10) and Peceros Pedraza (NN09) from its conclusions, with the following explanation:

> [F]ifty-seven percent of the cases (NN2, NN3, NN4, NN6, NN7, NN11, NN13, NN14) presented a type of injury that generally perforated the back of the neck, through the first and third cervical vertebrae, and exited through the first cervical vertebra […]. The fact that these lesions had followed the same path (back to front) suggests that all these victims were in the same position with respect to the shooter and had little or no mobility.[414]

333. The fact that they did not all present the same pattern of injury does not rule out the use of the selective instinctive shooting technique (*supra* para. 163), but it may suggest a situation in which the commandos were caught by surprise and turned to the use of force, as the hostages were still being evacuated.

---

[411] *Cf. Case of the Santo Domingo Massacre v. Colombia, supra*, para. 201, and *Case of de the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, supra*, para. 77.

[412] Statement by Luis Ernesto Gálvez Melgar before the Specialized Provincial Prosecutor, May 11, 2001 (evidence file, volume XXVI, CVR evidence, folios 18338 to 18344).

[413] *Cf.* Tables 1 and 2 of the report on forensic examinations by the Institute of Forensic Medicine on MRTA members who died at the residence of the Japanese ambassador to Peru on August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folios 180 to 181). See also: Forensic examination report, case 12,444, State of Peru before the Inter-American Court of Human Rights, Report No. 2, June 22, 2012, by Juan Manuel Cartagena Pastor, stating, "[t]he [n]umber of shots at target NN9 was at least 12", and that the body of NN10 had received at least "15" (evidence file, volume XXIX, evidence submitted in the public hearing, folios 20558 and 20561).

[414] Report on human remains NN1-NN4 attributed to the Túpac Amaru Revolutionary Movement, by Clyde C. Snow and José Pablo Baraybar, Peruvian Forensic Anthropology Team, July, 2001 (evidence file, volume II, annex 12 to the case submission brief, folio 698).

C) The procedure by the military courts to reconstruct the facts.

334. The report on the exercise of reconstruction conducted in June, 2003 as part of the proceedings before the military courts indicates the following:

> Death of Víctor Salomón PECEROS PEDRAZA and Herma Luz MELENDEZ CUEVA, and the events that occurred in Room 'I'. The accused—Major HUARCAYA LOVÓN, Captain PAZ RAMOS and Sergeant ALVARADO DÍAZ—were summoned to describe and reiterate the positions, movements and events in the room tagged "I" of the residence from the moment the next-to-last hostage was evacuated, having heard the explanations of the case, this judiciary panel understands that those in room "I" were Major HUARCAYA, on the balcony helping to take the ladder and climb down it to the rescued hostages, and only two remained to be evacuated and were prostrate on the floor […] Sergeant ALVARADO DÍAZ was helping him pick up the next-to-last one (who was, according to his own words, the diplomat Hidetaka OGURA), and Captain PAZ RAMOS led him and turned him over to Major HUARCAYA LOVÓN on the balcony, the hostage climbed down the ladder while Sergeant ALVARADO DÍAZ returned for the final hostage, who went out to the balcony, hesitated, and went back to the closet to remove a package, saying 'medicine, medicine' as the next-to-last hostage descended the ladder. The final hostage, an elderly person, was led to the ladder […] and climbed down, and at that moment two MRTA subversives appeared from the hallway, a woman with a grenade and a man with a machine gun, firing at Captain PAZ RAMOS and at Sergeant ALVARADO DÍAZ, and it was evident that, given the position of the two soldiers, their movement as they shot, and the place where they claimed they had seized the two MRTA members, their shots could have hit the two subversives simultaneously and in different parts of the body.[415]

D) Conclusions of the Truth and Reconciliation Commission

335. In 2003, the Truth and Reconciliation Commission found as follows:

> According to the April 14, 2003 opinion of the provincial prosecutor, there are contradictions in the stories given by these military personnel. The opinion says that, under the circumstances in which the final hostage in room 'I' was evacuated over the room's balcony where the ladder had been set up, two terrorists entered the door to the room—a man carrying an UZI machine pistol or an AKM rifle, and a woman carrying a war grenade in her hand, and they responded by shooting at them, causing their death.
>
> The prosecutor finds that this narrative does not explain how the two subversives were able to get to the main door to room 'I', considering that the contiguous rooms and hallways were under the control of commandos from squads seven and eight. The prosecutor therefore finds plausible the report by Hidetaka Ogura that these two subversives had surrendered.
>
> Based on information collected during the investigation by the public prosecutor, it is safe to say that the order to kill the subversives was part of the modus operandi used during the hostage rescue actions.[416]

336. The report draws the following conclusion about Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza:

---

[415] Procedure of reconstruction of the facts with the replica of the residence of the Japanese ambassador, June 3, 2003 (evidence file, volume XVIII, annex 21 to the State's answering brief, folios 12074 to 12078).

[416] Truth and Reconciliation Commission, *Informe Final*, 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 733 (evidence file, volume I, annex 1 to the case submission brief, folio 19).

> In the case of the subversives Herma Luz Meléndez Cueva, alias 'Cinthya' and Víctor Salomón Peceros Pedraza, there is evidence, such as the testimony cited above by Hidetaka Ogura and the the autopsy reports, suggesting that these two were also victims of arbitrary executions.[417]

E) Finding on the facts by the Peruvian courts

337. The verdict by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012, drew the following conclusion:[418]

> At the beginning of the operation, the delta eight squad, divided into two subgroups provided with aluminum ladders, gained access to the second floor (room 'I') from the balcony, where they found several hostages, including the Japanese embassy's first secretary Hidetaka Ogura, and it was in this same area that the two subversives from the Túpac Amaru Revolutionary Movement died; they were tagged as NN09, later identified as Víctor Salomón Peceros Pedraza, and NN10, Herma Luz Meléndez Cueva. […], it was Captain Paz and Sergeant Alvarado from the Third Army Infantry who killed these subversives under circumstances in which the subversives approached the place where the Japanese hostages were being evacuated, and they were carrying firearms; this intervention was depicted in the sketches mentioned above, submitted by General José Williams Zapata when he made his statement […], that is, according to the unfolding of the events and the design of the operation itself, it can be concluded that these subversives were felled in combat and therefore it is clear that there was no arbitrary execution whatsoever and consequently no order or transmission of any order to the accused for this purpose, because the decision to shoot was taken immediately as a result of the entry into the room of the two armed subversives when the hostages were being evacuated, and it would make no sense to presume that there was some order or transmission of an order between the accused concerning these two commandos at that very moment. […]. The expert statements in the case file repeatedly uphold the thesis that there was no extrajudicial execution of these two commandos, concluding that the gunshots observed showed no sign of having been fired by a targeted weapon, and with

---

[417] Truth and Reconciliation Commission, *Informe Final*, 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 735 (evidence file, volume I, annex 1 to the case submission brief, folio 21).

[418] In her dissenting opinion, Judge Carolina Lizárraga Houghton defended a different view of the facts:

> [W]itness Ogura related his experience, saying that […] when he was rescued by the commandos in room 'I' of the residence of the Japanese ambassador, when he turned to take the ladder, he was facing the main door to the room and saw that two members of the MRTA were surrounded by the military, a woman called 'Cynthia' and a man he said he did not recognize, and that before he went down the ladder, he heard that 'Cynthia' was shouting something like, 'Don't kill him' or 'Don't kill me,' and his testimony convinced this writer, and in her opinion, she can state that it has not been proven that the ladder that witness Ogura used to climb down from room 'I' had been placed against the left side railing of the balcony of room 'I' because the photographic record referenced in the majority opinion […] was taken at a different time, after the rescue operation, and there are also other photographs taken after the rescue operation, […] showing that the ladder was placed at the front part of the room 'I' balcony; moreover, the sketches also referenced in the opinion, […] showing the placement of this ladder on the left side of the balcony are not official documents, but were drawn by the commandos themselves and brought to this trial as an addition to their initial statements as an argument for the defense when they were defendants before the Third Special Criminal Chamber of the Superior Court of Lima. Even if the ladder had been placed on the left side of the balcony, the statement by witness Ogura, in the opinion of the undersigned, is consistent with the view shown in the photograph from the case file […] and the photograph […] that shows that the distance between the door frame and the railing beside which the ladder is claimed to have been placed is so narrow that it does provide a line of sight into the room, especially so if witness Ogura claims that what he observed took place before he climbed onto the ladder.

Dissenting opinion by Superior Judge Carolina Lizárraga Houghton (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13694 to 13695).

respect to the number of bullet wounds found in the bodies of these two MRTA members, they can be explained according to the same story being told by the commandos, who entered two-by-two into the different rooms in sequence and fired when they saw a subversive element, or by indication of the commandos Paz and Alvarado who fired shots but they did not say how many or the place in the body where they shot, aside from their positions when the subversives entered the room armed; body NN09 presented gunshot wounds to the head, chest, and upper and lower right extremities, the entry orifice in the front midsection and the exit orifice in the neck, and body NN10 with gunshot wounds to the head, chest, abdomen and left arm, entering through the occipital region and exiting through the left infraorbital region, but the interesting thing for this case is that other subversives have been taken down by similar bullet impacts to the body but not to the head, which suggests that selective instinctive shooting was applied discretionally and for the reasons already discussed, and particularly that it was not necessarily the gunshot to the head that caused the death of these two subversives. Regarding the statement by witness Hidetaka Ogura, […] it says that when he turned to take the stepladder (set in place by the commando personnel for the rescue) on the terrace, facing the main door to the room, when he turned that way, he saw that two members of the MRTA were surrounded by the soldiers and he heard voices saying, 'Don't kill me' or 'don't kill him', and he saw two subversives who had surrendered and were surrounded by two commandos; the first conclusion is that it was these two subversives, Peceros and Meléndez, and second, as concluded by the majority, according to the sketches that show the placement of a stepladder up against the railing to the side of the balcony and given the place where the ladder was set up and the length of the section of wall between the railing where the ladder was and the door to the room from the balcony, that witness Hidetaka Ogura could not have been able to observe what was actually happening inside the room, and indeed, this witness, confirming the written statement he had sent to the public prosecutor, said that to climb down the ladder, Mr. Nakae was ahead of him and Mr. Yamamoto was behind him, and this would have blocked his line of sight, given the physical presence of another hostage, […] combined with the obvious speed necessary for the evacuation itself to prevent injury to the physical welfare of any hostage because combat was still going on, at the same time, the air was filled with smoke in the rooms during the combat, which made it difficult to see what was happening inside the rooms […]; now, we should consider the statement by commando Huarcaya, who said that he was helping the hostages climb down, blocking them with his body, and they went down one at a time, which means that Ogura had already gone down the ladder so that the final hostage could hurry down, the one who when he was being evacuated from the balcony asked for his medications, so this hostage and Huarcaya went into room 'I' to get them and when this hostage was climbing down, was when he heard the shouting by the commandos that the terrorists were there, and when Huarcaya went in, he found two terrorists on the floor, and commando Paz, who was with commando Alvarado, was telling him they had seized the weapons and the grenades.

[…]

Regarding the MRTA members Meléndez Cueva and Peceros Pedraza, our majority conclusion is that they died in combat, for which we have the admission statement of two commandos, Paz and Alvarado, who admit to having killed them but in the act of combat, these subversives entered armed into the room tagged 'I', when the Japanese hostages were being evacuated, and the commandos left these weapons near a closet. Although these subversives, like the rest of the MRTA members, presented multiple gunshot wounds on their bodies, this has been explained in the relevant section of this verdict given that the commandos moved two-by-two through all the rooms of the residence and fired shots when they saw an 'enemy', the expert statements cited herein do not identify the outcome of the shots and therefore cannot establish which of them were necessarily lethal, finally, the only incriminating version is from Hidetaka Ogura, for which we must start with the reasonable assumption that the operation needed to be conducted under the protocols of the element of surprise and speed, not only to protect their own lives, but also to safeguard the lives of the hostages, so the evacuations had to be conducted in the same way, so following this witness's reasoning, he did not have a good enough line of sight to see that these subversives were surrendering because as he

himself said, he observed it when he was preparing to climb down the metal ladder placed on the balcony, and this ladder, as we have seen in the photographs, and as is clear from the statements of the commandos who were members of the strike force responsible for rescuing the Japanese hostages from this room, was resting against the metal railing of the balcony, so he would not have been able to see well enough into the room because the width of the wall between the door to the room and the far end of the balcony railing made it impossible, and moreover, the hostages were being evacuated one by one as a safety measure, so if as the witness himself said, he was the next-to-last hostage, and it is clear in the case file that the final hostage was hurrying to climb down but returned to the room for his medications, it means that witness Ogura was no longer on the scene, that is, he was climbing down the ladder; all this, without considering the terms of the oral questioning (the representative of the public prosecutor says that the military operation was a success and that no extrajudicial execution was committed by the commandos) or the final ruling by the military courts (saying that these two subversives died in combat).[419]

338. The description provided in this verdict concerning the deaths of these members of the MRTA was upheld by the Transitory Criminal Law Chamber of the Supreme Court of Justice in a ruling on July 24, 2013 on the motions to vacate:

> [C]oncerning the deaths of victims Peceros Pedraza and Meléndez Cueva, […] Hidetaka Ogura stated that after the commandos entered room 'I'—that was where the hostages were, including the judges; eleven Japanese hostages were in the room next door, room 'H', including Ogura. When he turned to look toward the main door to room 'I', he observed that two MRTA members—one of them was Cynthia—were surrounded by tall soldiers; that before he went down the ladder, he heard Cynthia shouting something like: *'Don't kill him'* or *'Don't kill me'*.
>
> [Other hostages] commented that they could see nothing because of all the smoke caused by the shooting and by the bombs exploding [… and] similar statements were made by the commandos from delta squad eight […].
>
> [N]ot only did three commandos (not two, as the verdict under appeal states) admit that they had shot at the complainant terrorists in an act of combat, but all the commandos dispute the description of the scene offered by Hidetaka Ogura. […]
>
> [S]imilarly, the forensic evidence fails to corroborate the charges and the description given by Hidetaka Ogura. […]
>
> [I]n the instant case, the statement by Hidetaka Ogura concerning victims Meléndez Cueva and Peceros Pedraza is not plausible and has not been corroborated on any point. This means it cannot be held as proven or conclusive evidence, nor can it be considered consequential. The evidence for the defense undermined the plausibility of his story. At the same time, forensic evidence points to crossfire in combat, not to a summary execution of overpowered, unarmed MRTA guerrillas.
>
> […]
>
> In short, it has been proven that victims Meléndez Cueva and Peceros Pedraza were not arbitrarily executed, and they died in an act of combat.[420]

F) Assessment of the State's international responsibility for the deaths of Herma Luz Meléndez Cueva y Víctor Salomón Peceros Pedraza based on the evidence

---

[419] Judgment by the Third Special Criminal Chamber of the Superior Court of Lima, October 15, 2012 (evidence file, volume XX, annexed to the representatives' observations on the State's preliminary objections, folios 13177 to 13692).

[420] Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012, July 24, 2013 (evidence file, volume XXI, further helpful evidence, folios 14666 to 14723).

339. The Court cautions that, unlike the situation confirmed for the case of Eduardo Nicolás Cruz Sánchez, the sequence of events surrounding the deaths of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza unfolded at the same time the operation was taking place, when it had not yet finished and the hostages were still being evacuated.

340. The evidence available to the Court is neither ample nor diverse enough to demonstrate consistently that Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza had ceased to take part in hostilities at the time they died, which would have qualified them as being *hors de combat*. The only evidence brought before it is the testimony of former hostage Hidetaka Ogura, who said that the two had already been neutralized. In this particular case, therefore, it has not been shown that Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza died after having surrendered or laid down their weapons. The Court agrees that the number of bullets found in their bodies could also be due to the fact that several different people, according to their own statements, had fired at the same time.

341. The Peruvian judicial authorities drew the same conclusion when they held that the two "died in combat" (*supra* paras. 222, 337 and 338). The Transitory Criminal Chamber of the Supreme Court delivered its decision on July 24, 2013 ruling on the motions to vacate, and held:

> [T]he number of gunshots that the fallen MRTA members received from the commandos reveals that it was a case of crossfire[…]: the many wounds on different parts of the body and the varied trajectories are commonly observed in clashes of armed groups, using either single-shot firearms or multiple-shot weapons (crossfire).[421]

342. The Court finds no grounds in this context to draw a conclusion different from that developed in the domestic jurisdiction, that Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza died while they were still taking part in the hostilities. Combined with this, because the Japanese hostages were still being evacuated, the two unquestionably could have posed a threat to the life and safety of the hostages. Therefore, based on its overall analysis of the evidence brought before it and outlined above, the Court deems that, in the instant case, it does not have sufficient evidence to hold that the State's actions regarding Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza constituted arbitrary deprivation of life due to the use of lethal weapons in a way that was contrary to the applicable principles of international humanitarian law (*supra* paras. 276 to 278).

343. The Court therefore concludes that there are insufficient grounds in this international process to find the State internationally responsible for violating Article 4(1) of the American Convention, read in conjunction with Article 1(1) thereof, in injury of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza.

X
RIGHT TO JUDICIAL GUARANTEES AND RIGHT TO JUDICIAL PROTECTION, READ IN CONJUNCTION WITH THE OBLIGATION TO RESPECT AND GUARANTEE RIGHTS AND THE OBLIGATION TO ADOPT DOMESTIC LEGAL EFFECTS

344. The Court would recount the following information about the facts in the instant case: (1) an investigation was initiated in 2001 when complaints were lodged, which led to the opening of a criminal trial in the ordinary courts; (2) an ensuing jurisdictional dispute was

---

[421] Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, helpful evidence, folio 14696).

settled by the Supreme Court in favor of the military courts for the accused commandos; (3) the military courts ruled to dismiss the case in 2003, and the file was later closed permanently; (4) the ordinary courts pursued the trial against the authorities involved, which was later joined with a process on criminal complicity; (5) at the time the case was submitted to this Court, there was as yet no final verdict in the process underway in the ordinary courts; (6) as a supervening event, the Third Special Criminal Chamber of the Superior Court of Lima handed down a verdict on October 15, 2012, acquitting all the defendants with the exception of one of the accused who was in contempt; (7) the Transitory Criminal Law Chamber of the Supreme Court of Justice decided on July 24, 2013 not to vacate the ruling; (8) a criminal trial begin in 2007 against former President Fujimori Fujimori and one other person, and (9) a new investigation is currently pending for the facts involving Eduardo Nicolás Cruz Sánchez (*supra* paras. 174 to 245).

345. Based on this account, and bearing in mind the Commission's claims in its Report on the Merits No. 66/11 and the arguments of the parties and the Commission before this Court, the Court will proceed with a general discussion of the obligation to investigate in the instant case, and then address the specific arguments.

A. General discussion of the obligation to investigate in the instant case

346. The Court has repeatedly held that the States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8(1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1(1)).[422]

347. This duty to "guarantee" rights carries with it the positive obligation for the State to undertake a series of actions, depending on the specific substantive right at issue.[423] For example, in cases of violent death, the Court has held that a serious, independent, impartial and effective investigation undertaken ex officio and without delay is a fundamental and conditioning element for protecting rights violated in situations of this kind.[424]

348. This general obligation comes particularly to the fore in cases when agents of the state have made use of lethal force. As soon as the state is aware that its security agents have used firearms with deadly consequences, it is obliged to initiate, ex officio and without delay, a serious, independent, impartial and effective investigation to determine whether the deprivation of life was arbitrary. This obligation is a fundamental and conditioning element for protecting the right to life that is negated in these situations.[425] Moreover, if actions that violate human rights are not investigated conscientiously, in a sense they would have the approval of public authorities, which would undercut the State's international responsibility.[426]

---

[422] *Cf. Case of Velásquez Rodríguez v. Honduras. Preliminary objections, supra*, para. 91, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 237.

[423] *Cf. Case of Cantoral Huamaní y García Santa Cruz v. Peru, supra*, para.101.

[424] *Cf. Case of the Pueblo Bello Massacre v. Colombia, supra,* para. 143, y *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 101.

[425] *Cf. Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 88, and *Case of Nadege Dorzema et al. v. Dominican Republic*, *supra*, para. 101.

[426] *Cf. Case of the Pueblo Bello Massacre v. Colombia, supra*, para. 145, and *Case of Zambrano Vélez et al. v. Ecuador, supra*, para. 102.

349. In cases where it has been established that extrajudicial executions have occurred, it is essential that States conduct an effective investigation into the violation of the right to life recognized in Article 4 of the Convention, geared toward discovering the truth and prosecuting, arresting, bringing to trial and ultimately punishing the perpetrators of the incident,[427] especially when agents of the state are involved.[428]

350. The fact that the deaths in the instant case took place in the context of a non-international armed conflict does not release the State from its obligation to undertake an investigation, initially on the use of force with lethal consequences; even so, the Court may take into account certain specific circumstances or constraints created by the situation of conflict per se when analyzing whether the State has complied with its obligations. The Court would caution, more particularly, that in the instant case, the hypothesis of alleged extrajudicial executions came to light several years after the events occurred (*supra* paras. 165 and 174), and therefore the State could not have been required to meet its obligation to initiate investigations at the outset, as stipulated by international standards developed for cases of extrajudicial executions (*infra* para. 381).

351. Nevertheless, the duty to investigate is an obligation of means, not results, that must be assumed by the State as its proper legal duty and not as a mere formality preordained to be ineffective, or a step taken by private interests that depends upon the initiative of the victims or their families or the provision of evidence by private parties.[429]

352. The fulfillment of the obligation to undertake a serious, impartial and effective investigation of the events, in accordance with the guarantees of due process of law, has also entailed an analysis of how much time the investigation takes [430] and "all the legal means at the disposal"[431] of family members of the deceased victim, to ensure that they are heard and can take part in the process of investigation.[432]

353. The Court does take note, in the instant case, that the State has recognized its responsibility for violating the duty to conduct the criminal trial in the ordinary courts within a reasonable period (*supra* Chapter IV). Today, 18 years after the event occurred, there is still no final, definitive ruling on what happened in the case of Eduardo Nicolás Cruz Sánchez, but instead, a new investigation has been ordered (*supra* para. 236); this sequence of events exceeds what could be considered a reasonable period for this purpose. In view of these considerations and the State's recognition of responsibility, the Court takes as proven that the State failed to comply with the requirements of Article 8(1) of the Convention, in injury of the family members of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza.

---

[427] *Cf. Case of the Pueblo Bello Massacre v. Colombia, supra*, para. 143, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 157.

[428] *Cf. Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs.* Judgment of November 25, 2003. Series C No. 101, para. 156, and *Case of the Massacres of El Mozote and surrounding areas v. El Salvador, supra*, para. 243.

[429] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 177, and *Case of García Lucero et al. v. Chile. Preliminary Objection, Merits and Reparations.* Judgment of August 28, 2013. Series C No. 267, para. 121.

[430] *Cf. Case of Genie Lacayo v. Nicaragua. Merits, Reparations and Costs.* Judgment of January 29, 1997. Series C No. 30, para. 77, and *Case of Kawas Fernández v. Honduras. Merits, Reparations and Costs.* Judgment of April 3, 2009. Series C No. 196, para. 109.

[431] *Case of the "White Van" (Paniagua Morales et al.) v. Guatemala. Merits, supra*, para. 173, and *Case of Kawas Fernández v. Honduras, supra*, para. 109.

[432] *Cf. Case of Kawas Fernández v. Honduras, supra*, para. 109.

354. Based on this reasoning, the Court will now examine the remaining arguments about possible violation of the right to judicial guarantees and the right to judicial protection, read in conjunction with the general obligations to respect and guarantee and the adoption of domestic legal effects, structured as follows: the initial procedures and securing of evidence; the duty to initiate an investigation ex officio; the military courts' lack of jurisdiction to hold trial on the alleged extrajudicial executions of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza; the alleged violation of the obligation to adopt domestic legal effects under the terms of Article 2, read in conjunction with Articles 8 and 25, of the American Convention; the lack of due diligence, and the right to know the truth.

B. Initial procedures and securing of evidence

Arguments of the parties and of the Commission

355. The ***Commission*** began by recalling that in cases of death at the hands of agents of the state, "it is particularly important for the competent authorities to take all reasonable measures to secure whatever evidence is necessary for conducting the investigation." The Commission added that, as stipulated in the United Nations Manual on Extrajudicial Executions, due diligence in the forensic examination of a death requires a continuous chain of custody for all forensic evidence, but the instant case presented several irregularities in collecting and preserving evidence. It emphasized: (i) the bodies were removed by the military judge and prosecutor one day after the incident, and it would appear that the case file contained no information to suggest that the scene of the crime had been secured at that time; (ii) at least two experts appear to have been compelled by military authorities to sign the report on removal of the bodies even though they had not been present; (iii) the military judge had ordered autopsies to be done in a facility that was ill-suited for such a procedure, specifically, the Central Hospital of the National Police of Peru, whose staff were not accustomed to performing these procedures; (iv) entry was barred to any personnel not involved in the autopsies, and the examiners themselves were not allowed to take pictures or videos; (vi) no dental paraffin tests were performed, and no ballistics comparisons were done of the weapons used in the operation; (vii) there was no analysis of the shooting distance of bullets lodged in the bodies; (viii) only three of the 14 bodies were identified, one of which was Eduardo Nicolás Cruz Sánchez; and (ix) the burial of the remains of the 14 MRTA members was clandestine.

356. The Commission noted, in this regard, that the shortcomings and irregularities in the early investigations in 1997 "were acknowledged by the State in its answering brief," and "expert witness Cartagena Pastor confirmed them". The Commission recalled that, from the very beginning, the procedures were under the control of military authorities, who had apparently placed "serious constraints on developing the most significant evidence". According to the Commission, "not only were limits placed on the scope of the autopsies, and the performance of supplementary examinations was blocked, but obstacles were set in the way, experts were denied access, and graphic records were not made available."

357. The Commission maintained, for all these reasons, that the State had failed to preserve the necessary evidence and had failed to conduct crucial procedures or had done so in ways that lacked the diligence required to explain the need and proportionality of the use of force by agents of the state who took part in the operation in which Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza lost their lives. The Commission held that all this amounted to a failure to secure the evidence concerning the facts and also a failure to implement the procedures that would have been essential for investigating them.

358. The ***representatives*** argued that the State had not proceeded with due diligence to investigate the facts and had taken actions that led to the loss of evidence that would have been useful to establish the truth but that could not be recovered. It cited the following: (i) omissions in the inspection of the scene of the events; (ii) effective procedures had not been undertaken promptly to identify the bodies of Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva, and (iii) omissions in performing the 1997 autopsies.

359. The representatives pointed out that the inspection of the scene had taken place the day after the incident occurred and, even though the duty officer from the Lima office of criminal prosecution had arrived the same day as the event, military personnel had blocked him from entering. The representatives added that, "as can be seen in the verdict of the first trial court, the commandos who took part in the operation entered the place after completing the mission and before members of the explosives deactivation unit and the military judge arrived, and therefore it is highly likely that at the time the bodies were removed, the scene had been tampered with." The representatives maintained that the report on removal of the bodies gave only a brief description of the corpses but did not clearly establish the location of the bullet wounds or other signs on the bodies, nor did it explain the methods used for the procedure or make reference to the condition of the clothing. They emphasized, moreover, that the report on removal of the bodies was signed by several experts who stated that they had not been present at the time the procedure was conducted and they were later forced to sign.

360. The representatives also said, "the case file does not show that any measures were taken whatsoever to secure the scene and prevent loss of evidence useful for shedding light on the truth of what happened." They added that the case file contained no evidence that the following procedures had been carried out: (i) a complete search of the residence of the Japanese ambassador to collect any possible evidence present on site; (ii) gathering of ballistic evidence; (iii) an examination of the site to detect the presence of other weapons; (iv) taking photographs of the scene of the crime, of the bodies, and of the presence and location of evidence at the scene, and (v) a complete map of the premises demonstrating the spots where the bodies and other evidence were found.

361. The representatives found that the State had not conducted any additional procedures to determine the identity of the bodies, and that Peceros Pedraza and Meléndez Cueva had been identified only upon exhumation in 2001. They stated, in this regard, that "the family members of the MRTA members were never contacted to tell them what had happened or to have them present to identify the bodies."

362. The representatives added that the partial selective autopsies did not meet necessary requirements. In the first place, they explained, the physicians who performed them had not been properly trained for this purpose because they were not professional forensic examiners who performed autopsies on a regular basis. In the second place, they argued, the autopsies had been only partial, not complete, as the skulls had not been opened and no samples had been taken for pathology tests. They added that the autopsy protocols had given only a general description of the bullet wounds found and other external injuries but did not describe findings from inside the corpses. In their final pleadings, the representatives recalled the words of expert witness Fondebrider concerning the autopsies performed in the Central Hospital of the National Police of Peru, to wit, "they were extremely basic, inadequate and did not qualify as a full autopsy, and the unique possibility for conducting more in-depth examinations was lost." The representatives also emphasized the orders given that only personnel directly involved in the autopsies would be allowed entry, and even those experts who had managed to get in were subject to constraints.

363. The representatives therefore asserted that the State had not acted with due diligence to secure evidence that was essential for shedding light on the facts, but to the contrary, had taken a number of actions whose result was to ensure that such evidence would not be available—evidence that cannot be recovered afterwards. Finally, the representatives contended that, alongside its forensic errors, the State had also committed other omissions that incurred international responsibility.

364. The ***State*** pointed out that "it has not denied that the [initial] procedures as conducted may have contained omissions or shortcomings, but this cannot be interpreted as an attempt by this means to cover up the commission of extrajudicial executions." The State asserted that "regardless of how many errors or omissions may have been committed in 1997, these early procedures did provide sufficient grounds to lead public authorities and officers to carry out due investigations in 2001."

365. The State then proceeded to analyze the actions undertaken by the public prosecutor in response to complaints lodged in 2001 and concluded, "based on the arguments given, it is clear that the office of the public prosecutor took action from the time the complaints were received in 2001, fulfilling its constitutionally mandated role, and was diligent in the procedural measures it ordered and those it conducted itself. The State therefore held that the public prosecutor had responded to the complaints filed of alleged extrajudicial executions and proceeded immediately with measures to bring about investigation of the facts by police authorities. It maintained that the bodies had been exhumed and identified as a consequence of the launch of the preliminary investigation. The State also noted that when the complaints were made public in 2001, the procedures undertaken by the Forensic Institute, as an auxiliary body to the office of the public prosecutor, received "highly favorable assessments both by expert witness Fondebrider and by expert witness Cartagena in the public hearing."

Considerations of the Court

366. In the instant case, the actions by the Peruvian authorities and the words of the State itself in the process before this Court tend to confirm that omissions and errors were committed in the initial procedures and in the first measures to secure evidence. Indeed, the Forensic Institute was ordered to undertake expert analysis in 2001 when the complaints of extrajudicial executions were lodged, specifically because of clearly demonstrated omissions in the autopsies and shortcomings in determining the causes of death (*supra* para. 175), as well as the failure to identify most of the bodies (*supra* para. 172). The State maintains, however, that these errors were corrected when the criminal investigation was launched (*supra* para. 79).

367. The Court has previously held that the management of the crime scene and the handling of bodies must include, as a minimum, the procedures essential for preserving evidence that may contribute to the success of the investigation.[433] The Court cautions that even in a situation of armed conflict, international humanitarian law includes obligations of due diligence concerning the correct and adequate removal of corpses and the efforts that should be made to identify and to bury them in order to facilitate their subsequent identification.[434]

---

[433] *Cf. Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 16, 2009. Series C No. 205, para. 301, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 489.

[434] *Cf. Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 496.

368. The Court notes that these obligatory actions must be performed immediately, to the degree that circumstances permit. The authorities in the case at hand believed that the removal of the bodies should not be done right away due to safety concerns (*supra* paras. 168 and 169). Even if circumstances militated against performing these procedures due to safety conditions, nonetheless the State was under obligation to conduct them as promptly as possible, as soon as the rescue operation was complete, and to do so meticulously and diligently.

369. Under circumstances like these, when government officers or authorities themselves hold information on how victims died from the use of lethal force by agents of the state, nothing must hinder the conduct of a proper investigation that will ensure the minimum guarantees of independence and effectiveness.

370. Nonetheless, it has been shown in this case that measures were not taken to preserve and properly secure the scene of the events and that removal of the bodies, which was controlled by authorities from the military and the National Intelligence Service, cannot be described as reliable, technically sound or professional: weapons and grenades that turned up were moved, and no technical personnel recorded or photographed the evidence found;[435] no fingerprints were taken on the weapons or grenades allegedly involved in the incident; no one was allowed to take prints or evidence at the scene of the events or to take the samples needed for use in forensic exams,[436] and the report on removal of the bodies did not record all necessary information.

371. The 1997 autopsies were performed in a place that was unsuitable and lacked the resources needed for such a procedure.[437] No external description of the bodies was made, and only the chest and abdominal cavities were opened, but not the skulls, which was a breach of internal regulations (*supra* para. 175). By superior orders, no pathology studies were requested.[438] Also by superior orders, the bodies were not to be photographed or filmed.[439]

---

[435] Members of the explosives deactivation unit made statements, now contained in the case file, consistently reporting that: (a) they were not allowed to keep a record of their procedures; (b) they were watched at all times by members of the army; (c) during the entire procedure, camouflaged army personnel were present, wearing face masks and taking notes of the scene. *Cf., inter alia,* Statement by Luis Ernesto Gálvez Melgar before the Specialized Provincial Prosecutor, May 11, 2001 (evidence file, volume XXVI, CVR evidence, folios 18338 to 18344); statement by José Alberto Marthans Gómez before the Specialized Provincial Prosecutor, May 14, 2001 (evidence file, volume XXVI, CVR evidence, folios 18345 to 18352), and statement by Oscar Fidel Pérez Torres before the Specialized Provincial Prosecutor, June 11, 2001 (evidence file, volume XXVI, CVR evidence, folios 18353 to 18358).

[436] *Cf.* Statement by Pedro Rigoberto Ruiz Chunga before the Specialized Provincial Prosecutor, June 13, 2001 (evidence file, volume XXVI, CVR evidence, folios 18359 to 18362).

[437] *Cf.* Statement by Pedro Rigoberto Ruiz Chunga before the Specialized Provincial Prosecutor, June 13, 2001 (evidence file, volume XXVI, CVR evidence, folios 18359 to 18362); statement by Vicente Pedro Maco Cárdenas before the Specialized Provincial Prosecutor, June 15, 2001 (evidence file, volume XXVI, CVR evidence, folios 18363 to 18368); statement by María del Rosario Peña Vargas before the Specialized Provincial Prosecutor, June 18, 2001 (evidence file, volume XXVI, CVR evidence, folios 18369 to 18374); and statement by Norvinda Muñoz Ortiz before the Specialized Provincial Prosecutor, June 19, 2001 (evidence file, volume XXVI, CVR evidence, folios 18375 to 18380).

[438] *Cf.* Statement by Pedro Rigoberto Ruiz Chunga before the Specialized Provincial Prosecutor, June 13, 2001 (evidence file, volume XXVI, CVR evidence, folios 18359 to 18362); statement by Vicente Pedro Maco Cárdenas before the Specialized Provincial Prosecutor, June 15, 2001 (evidence file, volume XXVI, CVR evidence, folios 18363 to 18368); statement by María del Rosario Peña Vargas before the Specialized Provincial Prosecutor, June 18, 2001 (evidence file, volume XXVI, CVR evidence, folios 18369 to 18374); and statement by Norvinda Muñoz Ortiz before the Specialized Provincial Prosecutor, June 19, 2001 (evidence file, volume XXVI, CVR evidence, folios 18375 to 18380).

[439] *Cf.* Memorandum 12-97-DGPNP from the Director General of the National Police of Peru of the General Directorate of the National Police of Peru, April 23, 1997, to the Director of Health of the National Police of Peru (evidence file, volume XXVI, CVR evidence, folio 18933).

Finally, a highly questionable decision was made to bury the bodies in different cemeteries around the city of Lima, and 11 of them were not identified (*supra* para. 172).

372. The Forensic Institute has itself recognized these irregularities in the management of the scene and removal of the bodies and the lack of rigor in performing the autopsies (*supra* para. 177), as has the Truth and Reconciliation Commission.[440] These omissions and shortcomings may condition or hamper later investigations. For instance, the Forensic Institute report said that, upon analysis of the bodies exhumed four years after the facts, "due to the advanced state of organ decomposition […] and the absence of soft tissue, it was impossible to identify accurately the distances from which the bullets had been fired."[441]

373. The correct implementation of these initial procedures is of paramount importance for the investigations, and one of their main purposes is precisely to collect and preserve the evidence, protecting it from being contaminated, in order to facilitate and ensure the subsequent clarification of the facts.[442] The actions of State authorities in this case, particularly the Special Military Prosecutor and the Special Military Judge, do not reflect this care.

374. The Court finds that in this specific case, the procedures by military and police authorities lacked the minimum degree of diligence, and this had and continues to have concrete repercussions for the investigation of the facts, which cannot be corrected or remedied due to the simple fact that forensic examinations were conducted later, when the facts were being investigated in the ordinary courts.

C. Duty to initiate an investigation ex officio

Arguments of the parties and of the Commission

375. The ***Commission*** noted that the prosecutor had undertaken an investigation of the alleged extrajudicial executions based on the criminal complaint lodged three years after the events by the families of two of the deceased members of the MRTA. The Commission also observed that no administrative investigation into the affair had been launched whatsoever. The Commission held, on this point, that in such cases, where a military operation takes place in the framework of a domestic armed conflict, once the State learns about the possible commission of extrajudicial executions, it is under obligation to act without delay to initiate a conscientious, independent, impartial, effective investigation. The Commission said, along this line, that "the investigations in the ordinary courts were triggered when family members lodged a complaint in 2001, and not on the initiative of the State," and that up until March 31, 2011, no judicial ruling about investigations had been issued by the ordinary courts.

---

[440] The final report by the Truth and Reconciliation Commission emphasized that: "according to statements by the National Police physicians who took part in the autopsies, the procedure was irregular, but they had to complete it because their immediate supervisors and even the President of Peru, Alberto Fujimori, had so ordered. This irregularity was later confirmed in the forensic reports by the Forensic Institute, whose specialists concluded that the autopsies performed at the Central Hospital of the National Police did not conform to current legal and scientific requirements." Truth and Reconciliation Commission, *Informe Final,* 2003, volume VII, chapter 2.66, Extrajudicial executions at the residence of the Japanese ambassador (1997), p. 726 (evidence file, volume I, annex 1 to the case submission brief, folio 12).

[441] Report of forensic studies by the Forensic Institute on MRTA members who died at the residence of the Japanese ambassador to Peru, August 16, 2001 (evidence file, volume I, annex 7 to the case submission brief, folio 185). See also: final report 008-2º Sec- V.I. CSJM, June 6, 2003, para. 63 (evidence file, volume XVIII, annex 21 to the States answering brief, folio 12097). See also: expert testimony by Luis Bernardo Fondebrider before the Inter-American Court at public hearing, February 3 and 4, 2014.

[442] *Cf. Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*, para. 492.

376. The ***representatives*** pointed out that the incidents had taken place with the knowledge of the state, "in the context of a counter-subversive military operation planned and executed by agents of the State, with the knowledge of the highest authorities." The representatives argued, in this regard, that even though the bodies had been removed the day after the operation and the partial selective autopsies had been performed, no investigation was launched to discover whether the use of firearms, and more specifically, the use of lethal force, had been legal. They held, accordingly, that "the State was under obligation to initiate an investigation to clear up the circumstances of the deaths" that occurred as a result of the operation. The representatives emphasized that investigations had not been conducted ex officio even after Hidetaka Ogura made his statements public. According to the representatives, that was the moment when the State acquired a heightened obligation to investigate, because allegations of extrajudicial executions were being made. The representatives added that the investigations began only after January 2, 2001, when APRODEH lodged a complaint about the matter in response to Ogura's statements, that is, nearly three years after the events had occurred. They therefore argued that the State was responsible for having failed to begin on its own initiative to conduct a conscientious, effective investigation into the reported executions of the alleged victims once it had become aware that they had died as a result of the use of force by agents of the state.

377. The ***State*** maintained that it had fulfilled its obligation to investigate the way lethal force had been used by its officials and pointed out that if, as a consequence of these investigations, the State had found that the death of the MRTA fighters had taken place outside the bounds of reasonable and proportional use of force, then investigations would have begun in the interest of clearing up what could have been considered an extrajudicial execution, but that this was not the case. The State explained that the conduct of this first investigation should be distinguished from any differences of opinion or questions about its outcome that had arisen since late 2000 and early 2001, owing to the statements by Hidetaka Ogura, and regarding which the State had also proceeded immediately with an investigation by the public prosecutor specifically to examine the alleged extrajudicial executions. The State held that "any claimed discrepancies, questions or shortcomings as to how the investigations had been conducted upon completion of the [military operation] cannot in and of themselves prove State responsibility."

378. The State added that "the time to begin examining whether the State fulfilled its obligations to investigate facts considered to be in violation of the [American Convention] should properly be when the State becomes aware of such facts, but not some time years later when someone begins to speculate that such violations may have been committed." The State invited the Court to "fully assess all the actions the State of Peru had undertaken since 2001 as an immediate response to the complaints brought before the public prosecutor concerning alleged extrajudicial executions of [the three alleged victims]."

Considerations of the Court

379. When accusations are made that extrajudicial executions have occurred, it is essential that States conduct an effective investigation into the violation of the right to life recognized in Article 4 of the Convention and determine the responsibilities of all the perpetrators and participants, especially when State agents are involved.[443].

380. The Court has also held that the obligation to investigate does not derive solely from treaty-based provisions of international law binding upon the States Parties, but also from the

---

[443] *Cf. Case of Myrna Mack Chang v. Guatemala, supra*, para. 156, y *Case of the Massacres of El Mozote and surrounding areas v. El Salvador, supra*, para. 243.

domestic legislation that makes reference to the duty to investigate certain unlawful conducts ex officio, and from the norms that allow the victims or their family members to present a complaint such that they may participate in the criminal proceedings in order to establish the truth of the events.[444]

381. The Court stresses that after the rescue operation, no consideration was given to the hypothesis of extrajudicial executions, and therefore, the State was not under obligation at that time to undertake such investigations. The State was under obligation, however, to conduct an investigation into the use of lethal force with the minimum guarantees of diligence (*supra* paras. 350 and 369).

382. The Court does understand that the State received notice of the possible extrajudicial execution of these persons from the newspaper report printed in the *El Comercio* newspaper on December 18, 2000, headlined "MRTA members captured alive" (*supra* para. 174). Moreover, in December, 2000 and January, 2001, several family members lodged complaints, after which the State undertook an investigation into the incident, and the public prosecutor filed charges based on the outcome of the investigation (*supra* paras. 174 to 182).

383. Therefore, as of at least December 18, 2000, the State needed to initiate ex officio a conscientious, impartial, effective investigation into the alleged extrajudicial executions. The Court deems that the time elapsed between the publication of the news story, the State's receiving complaints filed by family members, and the beginning of the police inquiry is reasonable, and therefore finds that the State did not violate its duty to initiate an ex officio investigation into this matter.

D. The military courts' lack of jurisdiction to hold trial on the alleged extrajudicial executions of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza

Arguments of the parties and of the Commission

384. The ***Commission*** recalled that: (i) the prosecutor general opened an inquiry in May, 2002 against several of the commandos who took part in the operation as alleged principals, and against several alleged abettors; (ii) days later, the military courts opened an investigation of all the commandos who took part in the operation, and (iii) on a motion by the military courts, the Supreme Court ruled on the jurisdictional dispute, finding that military personnel who had taken part in the commando group should be tried by the military courts, and the rest, by the ordinary courts. The Commission pointed out that "the Supreme Court based its decision on the fact that the incidents had occurred in a 'clear military confrontation', that the commandos were serving in a military operation in a state of emergency, in line with a principle enshrined in the Constitution, and that the members of the MRTA 'were acting as an armed group that belonged to a terrorist organization;' therefore, they could not be considered civilians," and any crimes committed should be heard by the military courts. The Commission noted, however, that, "although certain behaviors displayed by the commandos during the operation […] could ultimately have been heard by the military courts, the extrajudicial executions, held by the Supreme Court itself to be serious human rights violations, should have been fully investigated in the ordinary jurisdiction."

[444] *Cf. Case of García Prieto et al. v. El Salvador. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 20, 2007. Series C No. 168, para. 104, and *Case of Garibaldi v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 23, 2009. Series C No. 203, para. 118.

385. The Commission maintained that in cases such as this, where the State learns of alleged extrajudicial executions in the context of a military operation, the authorities who investigate the matter should be independent, both de jure and de facto, from the personnel involved in the facts. The Commission said that the jurisdiction of the military courts should apply only when legally protected military interests come under criminal attack, in a case involving the particular functions of defense and state security, and never to investigate human rights violations. In this connection, the Commission concluded that arbitrary extrajudicial executions cannot be considered a crime of military service, but serious human rights violations, and therefore, the investigation into the facts of the instant case should have been pursued in the ordinary jurisdiction.

386. The Commission added that the military courts cannot be an independent and impartial body to investigate and prosecute human rights violations because the military has a deeply rooted esprit de corps. The Commission also held that, "when military authorities prosecute an active subject who, like them, is also a member of the army, impartiality becomes difficult because the conduct of certain members of the security forces is being investigated by other members of the same forces; this often serves to cover up the facts instead of clarifying them[. A] court's impartiality derives from the fact that its members do not have a direct interest, have not taken a preconceived position, do not have a preference for any of the parties, and are not involved in the dispute." The Commission also pointed out that the family members of the alleged executed victims would have no access to the military courts, combined with the fact that the personnel involved were acquitted without an independent investigation, and the facts had thus remained unpunished.

387. Based on these arguments, the Commission held that in the instant case, the State of Peru "overstepped the sphere of military justice, breaching the parameters which are defined by exception and restriction. It had broadened the jurisdiction of the military courts to include crimes having no direct relationship to military discipline[,] in this case, extrajudicial executions[,] or to the legally protected military interests of that jurisdiction. It had dismissed the case against the military personnel who took part in the operation[,] preventing family members [of the alleged victims] from having access to justice."

388. The ***representatives*** maintained that it was already proven that "Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza did not die in an armed clash, but that instead, they had been captured and were neutralized at the time they were executed." They held, therefore, that the incident was unrelated to questions of discipline or military mission, but was a blow against interests protected by domestic criminal laws and by the American Convention, that is, against the lives of the alleged victims. The representatives asserted, accordingly, that "the intervention by the military courts in the investigation and prosecution of these facts runs counter to the principles of exception and restriction that should apply to this jurisdiction." They held that the submission of this case to the military jurisdiction violated the principle of natural justice and the right of the victims and their families to be heard by an independent and impartial judge, as "the lack of impartiality and independence of the military jurisdiction in this case is clearly demonstrated […] by the fact that these courts decided to dismiss the case against all the military personal who were being prosecuted, taking their accounts of the facts as true and setting aside all evidence that could have led to the conclusion that it was a case of extrajudicial execution."

389. The representatives in their closing arguments emphasized the opinion offered by expert witness Andreu, that "the presence of armed conflict or a situation of a state of emergency is irrelevant for determining whether the military courts have jurisdiction, as circumstances of means or time have no bearing on the legal interest being protected." They emphasized that the case entailed "execution of a person out of combat, making it a serious

violation of international humanitarian law and accordingly, a war crime." They added that "war crimes can never be considered military transgressions, and therefore cannot be brought before the military jurisdiction." Along the same lines, the representatives concluded that the investigations in the military jurisdiction had not been limited to discovering whether the operation had been conducted as planned, but that "this process was clearly directed toward investigating the execution" of, among others, Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva.

390. The ***State*** disagreed with the arguments of the Commission and the representatives that family members had been denied access to the proceedings in the military courts. It had been fully demonstrated, according to the State, that the family members of the alleged victims had had access to the process in the military courts and were able to avail themselves of the remedies provided by that jurisdiction. It held, in this regard, that the laws in effect at the time did allow the family members of victims to be present in the military criminal proceedings, and the case file of the trial "contains lengthy documentation demonstrating that anyone who had wanted to serve as a plaintiff had so requested and their petitions had been granted," under the terms of legislation in effect at the time. The State denied that the proceedings in the military courts had been secret.

391. The State further emphasized that the case of Eduardo Nicolás Cruz Sánchez had never been brought before the military courts, "as the alleged crime had been investigated from the beginning by the ordinary courts." The State therefore held that "any argument to the effect that the military courts were used to 'cover up' alleged criminal acts had absolutely no legal, […] political or anthropological basis," since in the instant case, "the ordinary courts [were] never blocked or impeded from taking jurisdiction over the case, nor [was] any effort made to try civilians in the military courts."

392. The State explained that "the military court trial of the commandos for alleged conduct directly related to the operation [was] permissible according to all international standards and [did] not breach judicial guarantees for the following reasons: (i) the complexity of the case from the perspective of the political context in which the facts occurred; (ii) this case unfolded in a legal context of transition toward a post-conflict state that had not yet been fully consolidated, as was evident from the continuing terrorist actions by Shining Path in Huallaga; (iii) the family members of the alleged victims had access to the proceedings in the military courts, despite arguments to the contrary by the Commission and the representatives of the alleged victims, and (iv) the domestic trials were divided into two phases following the ruling of the Supreme Court of the State of Peru, but the Cruz Sánchez case, as the case file clearly demonstrates, never entered the military jurisdiction."

393. The State also stressed that "the investigation and trial, as has been fully demonstrated, were conducted according to the standards of due process, and the jurisdictional dispute was settled impartially the Supreme Court, which handed down a duly reasoned judgment on April 5, 2004." The State went on to say, "bearing in mind that this was a military operation with implications for state security, the constitutional system guarantees that law enforcement bodies can perform their duties, [and therefore] the court best able to guarantee an impartial trial was the military jurisdiction, […] as this would prevent the possibility that judges who were ideologically biased or under pressure by various organizations might produce political judgments of such events."

394. The State added that there was no evidence indicating that the alleged victims and their rights might have been breached in the military criminal trial, so as to infer that this standard had been violated. The State also addressed the conduct of the military judges and prosecutors, maintaining that the military justice system had operated within the legal

framework in effect at the time of the facts, and it was only when evidence or indications of extrajudicial executions came to light that the ordinary courts immediately took over the investigations. The State contended that, despite any potential objections about its work, military justice had safeguarded the documentation that would later become part of the body of evidence in the investigation that began in 2001 and the resulting criminal trial.

395. The State also held that "when the Supreme Court concluded in 2013 that Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cruz had died in combat, it was upholding the same conclusion reached by military justice." It added that "even if it is argued that the hearing of this case by the military jurisdiction constituted a breach of procedural guarantees protected by the [American Convention], these guarantees were in fact respected in the process before the Supreme Court, which drew the same conclusion." The State noted that the ruling by the Third Special Criminal Chamber did reflect disagreement among the judges about the death of Eduardo Cruz Sánchez. The State held, in this regard, that "the continuing questions about the scope of the ruling by the military courts can be debated in the domestic sphere," depending on the position taken by the public prosecutor on whether to open an investigation into the death of Cruz Sánchez.

Considerations of the Court

396. The Court must first clarify, regarding the alleged victims in this case, that the military jurisdiction heard only the alleged extrajudicial executions of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, but not that of Eduardo Nicolás Cruz Sánchez (*supra* para. 185).

397. The Court would recall that its case law on the limited sphere of military courts to hear cases of human rights violations has consistently held that in a democratic state under the rule of law, the jurisdiction of military criminal courts must be restrictive and exceptional, applied only to the protection of legal interests associated with the particular functions of the armed forces.[445] This is why the Court has held that the military courts must judge only active-duty military personnel for committing crimes or misdemeanors that by their very nature affect the particular legally protected interests intrinsic to the military system.[446]

398. Moreover, considering the nature of the crime and the legally protected interest that has been injured, the military criminal courts have no competent jurisdiction to investigate and, if necessary, prosecute and punish the perpetrators of human rights violations; instead, the prosecution of such cases must always fall to the general justice system.[447] In this sense, the Court has held that "when military justice assumes competence for a matter that should be heard by ordinary justice, the right to an ordinary judge and, *a fortiori*, to due process is harmed,[448] and this, in turn, is closely related to the right of access to justice. The presiding

---

[445] *Cf. Case of Durand and Ugarte v. Peru. Merits, supra*, para. 117, and *Case of Argüelles et al. v. Argentina, supra*, para. 148.

[446] *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs.* Judgment of May 30, 1999. Series C No. 52, para. 128, and *Case of Argüelles et al. v. Argentina, supra*, para. 148.

[447] *Cf. Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs.* Judgment of May 11, 2007. Series C No. 163, para. 200, and *Case of Argüelles et al. v. Argentina, supra*, para. 148.

[448] *Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs, supra*, para. 128, and *Case of Cabrera García and Montiel Flores v. Mexico*. *Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 26, 2010. Series C No. 220, para. 197.

judge who hears a case must be competent, independent and impartial.[449] Thus, the victims of human rights violations and their families have the right to have those violations heard and adjudged by a competent court, according to due process of law and access to justice.[450]

399. The Court's judgment on the case *Cabrera García and Montiel Flores v. Mexico*, regarding cruel, inhuman and degrading treatment of civilians by military personnel, reiterated its constant case law according to which the military jurisdiction is not competent to investigate and, if applicable, prosecute and punish the perpetrators of alleged human rights violations; instead, those responsible must always be tried by the ordinary justice system. This conclusion applies not only to cases of torture, forced disappearance and rape, but to all human rights violations.[451] Moreover, the Court held in its judgment on *Radilla Pacheco v. Mexico*, a case of forced disappearance of a civilian, that in situations that violate the human rights of civilians, the military jurisdiction cannot operate under any circumstance.[452]

400. The Court is aware that this case differs from its earlier decisions that debated the jurisdiction of military courts to investigate, try and punish human rights violations committed by members of the military, because the alleged victims in the instant case are not civilians, but members of an armed group taking part in hostilities in the framework of a hostage rescue operation. Even so, the Court will not admit this factor as a reason to set aside its own case law, given the allegations concerning individuals who were allegedly *hors de combat* and were entitled to the guarantees provided in Common Article 3 of the four Geneva Conventions. The alleged extrajudicial executions were formally reported in late 2000 and early 2001, on the argument that the incidents occurred after members of the MRTA, the alleged victims in this case, were captured or placed *hors de combat*, which would have transformed these alleged executions, if so proven, into serious human rights violations that should be investigated, tried and sanctioned exclusively by the ordinary courts.

401. The Court would like to emphasize that the first investigations on the alleged extrajudicial executions of Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva began in the ordinary courts in January, 2001, after the families of some of the dead MRTA members had filed criminal complaints with the public prosecutor, alleging the commission of extrajudicial executions (*supra* paras. 174 and 175); later, following a jurisdictional dispute lodged by the investigative justice department of the CSJM that was settled by the Transitory Criminal Law Chamber of the Supreme Court on August 16, 2002 (*supra* para. 189), the investigation and prosecution of the facts were transferred to the military courts for claims involving the military commandos.

402. The Court recalls that ever since its judgment of the case *Durand and Ugarte v. Peru*, its case law has consistently held that the military courts have no competent jurisdiction to investigate and, if necessary, prosecute and punish the perpetrators of human rights violations; instead, the prosecution of such cases must always fall to the general justice system.[453]. The facts in the *Durand and Ugarte* case involved an operation to subdue prison riots in 1986, in which the military made "disproportionate use of force, which surpassed the

---

[449] *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs, supra*, para. 130, and *Case of Argüelles et al. v. Argentina, supra*, para. 149.

[450] *Cf. Case of Radilla Pacheco v. Mexico, supra*, para. 275, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 443.

[451] *Cf. Case of Cabrera García and Montiel Flores v. Mexico, supra*, para. 198.

[452] *Cf. Case of Radilla Pacheco v. Mexico, supra*, para. 274.

[453] *Cf. Case of Durand and Ugarte v. Peru. Merits, supra*, paras. 117, 118, 125 and 126, and *Case of Argüelles et al. v. Argentina, supra*, para. 148.

limits of their functions thus also causing a high [...] death toll" of inmates[454] This same consideration is also applicable to the instant case that took place in 1997. The Court repeats that, regardless of the year in which the acts that violated human rights occurred, the guarantee to be heard by an ordinary judge must be analyzed according to the object and purpose of the American Convention, which is the effective protection of the individual.[455]

403. Allegations were made of extrajudicial executions, and such acts derive from facts and codified crimes that are never associated with discipline or military justice. Instead, the alleged acts against Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza entail legal rights protected by domestic criminal law and the American Convention, including the victims' right to life and right to personal integrity. This is why the Court reiterates that the criteria that human rights violations should be investigated and prosecuted under the ordinary jurisdiction does not arise from the gravity of the violations, but rather from their very nature and that of the protected legal interest.[456] It is clear that the conduct under complaint is openly contrary to the duties to respect and protect human rights, and therefore lies outside the bounds of military jurisdiction. Therefore, the intervention of the military justice system in the investigation and prosecution of the extrajudicial executions of Víctor Salomón Peceros Pedraza and Herma Luz Meléndez Cueva was contrary to the parameters concerning its exceptional and restrictive nature and involved the application of a personal jurisdiction that functioned without taking into account the nature of the acts involved.[457]

404. Therefore, when the Supreme Court settled the jurisdictional dispute in favor of the military courts, it violated the guarantee of an ordinary judge called for in Article 8(1) of the American Convention, and as a result, the State incurred international responsibility in injury of the family members of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza. Because the military courts were not competent, the Court holds that there is no need to rule on the Commission's and representatives' arguments regarding the alleged lack of independence and impartiality and other judicial guarantees.

E. Alleged violation of the obligation to adopt domestic legal effects under the terms of Article 2, read in conjunction with Articles 8 and 25, of the American Convention

Arguments of the parties and of the Commission

405. The ***Commission*** contended that the facts surrounding the alleged extrajudicial executions of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza amounted to a breach of Article 2 of the American Convention, in injury of their families. It allowed that it had not addressed the alleged violation of this article in Admissibility Report 13/04, but "the facts on which it is built arose from information and documents that the parties supplied while the [...] case was being processed, and regarding which the State [had been] able to defend itself and submit its own arguments in the public

---

454 *Case of Durand and Ugarte v. Peru. Merits, supra*, para. 118.

455 *Cf. Case of Vélez Restrepo and family v. Colombia*. *Preliminary Objection, Merits, Reparations and Costs.* Judgment of September 3, 2012. Series C No. 248, para. 244, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 442.

456 *Cf. Case of Vélez Restrepo and family v. Colombia, supra*, para. 244, and *Case of Osorio Rivera and family v. Peru, supra*, para. 190.

457 *Cf. Case of Fernández Ortega et al. v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of August 30, 2010. Series C No. 215, para. 177, and *Case of Nadege Dorzema et al. v. Dominican Republic, supra*, para. 197.

hearing." The Commission noted that it was entitled to give its view on the matter based on the principle of *iura novit curia*.

406. The Commission noted that, under the terms of several articles of the military code of justice in effect at the time of the facts and Law 24,150, as well as Article 173 of Peru's Constitution,[458] the reasoning used by the Supreme Court to settle the jurisdictional dispute between the military courts and the ordinary courts was based on the contention that the commandos who took part in operation Chavín de Huántar were serving "in the line of duty, following orders, in the framework of a state of emergency."

407. The Commission recalled the Court's case law in the *Radilla Pacheco v. Mexico* case, according to which, "even if the crime is committed by active-duty servicemen or as a result of duty-related actions, this is not enough to justify their coming before the military criminal justice system." The Commission argued that, although the Supreme Court had ruled that the facts of the case could qualify as crimes against humanity, it found that they should be tried by the military courts for the military personnel who had participated in the operation. Citing the Court's case law in the cases of *Radilla Pacheco v. Mexico*, *Usón Ramírez v. Venezuela* and *Palamara Iribarne v. Chile*, the Commission underscored that the Supreme Court's interpretation had failed to establish clearly and unambiguously which of the crimes should be considered as part of military duty by identifying a direct, proximate line to that duty or to the violation of legal rights proper to the military system. The Commission held that, although the State had reported that in 2004 both the Constitutional Court and the Supreme Court had handed down rulings that human rights violations could not be considered duty-related, it had not explained how that case law could be applicable to the facts of this case.

408. In view of these considerations, the Commission concluded that the State had failed to fulfill the obligation contained in Article 2 of the American Convention, read in conjunction with Articles 8 and 25, when it broadened the military jurisdiction to hear crimes having no direct relationship to military discipline or legally protected interests of the military system.

409. The ***representatives*** offered no arguments on possible violation of Article 2 of the American Convention read in conjunction with Articles 8 and 25.

410. The ***State*** asked the Court to relieve it of "responsibility for Article 2 of the American Convention, read in conjunction with Articles 8 and 25 thereof." The State held that "it cannot be said […] that the intervention by the military courts was intended to cover up serious human rights violations" and that, even considering the hypothesis that some military court may have participated in the case with this perspective, "the situation was corrected by the subsequent rulings of the Constitutional Court and the Supreme Court." The State also made reference to the use of law 24,150, emphasizing that "it had been amended by law and and was also amended when some of its articles or phrases were declared unconstitutional, even before the Commission had issued its Report on the Merits 66/11." The State also clarified that the Supreme Court and the Supreme Military Court had applied substantive criminal laws that were on the books at the time, but which had now been repealed.

Considerations of the Court

[458] It reads: "[i]n the case of a crime of duty, members of the military and the police are under the applicable jurisdiction and the military code of justice. The provisions of this code do not apply to civilians, although the law makes an exception for crimes of treason and terrorism […]."

411. The Court's case law holds that a State incurs international responsibility for Article 2 of the American Convention not only when its domestic laws violate the Convention,[459] but also when government officials, in applying a domestic provision, interpret it in a way that violates rights protected by the Convention.[460]

412. The Court notes that in the instant case, the Commission did not challenge the domestic legal effects governing the possibility that crimes of function could be heard by the military courts, but merely questioned the interpretation given by the Supreme Court when it settled the jurisdictional dispute between the ordinary courts and the military courts, pointing to the Court's case law on the jurisdictional scope of military justice.

413. The Court agrees that this argument does not challenge Peruvian law, but rather a practice by domestic authorities based on the decision by which the jurisdictional dispute was settled when the Supreme Court extended the jurisdiction of the military justice system to include crimes having no strict connection to military discipline or protected interests proper to the military. It thus overlooked the Inter-American Court's interpretation of such guarantees concerning the scope of the military criminal jurisdiction. This line of reasoning is closely related to the argument discussed above to the effect that the military criminal courts were not competent to hear the facts of this case in light of the Court's established case law on Articles 8 and 25 of the American Convention.

414. The Court understands that the decision was specific to the particular case at hand and that both the Constitutional Court[461] and the Supreme Court[462] subsequently changed this practice, setting general, binding principles according to which the military courts must limit themselves to crimes of function determined on the basis of the protected legal interest, and not common crimes entailing human rights violations.

415. The Court therefore does not find violation of Article 2 of the American Convention, read in conjunction with Articles 8 and 25 thereof.

F. Lack of due diligence

Arguments of the parties and of the Commission

416. The ***Commission*** offered no arguments on this matter.

417. The ***representatives*** emphasized that no process had begun as yet, nor had any proceedings been undertaken at all, to discover whether military personnel had participated in the execution of Eduardo Nicolás Cruz Sánchez, "even though there was evidence that the

---

459 *Cf. Case of Almonacid Arellano et al. v. Chile. Preliminary Objections, Merits, Reparations and Costs*. Judgment of September 26, 2006. Series C No. 154, para. 123.

460 *Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil. Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, paras. 172 and 174.

461 *Cf.* Constitutional Court, File 0017-2003-AI/TC, judgment of March 16, 2004, paras. 129 to 133 (evidence file, volume VIII, annex 8 to the brief with pleadings, motions and evidence, folios 5249 to 5278). See also: Office of the Ombudsman, Report 97, *A dos años de la Comisión de la Verdad y Reconciliación*, September, 2005, pp. 130 to 135 (evidence file, volume VII, annex 6 to the brief with pleadings, motions and evidence. folios 4842 to 4847).

462 *Cf.* Supreme Court, Permanent Criminal Law Chamber, jurisdictional dispute 18-2004, order of November 17, 2004; First Transitory Criminal Law Chamber, jurisdictional dispute 29-04, order of December 14, 2004, and Permanent Criminal Law Chamber, jurisdictional dispute 8-2005, order of July 1, 2005. See also: Office of the Ombudsman, Report 97, *A dos años de la Comisión de la Verdad y Reconciliación*, September, 2005, pp. 130 to 135 (evidence file, volume VII, annex 6 to the brief with pleadings, motions and evidence. folios 4842 to 4847).

[alleged] victim was alive when he was turned over to a soldier, who had taken him into the residence of the Japanese ambassador, which at that time was occupied by the military." The representatives found that the State had not exercised due diligence to determine the identify of all those who took part in executing Eduardo Nicolás Cruz Sánchez and to punish them.

418. The representatives pointed out that, from the time the criminal process had begun on June 11, 2002, "defendant Jesús Zamudio Aliaga had been a fugitive from Peruvian justice, despite the fact that a warrant had been issued to the National Police to find him immediately, capture him, and confine him in the judicial prison." There was no further information, they noted, on actions taken by judicial and police authorities to locate and arrest this suspect, whose trial had been held in abeyance until such time as he was turned over to the trial court. They also said that the actions by court assistants who support the judges in charge of investigation and prosecution of facts involving serious human rights violations in themselves are creating a situation that runs counter to the general obligation to guarantee.

419. Finally, the representatives pointed to the case of former President Alberto Fujimori Fujimori, commenting that the prosecutor general had brought a complaint before the Congress seven years after the facts occurred and over eight years after the first complaints had been lodged. It was never processed. Four more years passed before the specialized provincial prosecutor brought charges. They closed by saying, "over four years after judicial authorities requested the extradition of Alberto Fujimori [Fujimori], the request had yet to be resolved by the ministry of justice and the president of the Peruvian cabinet of ministers."

420. The ***State*** offered no specific arguments on this matter.

Considerations of the Court

421. Although the Court has held that the duty to investigate is an obligation of means, not results, this does not mean that the investigation can be launched as "a mere formality preordained to be ineffective", or simply a step taken by private interests that depends upon the procedural initiative of the victims or their families or the provision of evidence by private parties.[463] It is the responsibility of government authorities to conduct a serious, impartial and effective investigation, using all the available legal means, designed to determine the truth and to prosecute and ultimately punish the perpetrators of the facts, especially in a case such as this one, in which agents of the state were involved.[464]

422. This Court has addressed the obligation to investigate with due diligence, asserting that the investigating body for an alleged human rights violation should use all the legal means at its disposal, within a reasonable period of time, to conduct all necessary actions and inquiries to achieve the desired results.[465] However, the Court recalls that the State's obligation to investigate consists primarily of fixing responsibilities and, where relevant, prosecuting and finally convicting. The Court reiterates that this is an obligation of means or conduct, and

---

[463] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 177, and *Case of García Lucero et al. v. Chile, supra*, para. 121.

[464] *Cf. Case of the Pueblo Bello Massacre v. Colombia, supra*, para. 143, and *Case of the Santo Domingo Massacre v. Colombia, supra*, para. 157.

[465] *Cf. Case of Gómez Palomino v. Peru, supra*, para. 80, and *Case of Human Rights Defender et al. v. Guatemala, supra*, para. 200.

therefore cannot be held as breached merely because the investigation does not produce a satisfactory result.[466]

423. The Court would also note the State's obligation to undertake all necessary measures to locate the fugitive defendant Jesús Salvador Zamudio Aliaga and bring him to trial, holding that the State has not demonstrated due diligence to find him.

424. Competent domestic authorities also must undertake or continue with the investigation of former President Alberto Fujimori Fujimori and elucidate possible military participation in the execution of Eduardo Nicolás Cruz Sánchez, to determine whether these hypotheses are consistent with the facts of the case and, if so, proceed accordingly.[467]

G. Right to know the truth

Arguments of the parties and of the Commission

425. The ***Commission*** offered no arguments on this matter.

426. The ***representatives*** held that the State had violated the right to the truth for the alleged victims and their family members "because the extrajudicial executions under consideration in the instant case were committed in a military operation that was planned and implemented by agents of the state, with the knowledge of the highest governmental authorities." They therefore believed that "only the State has possession of information necessary to discover the truth of what happened," but it had refrained from releasing this information. Moreover, they said that the State had taken several actions to block the truth from being known and to date had not identified or punished those responsible for these serious actions. They therefore asked the Court to hold the State responsible for the alleged violation of Articles 1(1), 8, 25 and 13 of the American Convention.

427. The ***State*** found that the Court's consistent case law led clearly to the conclusion that the right to the truth was "included in the right of the victim or their next of kin to obtain from the competent organs of the State an elucidation on the facts of the violation and set the resulting responsibilities, through the investigation and prosecution called for in Articles 8 and 25 of the Convention," and that it was therefore not necessary for the Court to rule on an autonomous, independent violation of the so-called right to the truth. The State cited, more specifically, the judgment on the *Blanco Romero et al. v. Venezuela* case, in which the Court did not find "that the right to the truth was an autonomous right enshrined in Articles 8, 13, 25 and 1(1) of the Convention, as the representatives were arguing"; it rejected any analogous line of reasoning in the claims that the representatives were making in the case at hand. The State added that this case law was reiterated in the judgment on the case of *The Pueblo Bello Massacre v. Colombia.*

Considerations of the Court

428. In several cases, the Court has held that the right to know the truth "is included in the rights of the victim or their next of kin to obtain from the competent organs of the State an elucidation on the facts of the violation and corresponding responsibilities, through the

---

[466] *Cf. Case of Velásquez Rodríguez v. Honduras. Merits, supra*, para. 177; *Case of Caballero Delgado y Santana v. Colombia. Merits.* Judgment of December 8, 1995. Series C No. 22, para. 58, and *Case of Castillo González et al. v. Venezuela. Merits.* Judgment of November 27, 2012. Series C No. 256, para. 153.

[467] *Cf. Case of the Afro-descendant communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, supra*, para. 378.

investigation and prosecution enshrined in Articles 8 and 25 of the Convention."[468] The Court has adjudged other cases in which it has developed additional and more specific tenets applicable to this concrete case of violation of the right to know the truth, such as *Anzualdo Castro et al. vs. Peru* and *Gelman vs. Uruguay*.[469] Similarly, in the *Gudiel Álvarez et al. (Diario Militar) v. Guatemala* case, the Court examined violation of the right to know the truth in its analysis of the right to personal integrity of family members and found that, by covering up information that could have helped the families learn the truth, the State in that case had violated Articles 5(1) and 5(2) of the American Convention.[470] The Court also declared an autonomous violation of the right to the truth in the *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil* case, in which, due to the specific circumstances at play, in addition to a violation of the right of access to justice and effective recourse, it also found a violation of the right to seek and receive information, enshrined in Article 13 of the Convention.[471]

429. The Court therefore reiterates that all persons, including the next of kin of the victims of gross human rights violations, have, pursuant to Articles 1(1), 8(1), and 25, as well as in certain circumstances Article 13 of the Convention, the right to know the truth.[472] The Court would add that the facts regarding Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza came under analysis by the ordinary courts at a later date, and this process provided answers to what had happened. By contrast, 18 years after the facts, the whole truth about the events surrounding the extrajudicial execution of Eduardo Nicolás Cruz Sánchez is still not known. Although these facts were addressed in a ruling by the Truth and Reconciliation Commission (*supra* paras. 308 to 310) and by a judicial investigation, even the Supreme Court has found that "there are still certain details about the facts associated with victim Cruz Sánchez that can and must be clarified through a more intense line of investigation."[473].

---

[468] In most cases, the Court has established this precept in its analysis of the violation of Articles 8 and 25 of the Convention. *Cf*. *Case of Baldeón García v. Peru, supra*, para. 166; *Case of Radilla Pacheco v. Mexico, supra*, para. 180; *Case of the "Las Dos Erres" Massacre v. Guatemala. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 24, 2009. Series C No. 211, para. 151; *Case of Chitay Nech et al. v. Guatemala. Preliminary Objections, Merits, Reparations and Costs.* Judgment of May 25, 2010. Series C No. 212, para. 206; *Case of Gelman v. Uruguay*. *Merits and Reparations.* Judgment of February 24, 2011. Series C No. 221, paras. 243 and 244; *Case of Uzcátegui et al. v. Venezuela. Merits and Reparations.* Judgment of September 3, 2012. Series C No. 249, para. 240; *Case of Osorio Rivera and family v. Peru, supra*, para. 220; *Case of the Rochela Massacre v. Colombia, supra*, para. 147; *Case of Anzualdo Castro v. Peru, supra*, paras. 119 and 120, and *Case of the Massacres of El Mozote and surrounding areas v. El Salvador, supra*, para. 298. This precept was developed in another case under the obligation to investigate, and ordered as a measure of reparation. *Cf. Case of Almonacid Arellano et al. v. Chile, supra*, para. 148. In other cases, the Court held in its analysis that it is subsumed in Articles 8(1), 25 and 1(1) of the Convention, but did not include this consideration as part of its reasoning in the particular operative paragraph. *Cf. Case of the Barrios family v. Venezuela,* para. 291; *Case of González Medina and family v. Dominican Republic, supra*, para. 263, and *Case of Contreras et al. v. El Salvador. Merits, Reparations and Costs.* Judgment of August 31, 2011. Series C No. 232, para. 173.

[469] *Cf. Case of Anzualdo Castro v. Peru, supra*, paras. 168 and 169, and *Case of Gelman v. Uruguay, supra*, paras. 192, 226 and 243 to 246.

[470] *Cf. Case of Gudiel Álvarez et al. (Diario Militar) v. Guatemala. Merits, Reparations and Costs.* Judgment of November 20, 2012. Series C No. 253, para. 302.

[471] The Court discussed the matter in the *Gomes Lund et al.* case, holding that, given the facts of the case, the right to know the truth was related to a motion lodged by family members to gain access to certain information concerning access to justice and the right to seek and receive information, enshrined in Article 13 of the American Convention, and therefore included this right in its analysis of the same provision. *Cf. Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil, supra,* para. 201.

[472] *Cf. Case of Gelman v. Uruguay, supra*, para. 243, and *Case of Osorio Rivera and family v. Peru, supra*, para. 220.

[473] Ruling by the Transitory Criminal Chamber of the Supreme Court on an appeal to vacate judgment, 3521-2012 July 24, 2013 (evidence file, volume XXI, further helpful evidence, folio 14721).

430. The Court finds, nevertheless that there is no need for a specific ruling on violation of the right to know the truth, given the violations declared above and the particular details of the instant case.

H. Conclusion

431. The Court finds, in summary, that there were irregularities in the handling of the scene of the events and in the removal of the bodies and a lack of rigor in performing the 1997 autopsies, and as a result, the initial procedures and the first measures to secure the evidence were not even minimally diligent. Moreover, the processes before the Peruvian courts were not developed within a reasonable period, and the State has not demonstrated that it conducted all the necessary steps to locate one of the accused who is a fugitive and in contempt. Based on these arguments and on the State's partial recognition of responsibility, the Court concludes that the State is responsible for violating Articles 8(1) and 25(1) of the American Convention, read in conjunction with Article 1(1) thereof, in injury of the family members of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, to wit, Edgar Odón Cruz Acuña, Herma Luz Cueva Torres, Florentín Peceros Farfán, Nemecia Pedraza de Peceros and Jhenifer Solanch Peceros Quispe, in the terms of the foregoing paragraphs.

XI
RIGHT TO HUMANE TREATMENT, READ IN CONJUNCTION WITH THE OBLIGATION TO RESPECT RIGHTS

432. The Court will use this chapter to outline the arguments of the parties and the inter-American Commission and then rule on the merits of the allegations that Article 5 of the American Convention was breached in injury of the family members of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza.

A. Arguments of the parties and of the Commission

433. The ***Commission*** said that the State had not provided sufficient judicial guarantees for the alleged victims, as it had not conducted a diligent, effective investigation or attributed responsibilities to the principals and abettors of the alleged extrajudicial executions of their relatives. The Commission argued that the failure of authorities to deliver true justice had violated the personal integrity of the families by prolonging the already painful events they had lived through as they lost their loved ones to alleged extrajudicial execution. In the view of the Commission, other episodes the families had suffered through were that the State had not informed them about the transfer or burial of the bodies or notified them about the findings of the autopsies on the bodies of the alleged victims or the causes and circumstances of their deaths, and finally, it had denied them any real access to justice, as the family members needed to contend with "the slow pace of the process, […] the attempts to cover up the deaths and the lack of diligence by authorities in both the ordinary courts and the military jurisdiction." The Commission emphasized that the alleged victims had been subjected to disinformation by the State when it did not allow them to know the whereabouts of their family members.

434. The Commission contended more specifically that the facts surrounding the alleged extrajudicial executions of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza amounted to breaches of Article 5 of the American Convention, in injury of their families. The Commission noted, in this regard, that the Court had repeatedly established in its case law that the next of kin of the victims of human rights violations may also be victims in their own right. The Commission also pointed to the Court's case law regarding the rights of the families of victims of extrajudicial execution, namely that there is

no need for evidence-based proof that family members have experienced serious violations of their psychological and moral, as this collateral outcome can be presupposed.

435. The Commission emphasized actions taken by the State subsequent to the alleged arbitrary and extrajudicial executions, which were additional violations of the dignity of the alleged victims' families, specifically: (i) burying the remains as unidentified persons which, as explained by the Commission, visited additional suffering upon the families, denying them the possibility of burying their dead in a place of their own choosing and according their own beliefs, and (ii) not having conducted a serious investigation into the alleged arbitrary extrajudicial executions of the alleged victims, so that even today the facts remain in impunity. The Commission cited the Court's case law holding that the lack of effective judicial remedies is in itself a source of additional suffering and anguish for the family members of alleged victims, stressing that justice had still not been delivered in the instant case. The Commission said that the alleged denial of justice "was shown to have occurred: (i) from the first moment […] after the [alleged] executions took place, because of the irregularities in the investigation; (ii) by the [many years'] failure to conduct an effective investigation, on the court's own motion; (iii) by granting jurisdiction to the military criminal justice system, and (iv) because of the delays and limitations […] that occurred in prosecution by the ordinary courts of a very small number of persons." The Commission held that all the State's actions, combined with the alleged extrajudicial executions per se, embodied a violation of the personal integrity of family members of the alleged victims.

436. The Commission concluded that the State should be declared responsible for violating the right to humane treatment enshrined in Article 5(1) and 5(2) of the American Convention, read in conjunction with Article 1(1) thereof, in injury of the following family members: Florentín Peceros Farfán, Nemecia Pedraza de Peceros, Jhenifer Solanch Peceros Quispe, Herma Luz Cueva Torres, Edgar Odón Cruz Acuña and Lucinda Rojas Landa.

437. The ***representatives*** said that, according to the Court's case law, the family members of alleged victims may themselves be considered victims of violation of their personal integrity, and detailed the facts that pointed to this breach. They stressed that "Peru violated the right to personal integrity in injury of the family members […] due to the suffering caused by the [alleged] extrajudicial executions of the [alleged] victims, the failure of justice and the way their loved ones' remains were disposed of." The representatives argued that in the instant case, the "next of kin" of the alleged victims "were exposed to profound sorrow over the years," and that the relatives of Eduardo Nicolás Cruz Sánchez found out about his death when they saw it in the news, while the families of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza did not learn of the deaths of their loved ones until the 2001 investigations. The representatives noted that the fact that the bodies of the alleged victims had been transferred to the Central Hospital of the National Police of Peru, and that the bodies had been disposed of secretly without notifying the next of kin, combined with the lack of explanations by the State "about the circumstances in which [the alleged victims] had died or the circumstances of their deaths," violated the personal integrity of the family members of the alleged victims. The representatives went on to stress the violations committed against the personal integrity of these alleged victims because of the way their loved ones' remains were disposed of, and due to the slowness and lack of diligence in both the ordinary courts and the military jurisdiction in imparting justice for the reported extrajudicial executions. Finally, the representatives argued that the Court had established the *iuris tantum* presumption of violation of the rights to psychological and moral integrity in injury of the next of kin of the victims of certain human rights violations, such as extrajudicial execution and forced disappearance, and therefore it fell to the State to prove otherwise.

438. The ***State*** argued that some of the family members that the Commission had included as victims of violation of personal integrity did not qualify as such, because in its opinion, the rights of these individuals had not been violated by the State because they had no close family tie with the alleged victims. The State asked the Court to rule on the degree of kinship that petitioning family members should have with the alleged victim and how much of an impact the death had had on their well-being.

439. The State argued in the case of Herma Luz Cueva Torres, the mother of Herma Luz Meléndez Cueva, that her health problems had been caused primarily by the "kidnapping" of her daughter by the MRTA when she was still a minor, and not because of the alleged extrajudicial execution. The State also pointed to the family members of Víctor Salomón Peceros Pedraza, noting that it was impossible to conclude reliably that alleged victim Jhenifer Solanch Peceros Quispe had been legally recognized as his daughter, and also observing that Peceros Pedraza had apparently abandoned his then domestic partner before the birth, which negated claims of any close relationship between father and daughter, and therefore, any breach of her rights. The State then argued that, aside from the agreement by family members that Jhenifer Solanch Peceros Quispe was the daughter of Víctor Salomón Peceros Pedraza, there was no other evidence pointing to consanguinity between them.

440. The State moved on to discuss injury to the rights of family members of Eduardo Nicolás Cruz Sánchez. It denied any alleged violation of the rights of his brother Edgar Odón Cruz Acuña and argued that "their relationship was not so close", because as was clear from the latter's testimonies, the two brothers had not lived together for a significant amount of time, both because they had been raised in different environments, and because of the activities that Eduardo Nicolás Cruz Sánchez began to develop in the MRTA.

441. The State denied that the disintegration of the family had been caused directly by the State's action and argued that family ties had broken down when the alleged victims chose to enroll in the MRTA. According to the State, "the families of the 'terrorist criminals' denied their relationship with them, or simply avoided being found, […] and therefore, the decision of those who chose to join a terrorist group had a serious impact on their family members that could not be attributed to the State." The State held up as additional proof of this breakdown the fact that family members of the alleged victims did not even know that their relatives were dead, as they had received no news of them for years.

442. The State denied that it had conducted clandestine burials of the alleged victims or barred the families from giving them a proper burial. The State said, in this regard, that it had not been in a position at that time to find the next of kin of the alleged victims. In its view, this conclusion could be drawn from several considerations: (i) that according to their testimonies, family members of the alleged victims had expressed surprise when they were located by the Red Cross; (ii) that none of the family members had claimed the bodies of the alleged victims, due to the fact that, with the exception of Edgar Odón Cruz Acuña, they did not know that their relatives had died in the residence of the Japanese ambassador, and (iii) that in other cases in which the State had the technical means to find the next of kin, it had done so and had turned over the bodies as soon as possible. The State made particular reference to the case of Edgar Odón Cruz Acuña, as he, unlike the other family members, did admit that he had known his brother was dead and the body was in the hands of the authorities, but even so, he had not claimed the body. Finally, the State argued that it had provided all the necessary judicial guarantees, contending that processes were currently underway in Peru, that the family members had been participating in them, and they had been receiving legal counsel free of charge.

B. Considerations of the Court

443. The Court recalls its case law holding that the family members of victims of certain human rights violations may be victims in their own right.[474] The Court has understood that the right to mental and moral integrity of the victims' "next of kin" and other persons with close personal ties to such victims has been violated as a result of the additional suffering they have experienced because of the particular circumstances of the violations perpetrated against their loved ones and owing to the subsequent actions of State authorities in relation to those violations.[475]

444. The Court has maintained that in cases of alleged arbitrary or extrajudicial execution, it can be understood that the violation of the right to psychological and moral integrity of the "next of kin" of victim(s) is a direct consequence of the phenomenon. The Court has therefore held parents, children, spouses, and permanent domestic partners as the "next of kin" of people found to be victims of a serious human rights violation, such as a massacre,[476], forced disappearance,[477] or extrajudicial execution.[478] In such cases, the Commission and the representatives do not need to prove that the right to personal integrity has been breached, as a *iuris tantum* assumption is in effect; the burden of proof is reversed and it falls to the State to refute violation of the right to psychological and moral integrity of these "next of kin", which does not need to be proven.[479]

445. The presence of this *iuris tantum* presumption on behalf of the victims' "next of kin" does not preclude the possibility that other people who do not fit into this category may demonstrate a particularly close tie between themselves and the victims in the case, such as would allow the Court to declare a violation of their right to personal integrity,[480] and who can therefore be held as victims of the reproachable conduct or omissions by the State. Under these assumptions, the Court must examine whether the evidence in the case file proves that the right to personal integrity for the alleged victim has been abridged, regardless of his or her kinship to one of the other victims in the case. As for the people that the Court does not assume to have experienced harm to their personal integrity because they are not next of kin, the Court must evaluate, for example, whether particularly close ties existed between them and the victims in the case that would enable them to prove an impairment of their right to personal integrity. The Court can also assess whether the alleged victims have been involved

---

[474] *Cf. Case of López Álvarez v. Honduras. Merits, Reparations and Costs.* Judgment of February 1, 2006. Series C No. 141, para. 119, y *Case of Luna López v. Honduras. Merits, Reparations and Costs.* Judgment of October 10, 2013. Series C No. 269, para. 201.

[475] *Cf. Case of Blake v. Guatemala. Merits.* Judgment of January 24, 1998. Series C No. 36, para. 114; *Case of the Serrano Cruz Sisters v. El Salvador Merits, Reparations and Costs.* Judgment of March 1, 2005. Series C No. 120, paras. 113 and 114, and *Case of Gutiérrez and family v. Argentina, supra*, para. 138.

[476] *Cf. Case of the Mapiripán Massacre v. Colombia. Merits, Reparations and Costs.* Judgment of September 15, 2005. Series C No. 134, para. 146 and *Case of the Santo Domingo Massacre v. Colombia, supra*, paras. 243 and 244.

[477] *Cf. Case of Blake v. Guatemala. Merits, supra*, para. 114, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 533.

[478] *Cf. Case of La Cantuta v. Peru, supra*, para. 218, and *Case of Valle Jaramillo et al. v. Colombia. Merits, Reparations and Costs.* Judgment of November 27, 2008. Series C No. 192, para. 119.

[479] *Cf. Case of Valle Jaramillo et al. v. Colombia, supra*, para. 119, and *Case of García and Family v. Guatemala, supra*, para. 161.

[480] *Cf. Case of Valle Jaramillo et al. v. Colombia, supra*, para. 119, and *Case of Landaeta Mejías Brothers et al. v. Venezuela, supra*, para. 281.

in seeking justice in the specific case,[481] or whether they have suffered harm as a result of the facts of the case or of subsequent acts or omissions on the part of the State authorities in relation to the facts.[482] The Court has considered at least the following points: (i) the presence of close family ties; (ii) the particular circumstances of the relationship with the victim; (iii) the way the family member took part in the quest for justice; (iv) the State's response to actions they have taken; (v) the context of a system that hindered free access to justice, and (vi) the families' having to live in a state of continuing uncertainty as a result of not knowing the victims' whereabouts.

446. The following persons were alleged to be victims of the breach of Convention Article 5 in the instant case: Herma Luz Cueva Torres as mother of Herma Luz Meléndez Cueva; Florentín Peceros Farfán, as father, Nemecia Pedraza de Peceros, as mother, and Jhenifer Solanch Peceros Quispe, as daughter, of Víctor Salomón Peceros Pedraza, and Edgar Odón Cruz Acuña as brother of Eduardo Nicolás Cruz Sánchez[483].

447. The *iuris tantum* presumption would apply to Herma Luz Cueva Torres, Florentín Peceros Farfán, Nemecia Pedraza de Peceros and Jhenifer Solanch Peceros Quispe, as they qualify as "next of kin" according this Court's case law (*supra* para. 444), but in keeping with the provisions set forth in Chapter IX *supra*, the Court has not held family members as direct victims of the alleged violations of the right to life. The Court must therefore rule on whether Article 5 of the American Convention has been breached due to the harm derived from the alleged extrajudicial executions that the Court did not recognize as proven or on other grounds of suffering and distress, as these are always additional to the violation of the right to life.

448. The Court will now examine the arguments brought by the parties and the Commission regarding whether the brother of Eduardo Nicolás Cruz Sánchez,[484] the latter having been declared a direct victim of violation of the right to life, is himself a victim. Based on the Court's case law, (*supra* para. 444), the *iuris tantum* presumption would not apply to Edgar Odón Cruz Acuña, and the Court must therefore look to the body of evidence to determine whether he can be held as a victim under Article 5 of the Convention. The Court will determine, in light of the arguments and evidence submitted by the parties, whether there was a close enough tie between Edgar Odón Cruz Acuña and Eduardo Nicolás Cruz Sánchez to confirm that his personal integrity was harmed, which would entail a violation of Article 5 of the Convention.

449. The Court comments, in this regard, that: (a) although Edgar Odón Cruz Acuña and Eduardo Nicolás Cruz Sánchez did not live together as children, they had a close family relationship, especially since they had both taken up residency in Lima;[485] (b) Edgar Odón Cruz

---

[481] *Cf. Case of Bámaca Velásquez v. Guatemala. Merits, supra,* para. 163, and *Case of Barrios family v. Venezuela, supra,* para. 302.

[482] *Cf. Case of Blake v. Guatemala. Merits, supra*, para. 114, and *Case of Barrios family v. Venezuela, supra,* para. 302.

[483] See the above decision in the chapter on preliminary questions, that Lucinda Rojas Landa will not be held as an alleged victim in this case (*supra* paras. 95 to 98).

[484] Both are sons of Nicolás Cruz Santos. *Cf.* Brief of his appearance as a family member in the criminal process and the relevant annexes (evidence file, volume XVII, CVR evidence, folios 19507 to 19511).

[485] Edgar Odón Cruz Acuña stated that he is the brother of victim Eduardo Nicolás Cruz Sánchez. They were the sons of two different mothers, and did not live together as children. The two brothers reunited in 1981 when Eduardo finished high school and traveled to Lima to begin his university studies. They got together "sporadically, sometimes weekly, sometimes monthly," and spent their vacations together. Between 1985 and 1986, they met every two weeks at the home of an aunt, when the declarant was in Lima living in a dormitory. *Cf.* Statement before a public attestor by Edgar Odón Cruz Acuña, January 28, 2014 (evidence file, affidavits, volume XXX, folios 20625

Acuña did not claim his brother's body for fear of reprisal from government authorities, which was understandable in view of the context, the circumstances of the operation and the way the success of the operation was later managed;[486] (c) after the Fujimori regime had ended, and he learned that APRODEH was examining the cases of the deaths in operation "Chavín de Huántar", he contacted them and took part in identifying his brother's body and in the DNA analysis;[487] and (d) Edgar Odón Cruz Acuña was one of the plaintiffs in the criminal trial in the ordinary courts against Vladimiro Montesinos et al. for murder of Eduardo Nicolás Cruz Sánchez (*supra* para. 193) and lodged a motion to vacate before the Transitory Criminal Law Chamber of the Supreme Court (*supra* para. 228), and so was involved in the criminal proceedings. The claimant also stated that he had been affected by his brother's death at the hands of the State and, among other things, by the sense of injustice.[488]

450. The statement delivered by affidavit and the expert testimony received demonstrate that the death of Eduardo Nicolás Cruz Sánchez caused personal aftereffects for Edgar Odón Cruz Acuña, creating feelings of fear and defenselessness. Based on these considerations, the Court concludes that the State violated the right to personal integrity enshrined in Article 5(1) of the Convention, in injury of Edgar Odón Cruz Acuña, brother of Eduardo Nicolás Cruz Sánchez, due to suffering caused by the extrajudicial execution of his family member and the lack of effective investigations.

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

451. Pursuant to the provisions of Article 63(1) of the American Convention,[489] the Court has held that every violation of an international obligation which results in harm creates a duty to make adequate reparation, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.[490]

452. Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation. If this is not possible, as in most cases of human rights violations, the Court will order measures to guarantee the rights that have been violated and to redress the consequences of the violations[491]. Therefore, the Court has found it necessary to award different measures of

---

to 20626), and witness statement by Edgar Odón Cruz Acuña before the Third Special Criminal Chamber, June 24, 2002 (evidence file, volume XXVII, CVR evidence, folios 19658 to 19660).

[486] *Cf.* Statement before a public attestor by Edgar Odón Cruz Acuña, January 28, 2014 (evidence file, affidavits, volume XXX, folios 20625 to 20632), and witness statement by Edgar Odón Cruz Acuña before the Third Special Criminal Chamber, June 24, 2002 (evidence file, volume XXVII, CVR evidence, folios 19658 to 19660).

[487] *Cf.* Statement before a public attestor by Edgar Odón Cruz Acuña, January 28, 2014 (evidence file, affidavits, volume XXX, folios 20625 to 20632).

[488] *Cf.* Statement before a public attestor by Edgar Odón Cruz Acuña, January 28, 2014 (evidence file, affidavits, volume XXX, folios 20625 to 20632), and expert psychological statement by Viviana Valz Gen Rivera, January 19, 2014, legalized before a public attestor (evidence file, affidavits, volume XXX, folios 20683 to 20689 and 20696).

[489] Article 63(1) of the Convention says, "[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[490] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7, para. 25, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 300.

[491] *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, para. 26, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 543.

reparation in order to provide comprehensive redress for the harm; thus, in addition to pecuniary compensation, the measures of restitution, rehabilitation and satisfaction, as well as guarantees of non-repetition, are particularly relevant to the harm caused.[492].

453. This Court has established that reparations must have a causal nexus with the facts of the case, the alleged violations, the proven damages, as well as the measures requested to repair the resulting damages. Therefore, the Court must observe such congruence in order to adjudge and declare according to law.[493]

454. In view of the breaches of the Convention as held in the above chapters, the Court will proceed to examine the petitions made by the Commission and the representatives, in light of the tenets established in its case law on the nature and scope of the obligation to make reparation and thus order the measures required to redress the damage.[494]

A. Injured Party

455. The Court, under the terms of article 63(1) of the Convention, holds as an injured party anyone who has been declared the victim of violation of a right recognized therein. The Court therefore deems Eduardo Nicolás Cruz Sánchez, Florentín Peceros Farfán, Nemecia Pedraza de Peceros, Jhenifer Solanch Peceros Quispe, Herma Luz Cueva Torres and Edgar Odón Cruz Acuña to be injured parties, and as victims of the violations declared in this judgment, they will stand as beneficiaries of the Court-ordered measures of redress.

B. Obligation to investigate the facts in the ordinary courts and to identify, prosecute and, if applicable, punish those responsible

Arguments of the parties and of the Commission

456. The ***Commission*** asked that the ordinary courts conduct an investigation of the facts concerning the human rights violations declared in its Report on the Merits in relation to the direct perpetrators and that the State conduct the investigations impartially and effectively, and within a reasonable time period, for the purpose of completely clarifying the facts, identifying all of the principals and abettors and imposing the applicable punishments. The Commission also asked that orders be given to take all appropriate administrative, disciplinary or criminal measures in response to the acts or omissions of State officials that contributed to the denial of justice and impunity associated with the facts of this case.

457. The ***representatives*** asked the Court to order Peru to proceed, within a reasonable period, to conduct a full, impartial, effective investigation to identify, prosecute and punish all the principals and abettors in the human rights violations, sentencing them in proportion to the seriousness of their actions against Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza. The representatives added, in their final written arguments, that this investigation should also cover the people involved in the different actions and omissions that had hindered the processes in the domestic courts, and they asked that

---

[492] *Cf. Case of Cantoral Benavides v. Peru. Reparations and Costs.* Judgment of December 3, 2001. Series C No. 88, paras. 79 to 81, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 543.

[493] *Cf. Case of Ticona Estrada v. Bolivia. Merits, Reparations and Costs.* Judgment of November 27, 2008. Series C No. 191, para. 110, and *Case of Argüelles et al. v. Argentina, supra*, para. 233.

[494] *Cf. Case of Velásquez Rodríguez. Reparations and Costs, supra,* paras. 25 to 27, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 302.

the findings be published so that society at large would know the truth about what had happened and ensure that incidents of this kind would not recur.

458. The ***State*** asked in its answering brief for the Court "to apply the tenets marked out in earlier judgments with regard to any reparations, given the State's recognition of international responsibility for having exceeded a reasonable period," and expressed its commitment to continue with all due haste in the judicial processes underway against the alleged perpetrators. The State added, in its final written pleadings, that it rejected each and every one of the representatives' claims for reparations because, given the arguments put forward in this process, it was not proven that extrajudicial executions had occurred, nor, therefore, had the right to life enshrined in the Convention been breached.

Considerations of the Court

459. The Court has ruled in this judgment, *inter alia*, that the initial procedures and securing of evidence lacked even a minimum degree of diligence, and the processes before the Peruvian courts did not take place within a reasonable period, as a new investigation was now underway into the facts involving Eduardo Nicolás Cruz Sánchez, and the State had not shown that it exercised diligence in searching for, locating or capturing a fugitive suspect (*supra* para. 431). The Court further found, regarding the violation of the right to life, that the State was responsible for arbitrary deprivation of the life of only Eduardo Nicolás Cruz Sánchez (*supra* Chapter IX).

460. The Court consequently orders the State to proceed with the ongoing investigation and/or criminal process into the facts involving the extrajudicial execution of Eduardo Nicolás Cruz Sánchez, effectively, with due diligence and within a reasonable period to identify, prosecute and, as applicable, punish those responsible. Due diligence in the investigation signifies that all the pertinent State authorities are obliged to collaborate in the collection of evidence and must therefore provide the judge, prosecutor or other judicial authority with all the information requested and refrain from acts that could obstruct the investigative procedure.[495] More specifically, the State should:

a) ensure full access and capacity to act to the next of kin at all stages of the investigations, pursuant to domestic law and to the provisions of the American Convention;[496]

b) because this is a serious violation of human rights, and considering the particular details and the context in which the facts occurred, the State must refrain from invoking any measures such as amnesty for the perpetrators, or any similar provision, statute of limitations, ex post facto criminal laws, res judicata, double jeopardy, or any similar means to exempt anyone from responsibility in order to evade this obligation;[497]

c) ensure that the investigations and trials for the facts that comprise extrajudicial execution in the instant case remain at all times under the jurisdiction of the ordinary

---

[495] *Cf. Case of García Prieto et al. v. El Salvador, supra*, para. 112, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 308.

[496] *Cf.* Case of the Caracazo v. Venezuela. *Reparations and Costs.* Judgment of August 29, 2002. Series C No. 95, para. 118, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 559.

[497] *Cf. Case of Barrios Altos v. Peru. Merits.* Judgment of March 14, 2001. Series C No. 75, para. 41, and *Case of Cantoral Huamaní y García Santa Cruz v. Peru, supra*, para. 190.

courts, and

d) publicly disseminate the outcome of the processes so that Peruvian society can learn about the judicial decision on the facts of the instant case.

C. Measures of rehabilitation, satisfaction and guarantees of non-repetition

C.1. Rehabilitation

Arguments of the parties

461. The ***representatives*** asked this Court to order the State to guarantee free, ongoing medical and psychological care for the family members of the victims. The representatives specifically asked that these services be provided by qualified professionals, after the medical needs of each victim had been determined, and should include the provision of any needed medications, always ensuring that the victims participate fully in the process. They also asked the Court to order the State to cover other expenditures that may arise along with the provision of treatment, such as costs of transportation or other related needs.

462. The ***State*** asked the Court, as a preliminary step, to rule on the State's preliminary objections, and pointed out that the purpose of the *Sistema Integral de Salud* (SIS), Comprehensive Healthcare System, is to protect the health of Peruvian citizens who do not have health insurance, with top priority on vulnerable populations in poverty and extreme poverty, so they may have medical and psychological care. The State added in its final written arguments that it rejected each and every one of the representatives' claims for reparations.

Considerations of the Court

463. The Court, having granted that the personal integrity of Edgar Odón Cruz Acuña had been abridged (*supra* paras. 449 and 450), finds, as it has in other cases,[498] that he requires a measure of reparation providing appropriate care for physical and psychological impairment derived from the violations established in this judgment. The Court therefore orders the State, as an obligation for which it is responsible, to provide, free of charge and through its specialized healthcare facilities, immediate, appropriate, effective psychological and/or psychiatric treatment, if so requested, with prior informed consent, including the provision free of charge of any medications that may be needed in consideration of health problems associated with the facts of the instant case. Moreover, this treatment must be provided, as much s possible, in the facility nearest to his place of residence in Peru for as long as necessary. Mr. Cruz Acuña or his legal representatives have six months from the date of notification of this judgment to inform the State of his intention to receive psychological or psychiatric care.

C.2. Satisfaction: publication of the judgment

Arguments of the parties

464. The ***representatives*** asked the Court to order the State to proceed within six months to publish at least the sections on the context, proven facts, and operative paragraphs of the judgment in the official gazette, in a widely circulated national newspaper, and on the website

---

[498] *Cf. Case of Barrios Altos v. Peru. Reparations and Costs*. Judgment of November 30, 2001. Series C No. 87, paras. 42 and 45, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 567.

of the public prosecutor, accessible through no more than three links from the home page, to remain in place until the orders given in this judgment have been fully met.

465. While the ***State*** initially expressed no objections to this measure, in its final written arguments it rejected each and every one of the representatives' claims for reparations.

Considerations of the Court

466. As it has done in other cases, the Court holds[499] that the State must publish, within six months of notification of this judgment: (a) the official summary of this judgment prepared by the Court, once, in the official gazette; (b) the official summary of this judgment prepared by the Court, once, in a national newspaper with widespread circulation, and (c) this judgment in its entirety, available for one year on an official national website accessible to the public.

C.3. Requested guarantees of nonrepetition

Arguments of the parties and of the Commission

467. The ***Commission*** emphasized the need for the State to adopt any measures necessary to prevent incidents similar to those in the instant case from occurring in the future. In particular, the Commission asked the Court to order Peru to implement ongoing human rights programs in armed forces and national police training academies and carry out awareness-raising programs for active-duty military.

468. The ***representatives*** asked the Court to order the State to adopt or amend suitable protocols for investigating violations involving the right to life and the right to personal integrity, and to adopt appropriate protocols limiting the use of force by security personnel, to be compatible with the standards provided in international law. Similarly, they noted that Legislative Decree 1095 had been enacted in 2010, regulating the use of force by the military, but it did not meet the standards that this Court has established on the use of force and firearms and was currently facing a constitutional challenge.

469. The ***State*** explained that the Forensic Institute has been working under protocols that are compatible with the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. Moreover, with respect to the challenges to Legislative Decree 1095, the State noted that this legal standard marks a significant step forward by the State to create a legal framework consistent with the standards set by the Court on the use of force by the military throughout the country. The State pointed out, nonetheless, that it was "fully aware of the challenges facing this standard, which were under review by the Constitutional Court after a constitutional motion was lodged by 6430 citizens." The State added in its final written arguments that it rejected each and every one of the representatives' claims for reparations.

Considerations of the Court

470. This Court has previously held that the State has the duty to adapt its domestic laws and to "see that its security forces, which are entitled to use legitimate force, respect the right of life of the people under their jurisdiction."[500]. The State must establish precise internal

---

[499] *Cf. Case of Cantoral Benavides v. Peru. Reparations and Costs, supra*, para. 79, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 318.

[500] *Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 66, and *Case of Landaeta Mejías Brothers et al. v. Venezuela, supra*, para. 126.

policies in relation to the use of force and identify strategies to implement the Basic Principles on the Use of Force and the Code of Conduct.[501] Moreover, the State must provide courses for its agents to ensure they know the legal provisions that allow the use of firearms and that they have adequate training so that if they are ever faced with a decision on whether to use them, they have the necessary knowledge to do so.[502]

471. As for the request to adopt suitable protocols that limit the use of force by security officers, the Court cautions that it has not declared a violation of the American Convention based on a failure to upgrade legislation on the use of force. The Court understands, in this regard, that there is no causal nexus with the facts of the case at hand, as the planning of operation "Nipón 96" was a reaction to exceptional circumstances unrelated to the daily work of security forces. This is why the Court finds that such a measure would out of order.

472. The Court recalls, regarding the request to order human rights training for members of the military and the police, that it has already ordered the State of Peru to hold ongoing human rights training courses to military and police forces in the cases of *La Cantuta,*[503] *Anzualdo Castro,*[504] *Osorio Rivera*[505] *and Espinoza Gonzales,*[506] and therefore it would be unnecessary to order the same measure in this case.

473. As for the request to adopt or revise appropriate protocols for investigating violations involving the right to life and the right to personal integrity, the State submitted copies of several protocols[507] developed for the investigation of violent death, torture, the scene of the crime, and more, which are already being used by the Forensic institute and the National Directorate of Criminology. The Inter-American Commission and the representatives said nothing about any of the instruments submitted by the State. The Court recalls that the State must prevent the recurrence of human rights violations such as those that occurred in the instant case, and with this intent, adopt all necessary legal, administrative and other types of measures to prevent similar incidents from occurring in the future.

474. The Court has ordered the States in other cases to upgrade the parameters for investigating extrajudicial executions and torture and for conducting forensic examinations, based on international standards.[508] In the instant case, the Court holds that the State must continue with the process of implementing effective protocols for investigation of violations involving the right to life as provided in relevant international standards, such as the United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions. It must also provide the institutions responsible for preventing and investigating extrajudicial executions with sufficient human, economic, logistical and scientific

---

[501] *Cf. Case of Montero Aranguren et al. (Detention Center of Catia) v. Venezuela, supra*, para. 75, and *Case of Landaeta Mejías Brothers et al. v. Venezuela, supra*, para. 126.

[502] *Cf. Case of the Caracazo v. Venezuela. Reparations and Costs, supra*, para. 143(4)(a), and *Case of Landaeta Mejías Brothers et al. v. Venezuela, supra*, para. 126.

[503] *Cf. Case of La Cantuta v. Peru, supra*, para. 240.

[504] *Cf. Case of Anzualdo Castro v. Peru, supra*, para. 193.

[505] *Cf. Case of Osorio Rivera and family v. Peru, supra*, para. 274.

[506] *Cf. Case of Espinoza Gonzáles v. Peru, supra*, paras. 236 and 327.

[507] *Cf.* Forensic protocols and manuals (evidence file, volumes IX, X and XI, annex 3 to the State's answering brief, folios 6140 to 7208).

[508] *Cf. Case of Carpio Nicolle et al. v. Guatemala. Merits, Reparations and Costs.* Judgment of November 22, 2004. Series C No. 117, para. 135, and *Case of Gutiérrez Soler v. Colombia. Merits, Reparations and Costs.* Judgment of September 12, 2005. Series C No. 132, paras. 109 and 110.

resources to correctly process all scientific and other types of evidence with the purpose of clearing up criminal acts. The Court will not supervise this process.

Compensatory damages

D.1. Pecuniary damages

Arguments of the parties and of the Commission

475. The ***Commission*** asked, in general terms, for due redress for the human rights violations declared in its Report on the Merits, both pecuniary and nonpecuniary.

476. The ***representatives*** said that the family members had decided not to ask the Court for compensation to redress consequential damages, damages to family assets, and damages for lost earnings.

477. The ***State*** said that, because the applicants expressed their willingness to forgo compensation for pecuniary damage, the Inter-American Court should not order redress under that heading.

Considerations of the Court

478. In view of the representatives' petition, the Court finds it unnecessary to rule on pecuniary damages.

D.2. Nonpecuniary damages

Arguments of the parties and of the Commission

479. The ***Commission*** asked, in general terms, for due redress for the human rights violations declared in its Report on the Merits, both pecuniary and nonpecuniary.

480. The ***representatives*** explained that the family members in this case "preferred not to ask the Court for a specific amount for the losses they had experienced over the course of these […] years," and thus asked this Court, availing itself of its powers and considering its precedent case law on the subject, to allocate an amount in equity.

481. The ***State*** objected to this request on the basis of its preliminary objections. In its final written arguments, the State said that, even though the representatives had not requested a specific amount but instead had requested redress in equity, in its view there had been no abridgment of the rights recognized in the American Convention, and therefore, no obligation to compensate. It added that "the purpose of the inter-American system is to protect human rights, and not profit from them, and therefore it would be inappropriate to allow financial claims to transform the […] Court into a mercantile tribunal, as this would not be consistent with its object and purpose."

Considerations of the Court

482. International case law has repeatedly established that the judgment constitutes per se a form of reparation.[509] The Court's case law has further developed the concept of non-pecuniary damage, holding that it "may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as other nonmaterial changes in the living conditions of the victim or family members."[510]

483. The Court considers that, in the instant case, it is not pertinent to order the payment of financial compensation for nonpecuniary damage for violation of the right to life in injury of Eduardo Nicolás Cruz Sánchez, bearing in mind that this judgment constitutes, per se, sufficient redress for such damage,[511] and considering that measures concerning the investigation and the publication of this judgment that have already been ordered provide due reparation under the terms of Article 63(1) of the American Convention.

484. The Court also maintains that, with respect to Edgar Odón Cruz Acuña, the measures of rehabilitation awarded in this judgment provide sufficient, appropriate redress to compensate for the damage done to his personal integrity.

485. Furthermore, concerning the harm derived from violation of Articles 8 and 25 of the Convention in injury of Florentín Peceros Farfán, Nemecia Pedraza de Peceros, Jhenifer Solanch Peceros Quispe, Herma Luz Cueva Torres and Edgar Odón Cruz Acuña in varying measure as a consequence of the facts in the instant case, which was upheld herein, the Court holds that the present judgment is in itself a form of compensation and moral satisfaction for the victims and their relatives.[512] The reparations involving investigation and publication of this judgment, as ordered above, also provide due compensation under the terms of Article 63(1) of the American Convention.

E. Costs and expenses

Arguments of the parties

486. The ***representatives*** said that, for most of the domestic legal proceedings on the case, the family had received support from APRODEH, which as a nonprofit organization, "has not charged the family any fees whatsoever." The representatives therefore asked the Court to set an amount in equity for expenses incurred by APRODEH as legal representatives of the victims in the domestic and international processes. The representatives also noted that CEJIL had been helping with documentation for the case since 2001, and later joined the litigation in the international process. According to the representatives, all this cost CEJIL money for travel, hotel lodging, communication expenses, photocopies, office supplies, shipping, and the expenditures for legal work specifically on this case and the work of investigation, compiling and submitting evidence, holding interviews and preparing briefs. They provided a detailed table itemizing all the expenditures CEJIL had incurred and asked the Court to set an amount

---

509 *Cf. Case of El Amparo v. Venezuela. Reparations and Costs*. Judgment of September 14, 1996. Series C No. 28, para. 35, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 600.

510 *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemala. Reparations and Costs.* Judgment of May 26, 2001. Series C No. 77, para. 84, and *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia, supra*, para. 600.

511 *Cf. Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs.* Judgment of June 20, 2005. Series C No. 126, para. 130, and *Case of Raxcacó Reyes v. Guatemala. Merits, Reparations and Costs.* Judgment of September 15, 2005. Series C No. 133, para. 131.

512 *Cf. Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs, supra*, para. 225.

of USD 31,778.10 in equity for expenses. The representatives, in their final written arguments, itemized expenses incurred after the brief with pleadings, motions and evidence had been submitted, for the preparation of the exercise of reconstruction of the facts held in Lima, Peru, and participation in the public hearing in San Jose, Costa Rica. They estimated that APRODEH had spent USD 3,719 for this purpose, and CEJIL, USD 8,404.

487. The ***State*** held that in order to calculate court costs and attorney fees, it is necessary to verify whether the representatives' expenditures are reasonable for the task of defending the alleged victims. In general terms, it recognized the possibility of payment vouchers, internal documents of the representatives, proformas, and so forth, recording expenditures in amounts that are unreasonable for the defense of the alleged victims and bear no relationship to the current international process. The State reiterated in its final written arguments that court costs and attorney fees are admissible only if there are receipts, travel tickets or other documents confirming that the expenses were in fact incurred for this process, and emphasized that APRODEH had not submitted any receipts or other documents and that the claims for court costs and attorney fees should be directly related to the instant case and the development of the process per se, with the understanding that all claimed amounts that do not pertain to and are not associated with this particular case are precluded.

Considerations of the Court

488. The Court reiterates that, pursuant to its case law,[513] court costs and attorney fees are part of the body of reparations because the activities undertaken by the victims to obtain justice both nationally and internationally require outlays that should be covered when the Court judges the State to be internationally responsible. With respect to reimbursement for these costs and fees, it is the Court's responsibility to prudently assess their scope, which includes expenses incurred before domestic legal authorities, as well as those incurred in the course of the proceedings before the inter-American system, keeping in mind the circumstances of the specific case and the nature of international jurisdiction for the protection of human rights. This assessment can be done on the basis of the principle of equity and taking into account the expenses declared by the parties, provided the amounts are reasonable.[514]

489. The Court has held that "the claims of the victims or their representatives in relation to costs and expenses, and the evidence supporting them, must be presented to the Court at the first procedural opportunity granted them, namely, in the brief containing pleadings and motions, without prejudice to those claims being updated subsequently, to include new costs and expenses incurred as a result of the proceedings before this Court."[515] The Court also recalls that it is not enough to merely remit probative documents; rather the parties must develop the reasoning linking the evidence to the fact under consideration and, in the case of alleged financial outlays, the items of expenditure and their justification must be described clearly.[516]

---

513 *Cf. Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, para. 42, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 337.

514 *Cf. Case of Garrido and Baigorria v. Argentina. Reparations and Costs.* Judgment of August 27, 1998. Series C No. 39, para. 82, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 337.

515 *Case of Garrido and Baigorria v. Argentina. Reparations and Costs, supra*, para. 79, and *Case of Argüelles et al. v. Argentina, supra*, para. 297.

516 *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. 277, and *Case of Espinoza Gonzáles v. Peru, supra*, para. 337.

490. First of all, APRODEH has been accompanying the family members of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza in the investigation and processing of the domestic and international litigation of the instant case since 2001 and until the present, but the representatives submitted vouchers only for the costs of transportation, room and board and per diem to attend the Court's hearing on this case in San Jose, Costa Rica. The vouchers sent for CEJIL pertain to expenditures for processing the international case, including transportation, room and board and per diem, as well as the costs of sending affidavits.

491. The Court finds, regarding the vouchers submitted by the representatives, that: (a) some of the payment vouchers cite an item of expenditure that does not clearly and specifically pertain to the instant case, and (b) some of the payment receipts are so illegible as not to clearly indicate the amount of money being proven or the item of expenditure. These particular amounts have been deducted equitably from the Court's calculations. The representatives also submitted payment vouchers on the exercise of reconstruction of the facts, which were taken into account for inclusion in the calculation because they apply to disbursements for litigation of this case beyond those covered by the State. The Court also finds it reasonable to presume that there were other outlays over the course of the approximately 14 years that APRODEH was working.

492. Therefore, the Court judges that it can correctly order a reasonable sum, USD 10,000 (ten thousand United States dollars) to the *Asociación Pro Derechos Humanos (APRODEH)*, Human Rights Association, in reimbursement of costs and expenses for the work done in domestic and international litigation of the case. The Court will also set a reasonable amount of USD 20,000 (twenty thousand United States dollars) for the Center for Justice and International Law (CEJIL) as reimbursement of costs and expenses in its work for international litigation of the case. These amounts must be disbursed directly to each representative organization. The Court may also order the State to further reimburse the victims or their representatives for reasonable expenses incurred during the procedural stage of monitoring compliance with this judgment.

F. Reimbursement of expenditures to the Legal Assistance Fund

493. The General Assembly of the Organization of American States created the Legal Assistance Fund of the Inter-American Human Rights System in 2008, with the stated purpose "to facilitate access to the inter-American human rights system by persons who currently lack the resources needed to bring their cases before the system".[517] The fund was used in the instant case to grant financial aid to cover travel and lodging expenses needed for expert witnesses Federico Andreu Guzmán and Luis Bernardo Fondebrider to appear before the Court and give their expert statements in the public hearing at the seat of the Court in the city of San Jose, Costa Rica, and the costs of formalizing and sending two affidavits by declarants proposed by the representatives (*supra* para. 7). However, on January 3, 2014, the representatives informed the Court that expert witness Luis Bernardo Fondebrider would be unable to travel to the seat of the Court to render his requested expert testimony due to medical issues, and the Court ordered that this expert testimony be taken over electronic audiovisual media during the scheduled hearing on the instant case (*supra* footnote 10).

---

[517] AG/RES. 2426 (XXXVIII-O/08), resolution adopted by the Thirty-eighth Regular Session of the OAS General Assembly in the fourth plenary session held on June 3, 2008, Establishment of the Legal Assistance Fund of the Inter-American Human Rights System", operative paragraph 2(a), and CP/RES. 963 (1728/09), Resolution adopted on November 11, 2009, by the Permanent Council of the OAS, Rules of Procedure for the Operation of the Legal Assistance Fund of the Inter-American Human Rights System*"*, article 1.1.

494. The State had the opportunity to submit its comments on the outlays made in this case, totaling USD 1,685.36 (one thousand eight hundred eighty-five United States dollars and thirty-five cents). Peru recognized that the itemization of expenditures as presented had been certified by the Court Registrar and therefore was sufficiently reliable. Moreover, these outlays were consistent with the terms of the orders by the President of the Court on August 28, 2012 and December 19, 2013. The State recalled, however, that before ordering a State to reimburse the fund for expenditures incurred, the Court must first verify that the particular case does entail violations of the American Convention, which in the State's view, had not occurred in the instant case.

495. In view of the violations declared in this judgment, which are consistent with the requirements for using the fund, the Court orders the State to reimburse the fund the amount of USD 1,685.36 (one thousand six hundred eighty-five United States dollars and thirty-five cents) to cover expenditures incurred for an expert witness to appear at the public hearing on the instant case and to formalize and send two affidavits. This amount should be paid within 90 days of the date of notification of this judgment.

G. Method of compliance with the payments ordered

496. The State must pay the compensation for costs and expenses as ordered in this judgment directly to the organizations indicated herein, within one year as of the date of notification of this judgment, in the terms given in the following paragraphs.

497. The State must fulfill all its monetary obligations by means of payment in United States dollars or the equivalent in Peruvian currency, calculated according to the exchange rate in effect in the Central Bank of Peru the day prior to the payment.

498. The amounts allocated in this judgment as reimbursement for court costs and attorney fees shall be disbursed in their entirety to the organizations named, as ordered in this judgment, with no deductions for possible fiscal fees.

499. If the State should fall behind in its payments, including for its reimbursement to the Victims Legal Assistance Fund, it must pay interest on the amount owed at the overdue interest rate charged by banks in Peru.

XIII
OPERATIVE PARAGRAPHS

500. Therefore,

THE COURT

DECIDES,

by five votes in favor and one opposed,

1. To deny the preliminary objections lodged by the State, pursuant to paragraphs 37 to 44, 48 to 53, 59 to 69, 75 to 78 and 82 to 83 of this judgment.

Dissenting vote, Judge Vio Grossi.

DECLARES,

by five votes in favor and one opposed, that:

2. It accepts the State's partial recognition of international responsibility pursuant to paragraphs 18 to 28 of this judgment.

3. The State is responsible for violating the right to life enshrined in Article 4(1) of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, in injury of Eduardo Nicolás Cruz Sánchez pursuant to paragraphs 292 to 319 of this judgment.

4. The State is responsible for violation of the right to judicial guarantees and the right to judicial protection enshrined in Articles 8(1) and 25(1) of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, in injury of Eduardo Nicolás Cruz Sánchez, Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza, pursuant to paragraphs 344 to 354, 366 to 374, 379 to 383, 396 to 404, 421 to 424, 428 to 430 and 431 of this judgment.

5. The State is responsible for violation of the right to humane treatment enshrined in Article 5(1) of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, in injury of Edgar Odón Cruz Acuña, pursuant to paragraphs 443 to 450 of this judgment.

6. The State is not responsible for violation of Article 2 of the American Convention on Human Rights, read in conjunction with Articles 8 and 25 thereof, pursuant to paragraphs 411 to 415 of this judgment.

7. There is insufficient evidence to hold the State internationally responsible for violation of the right to life enshrined in Article 4(1) of the American Convention on Human Rights, read in conjunction with Article 1(1) thereof, in injury of Herma Luz Meléndez Cueva and Víctor Salomón Peceros Pedraza pursuant to paragraphs 320 to 343 of this judgment.

Dissenting vote, Judge Vio Grossi.

AND ORDERS,

by five votes in favor and two opposed, that:

8. This judgment constitutes per se a form of reparation.

Dissenting vote, Judge Pérez Pérez and Judge Vio Grossi.

by five votes in favor and one opposed, that:

9. The State shall conduct effectively the ongoing investigation and/or criminal proceedings to identify, prosecute and, if applicable, punish those responsible for the facts involving the extrajudicial execution of Eduardo Nicolás Cruz Sánchez, pursuant to the provisions of paragraphs 459 to 460 of this judgment.

10. The State shall provide, free of charge, through its specialized healthcare facilities, immediate, appropriate, effective psychological and/or psychiatric care for the same victim if he so requests, pursuant to paragraph 463 of this judgment.

11. The State shall issue the publications as ordered, pursuant to paragraph 466 of this judgment.

12. The State shall pay the amounts set in paragraph 492 of this judgment as reimbursement of costs and expenses, pursuant to paragraphs 496 to 499 of this judgment.

13. The State shall repay the Victims Legal Assistance Fund of the Inter-American Court of Human Rights the amount that was spent in the processing of this case, pursuant to paragraphs 495 and 499 of this judgment.

14. The State shall, within one year of the date of notification of this judgment, submit to the Court a report on the measures adopted to comply therewith.

15. The Court will monitor full compliance with this judgment, in exercise of its authority and in compliance with its obligations pursuant to the American Convention on Human Rights, and shall declare this case closed when the State has fully complied with all the measures ordered herein.

Dissenting vote, Judge Vio Grossi.

Judge Alberto Pérez Pérez informed the Court of his partially dissenting opinion, attached hereto.

Judge Eduardo Vio Grossi informed the Court of his dissenting opinion, attached hereto.

Judge Eduardo Ferrer Mac-Gregor Poisot informed the Court of his concurring opinion, attached hereto.

Done in Spanish in the city of San Jose, Costa Rica, April 17, 2015.

Judgment of the Inter-American Court of Human Rights on Preliminary Objections, Merits, Reparations and Costs in the Case of Cruz Sánchez et al. v. Peru.

Humberto Sierra Porto
President

Roberto F. Caldas Manuel E.
Ventura Robles

Alberto Pérez Pérez Eduardo
Vio Grossi

Eduardo Ferrer Mac-Gregor Poisot

Pablo Saavedra Alessandri
Registrar

So ordered,

Humberto Sierra Porto
President

Pablo Saavedra Alessandri
Registrar

PARTIALLY DISSENTING OPINION BY JUDGE ALBERTO PÉREZ PÉREZ

CASE OF CRUZ SÁNCHEZ ET AL. V. PERU

1. The Court judged that Eduardo Nicolás Cruz Sánchez had been arbitrarily deprived of his life in violation of Article 4.1 of the American Convention, read in conjunction with Article 1(1) (para. 319 of the judgment). It also found several violations against the family members present in this case as alleged victims (paras. 431 and 450).

2. In paragraphs 451 and following, the Court recalled and reasserted its case law, according to which "(p)ursuant to the provisions of Article 63(1) of the American Convention, the Court has held that every violation of an international obligation which results in harm creates a duty to make adequate reparation, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility."

3. However, in paragraphs 483 to 485, the Court decided not to award any compensatory indemnification for nonpecuniary damage, as it judged "that, in the instant case, it is not pertinent to order the payment of financial compensation for non-pecuniary damage for the violations of the right to life in injury of Eduardo Nicolás Cruz Sánchez, bearing in mind that this judgment constitutes, per se, sufficient redress for such damage, and considering that reparations concerning the investigation and the publication of this judgment that have already been ordered, provide due reparation under the terms of Article 63(1) of the American Convention" (para. 483); "that, with respect to Edgar Odón Cruz Acuña, the measures of rehabilitation awarded in the judgment provide sufficient, appropriate redress to compensate for the damage done to his personal integrity (para. 484), and furthermore, "concerning the harm derived from violation of Articles 8 and 25 of the Convention in injury of Florentín Peceros Farfán, Nemecia Pedraza de Peceros, Jhenifer Solanch Peceros Quispe, Herma Luz Cueva Torres and Edgar Odón Cruz Acuña in varying measure as a consequence of the facts that were upheld in the instant case, [...] the Court holds that the present judgment is in itself a form of compensation and moral satisfaction for the victims and their relatives. The reparations involving investigation and publication [ordered in this judgment] also provide due compensation under the terms of Article 63(1) of the American Convention" (para. 485).

4. In my view, the Court should have awarded compensatory indemnification for nonpecuniary damage caused by violation of Article 4(1) of the American Convention for arbitrarily taking the life of Eduardo Nicolás Cruz Sánchez and for violating the rights of his family members, as established in the relevant sections of the judgment. There is no

justification for setting aside the practice of awarding compensatory indemnification for damage that "may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as other nonmaterial changes in the living conditions of the victim or family members" (para. 482). Arbitrary taking of life unquestionably undermines "very significant values for individuals", whether the "direct victim" or "his or her loved ones".

Alberto Pérez
Judge

Pablo Saavedra Alessandri
Registrar

SEPARATE DISSENTING OPINION BY JUDGE EDUARDO VIO GROSSI,
INTER-AMERICAN COURT OF HUMAN RIGHTS,
CASE OF CRUZ SÁNCHEZ ET AL V. PERU
JUDGMENT OF APRIL 17, 2015
(Preliminary Objections, Merits, Reparations and Costs)

INTRODUCTION

This separate dissenting opinion[1] on the above-referenced judgment[2] is being offered in response to the judgment's denial of the preliminary objection lodged by the Republic of Peru concerning failure to comply with the rule on prior exhaustion of domestic remedies.[3] This opinion is based on the question of timing, that is, when this rule should apply. The view given in the judgment is that this can happen at the very latest when the Inter-American Commission on Human Rights[4] issues its admissibility decision on the petition or communication[5] that gives rise to the case.[6] This separate opinion holds, by contrast, that the condition should already have been met when the motion is submitted, to be verified by the Commission both at the time of submission and when the decision on admissibility is delivered. In other words, while the judgment holds that compliance with this rule is a requirement for the petition to be admissible, the writer of this opinion believes that it should be at the time the motion is first presented, and is thus a condition for the case to proceed.

[1] Art. 66(2) of the American Convention on Human Rights, hereinafter the Convention: *"If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment."*

Art. 24(3) of the Statute of the Court: "*The decisions, judgments and opinions of the Court shall be delivered in public session, and the parties shall be given written notification thereof. In addition, the decisions, judgments and opinions shall be published, along with judges' individual votes and opinions and with such other data or background information that the Court may deem appropriate."*

Art. 65(2) of the Rules of Procedure of the Court: *"Any Judge who has taken part in the consideration of a case is entitled to append a separate reasoned opinion to the judgment, concurring or dissenting.*

These opinions shall be submitted within a time limit to be fixed by the Presidency so that the other Judges may take cognizance thereof before notice of the judgment is served. Said opinions shall only refer to the issues covered in the judgment."

[2] Hereinafter the judgment.

[3] Hereinafter the State.

[4] Hereinafter the Commission.

[5] Hereinafter the petition.

[6] Para. 52 of the judgment.

This writer, as he did in an earlier case, has voted against all the other consideranda and operative paragraphs of the judgment based on the position elucidated herein, that the ruling on the merits of the case was out of order.[7]

The reasons why he does not agree with the decision on the State's lodging of the preliminary objection for failure to exhaust domestic remedies is explained below with reference to the applicable provision of the Convention, the facts of the case that are relevant to that provision, and finally, to the judgment's discussion of the preliminary objection.

I. THE CONVENTION'S PROVISION ON THE RULE OF PRIOR EXHAUSTION OF DOMESTIC REMEDIES

The first part of this brief will offer an overview on the rule under discussion, followed by comments on the procedure that should be followed regarding the petition, its examination and initial processing by the Commission, the State's response thereto, the admissibility of the case, and the judgment to be made by the Court.

A. General Comments

Article 46 of the Convention establishes the rule of prior exhaustion of domestic remedies in the following terms:

> *1. Admission by the Commission of a petition or communication lodged in accordance with Articles 44 or 45 shall be subject to the following requirements:*
>
> *a. that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law;*
>
> *b. that the petition or communication is lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment;*
>
> *c. that the subject of the petition or communication is not pending in another international proceeding for settlement; and*
>
> *d. that, in the case of Article 44, the petition contains the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition.*
>
> *2. The provisions of paragraphs 1.a and 1.b of this article shall not be applicable when:*
>
> *a. the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated;*

[7] Separate dissenting opinion by Judge Eduardo Vio Grossi, *Case of Díaz Peña v. Venezuela*, judgment of June 26, 2012 (preliminary objection, merits, reparations and costs).

b. the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or

c. there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.

As a preliminary comment, it is worth noting that this provision is *sui generis*, that is, unique or exclusive to the Convention. It does not appear in these same terms, for example, in the Convention for the Protection of Human Rights and Fundamental Freedoms or the European Convention on Human Rights,[8] Article 35 of which addresses the requirement for prior exhaustion of domestic remedies in more general terms and does not consider the restrictive exceptions called for in Article 46(2) of the American Convention.[9]

It should also be emphasized that the requirement in the European Convention is to be met prior to initiating action before the European Court of Human Rights, a judicial body, while the American Convention calls for such compliance before the petition is brought to the Commission, which is a non-judicial body. This is significant inasmuch as the Commission's *"main function [...is] to promote respect for and defense of human rights"*[10] and in the exercise of this function, *"to take action on petitions and other communications pursuant to its authority under the provisions of Articles 44 through 51 of this Convention*,"[11] including submitting the particular case to the Court.[12]

Thus, the Commission's task is to promote and defend human rights, and it can eventually come before the Court to bring an application; in that sense, it does not necessarily share the quality of impartiality that should characterize a judicial body. As a result, the provision of Article 46(1)(a) of the Convention is also designed to place limits on the action of this non-judicial body that could ultimately become a party to a litigation that it may itself initiate. The intent of this provision is to prevent the Commission from taking action before the

[8] Nor is it included in the Statute or Rules of Court of the International Court of Justice. In that system, therefore, it would stand strictly as case law.

[9] *"Admissibility criteria 1. The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken. 2. The Court shall not deal with any application submitted under Article 34 that (a) is anonymous; or (b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information. 3. The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that: (a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly illfounded, or an abuse of the right of individual application; or (b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal. 4. The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings."*

[10] Clause 1, Art. 41, of the Convention.

[11] Clause Art. 41(f) of the Convention.

[12] Art. 51 and 61(1) of the Convention.

requirement or rule contained therein has been duly and properly met, that is, from proceeding with a case even if domestic remedies have not yet been exhausted.

It is in this same spirit that Article 46(2) of the Convention explicitly lists the only cases in which the rule of prior exhaustion of domestic remedies does not apply, that is, the exceptions to the rule—cases in which there is no due process of law by which claimants could avail themselves of domestic remedies, access has proven impossible, or there is excessive delay in resolving them. The article offers no other exceptions than these, so there is no merit in invoking or even wielding an objection not provided for in the text; if there were, this could strip the general rule set forth in Article 46(1)(a) of the Convention of any meaning or useful effect, and worse yet, leave application up to the discretion or even arbitrariness of the Commission.

And now, a second general comment will examine the Court's view on the article transcribed above, expressed as follows: "*the Court recalls that the rule on prior exhaustion of domestic remedies was conceived in the interest of the State, relieving it of the need to face international proceedings for actions ascribed to it before resolving the dispute using its own processes*."[13]

Thus, the intent of this rule is to extend to the State the possibility of restoring immediately the effective exercise and respect for human rights that have been infringed, which is the object and purpose of the Convention,[14] so as to bring about the ultimate goal as quickly as possible, thus obviating the need for intervention by the inter-American jurisdiction.[15]

The rule matters because, in those situations in which the State has failed to meet its acquired commitments to respect and guarantee the free and full exercise of human rights, there is an avenue to seek intervention by international jurisdictional remedies that, if the case is admissible, will order it to comply with the international obligations it has violated, provide guarantees that it will do so no more, and redress all the consequences of the violations.[16]

This rule is also therefore a mechanism that encourages the State to meet its human rights obligations without waiting for the inter-American system to go through a process and then

---

[13] Para. 48 of the judgment.

[14] Art. 1(1) of the Convention: "*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.*"

[15] Art. 33 of the Convention: "*The following organs shall have competence with respect to matters relating to the fulfillment of the commitments made by the States Parties to this Convention: a. the Inter-American Commission on Human Rights, referred to as "The Commission;" and b. the Inter-American Court of Human Rights, referred to as "The Court."*"

[16] Art. 63(1) of the Convention: "*If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.*"

order it to. Its useful effect is thus for the State to move as quickly as possible to restore respect for human rights, and this is why the rule can also be seen to exist in benefit of the victim of a human rights violation.[17]

All this points to the conclusion, then, that the rule was written into the Convention as an essential component of the entire inter-American system for the promotion and protection of human rights, because, as seen in paragraph two of the preamble, "*international protection [...takes...] the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states".*[18]

The international legal structure is still essentially grounded in the principle of sovereignty, which in the case of the inter-American system is enshrined in Articles 1(1)[19] and 3(b)[20] of the Charter of the Organization of American States. Therefore, pursuant to the public law principle that only what the law expressly authorizes can be done, the provisions of the Convention that call for restrictions on State sovereignty should be interpreted and applied in this same spirit.

The rule on prior exhaustion of domestic remedies, in this sense, is also an expression of the exercise of State sovereignty and the need to give the State the preferential opportunity to proceed correctly in matters of alleged human rights violations. This takes on even greater importance in today's climate, when all the States Parties to the Convention are governed by the system of the democratic rule of law, that is, they all uphold democracy.[21]

The conclusion from all this is that the requirement given in Article 46(1)(a) of the Convention, cited above, must have been met already, before the petition can be brought to the Commission.

---

[17] Hereinafter the victim.

[18] Paragraph 2 of the preamble to the Convention: "*Recognizing that the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by the domestic law of the American states*."

Article 8(1) of the Convention is perhaps the clearest in expressing the subsidiary nature of the inter-American system of human rights: "*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.*"

[19] *"The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency."*

[20] *"The American States reaffirm the following principles: …b) International order consists essentially of respect for the personality, sovereignty, and independence of States, and the faithful fulfillment of obligations derived from treaties and other sources of international law;*

[21] Inter-American Democratic Charter adopted by resolution of the twenty-eighth special session of the General Assembly of the Organization of American States, September 11, 2001.

B. The petition

The first observation that needs to be made about the petition that initiates a procedure before the Commission and that may end up in the Court is that compliance with the rule on prior exhaustion of domestic remedies is equally and fundamentally an obligation of the victim or the petitioner. This is the party that must comply with the requirement for prior exhaustion of domestic remedies, and who, in order to argue the violation before the inter-American jurisdiction,[22] must have done so already before the relevant national judicial bodies. If this does not occur, it would be an impediment to swift, timely achievement of the above-mentioned useful effect.

This is why Article 28(8) of the Rules of Procedure of the Commission, both the current edition[23] and the version in force at the time the petition was submitted,[24] says that the petition must contain information on *"...any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure*". It is worth noting that any reference to these Rules of Procedure points to the understanding held by the Commission itself when it approved this legal instrument and its interpretation of the provisions of the Convention, and more significantly for the purpose at hand, Article 46(1)(a) thereof.

It is clearly for the same reason that Article 31(3) of the Rules of Procedure of the Commission refers to a situation in which *"the petitioner contends that he or she is unable to prove compliance with the requirement..."* What this provision says is that the strictly delimited exceptions to the rule on prior exhaustion of domestic remedies are established in favor of the victim or petitioner. Consequently, it is the petitioner and only the petitioner who can allege or assert any exceptions to the rule, not the Commission, and clearly, therefore, this can be done only at the time the petition is lodged.

The second comment about the petition points to the words of this same Article 46(1) of the Convention, which describes it has having been *"lodged"*, certainly implying that the petition should be considered as is, and if in this state it meets the requirements set forth in the article, it should be "*admitted*". The requirement for prior exhaustion of domestic remedies called for in Article 46(1)(a) of the Convention needs to have been met by the petition at the time it is first submitted, and only if it has been, may the petition be "*admitted*" by the Commission.

---

[22] Art. 44 of the Convention: *"Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party."*
Art. 61(1) of the Convention: "*Only the States Parties and the Commission shall have the right to submit a case to the Court."*

[23] Approved by the Commission at its 137th Regular Period of Sessions, held from October 28 to November 13, 2009, and modified on September 2nd, 2011 and during the 147th Regular Period of Sessions, held from 8 to 22 March 2013, for entry into force on August 1st, 2013.

[24] Approved by the Commission at its 109th regular period of sessions, held from December 4 to 8, 2000, and modified at its 116th regular period of sessions, held from October 7 to 25, 2002.

The stipulations of Article 46(1)(b) of the Convention are based on the same premise; The text states that, for the petition to be admitted, it must have been *"lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment"*; it is unquestionably understood that this reference is to the final remedy that was filed, there being no other actionable options available. The established term for lodging the motion is thus counted from the time of notification of the final ruling by national authorities or courts on the motions that have been filed with them, and these are the actions that could trigger the State's international responsibility; this obviously suggests that, at the time the petition is "*lodged*", these remedies have been exhausted.

Moreover, Article 26(1) of the Rules of Procedure of the Commission says that initial processing can begin on petitions *"that fulfill all the requirements set forth"* and that these petitions must indicate, as already stipulated in Article 28.8 above, all *"steps taken to exhaust domestic remedies, or the impossibility of doing so",* and if these requirements are not met, the Commission, in accordance with Articles 26(2) and 29(3) of its Rules of Procedure, "*may request the petitioner or his or her representative to fulfill them*", and according to Article 46(1)(b) of the Convention, it may consider only those petitions that are lodged *"within a period of six months"* from the date of notification of the ruling by which domestic remedies are exhausted.

All this clearly shows that compliance with the rule on prior exhaustion of domestic remedies unquestionably stands as a requirement that the petition must meet in order to be "*lodged*".

C. Study and initial processing by the Commission

The rule on prior exhaustion of domestic remedies is not only a benefit both for the State and for the victim or petitioner, but it also places an obligation on the Commission. According to the provisions of Article 26(1) of the Rules of Procedure of the Commission, the "*Executive Secretariat of the Commission shall be responsible for the study and initial processing of petitions lodged before the Commission that fulfill all the requirements set forth in the Statute and in Article 28 of these Rules of Procedure."* As already stated, Articles 26(2) and 29(3) of the text add that if *"a petition or communication does not meet the requirements set for in these Rules of Procedure, the Executive Secretariat may request the petitioner or his or her representative to fulfill them."*

Furthermore, Article 29(1) states that the "*The Commission, acting initially through the Executive Secretariat, shall receive and carry out the initial processing of the petitions presented*" and adds, *[e]ach petition shall be registered, the date of receipt shall be recorded on the petition itself and an acknowledgement of receipt shall be sent to the petitioner.*" Finally, Article 30(1) of the text says that the "*Commission, through its Executive Secretariat, shall process the petitions that meet the requirements set forth in Article 28 of these Rules of Procedure."*

In other words, the Executive Secretariat of the Commission, working on behalf of the Commission itself, proceeds to take certain steps with the petition as "*lodged*". Its actions are not limited to merely checking whether it formally includes the required information, but it

must also complete the "*study and initial processing*" of the petition, so that it "*fulfills all the requirements set forth*", including, of course the first and foremost requirement, "*that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law*." The Commission, therefore, acting through its Executive Secretariat, must perform an initial review of whether the petition complies with the Convention, cross-checking it with the Convention's established requirements that must be met before the petition can be "*lodged*".

It is reasonable to infer from all this that domestic remedies must have been exhausted before the petition comes before the Commission, because otherwise it would be impossible to understand the sense and the need for a "*study and initial processing*" of the petition by the Executive Secretariat; it would be senseless to require the petitioner to complete the process or to indicate the steps undertaken to exhaust domestic remedies, and there would be no sense in setting a deadline for it to be lodged.

Finally, bearing in mind that the task of the Commission is to study the petition, require it to be complete and process it, all this must clearly be done in accordance with the terms in which the petition was "*lodged*". It can be maintained in this line of thinking that, just as *"it is not the task of the Court or the Commission to identify ex officio the domestic remedies that remain to be exhausted, and international bodies are not expected to rectify a lack of precision in the State's arguments"*,[25] similarly, they cannot be expected to rectify the petition or give it a scope beyond what it says and what it is requesting. The Commission must limit itself to what is being asked of it.

This thesis is further strengthened by the provisions concerning the situation in which it is either unnecessary or impossible to exhaust these remedies beforehand. Article 32(2) of the Rules of Procedure of the Commission states, "*[i]n those cases in which the exceptions to the requirement of prior exhaustion of domestic remedies are applicable, the petition shall be presented within a reasonable period of time, as determined by the Commission. For this purpose, the Commission shall consider the date on which the alleged violation of rights occurred and the circumstances of each case.* If this alternative applies, the Commission must also consider the time when the alleged violation occurred, which obviously must have been before the petition was lodged.

In summary, then, it is also the duty of the Commission, faced with the lodging of a petition, to confirm that the requirement for prior exhaustion of domestic remedies has already been met.

D. Response by the State

Article 30(2) of the Commission's Rules of the Rules of Procedure says that the *"Commission, through its Executive Secretariat, shall [...] forward the relevant parts of the petition to the State in question."*

---

[25] Para. 49 of the judgment.

The material it forwards to the State, according to Article 28(8) of these Rules of Procedure, should indeed include information on *"any steps taken to exhaust domestic remedies, or the impossibility of doing so as provided in Article 31 of these Rules of Procedure".* Article 30(3), cited above, goes on so say, "*[t]he State shall submit its response within three months from the date the request is transmitted."* This response should of course include the preliminary objection on failure to exhaust domestic remedies if the State so wishes.

This is in fact why Article 31(3) of the Commission's Rules of the Rules of Procedure stipulates, *"[w]hen the petitioner contends that he or she is unable to prove compliance with the requirement indicated in this article, it shall be up to the State concerned to demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record.*"

In other words, if the petitioner should argue in the petition that he or she is unable to demonstrate that domestic remedies have been exhausted, the State may challenge the claim and in this event must demonstrate that the available remedies have not been exhausted, especially if this not clearly evident in the case file. The Court's own words need to be understood in terms of just such an event, to wit, that a "*State that claims failure to exhaust domestic remedies needs to spell out the particular domestic remedies that have not yet been exhausted and demonstrate that they were in fact available and were appropriate, fitting and effective*."[26]

It naturally bears recalling, although this is not expressly addressed in the Commission's Rules of Procedure, that when the petitioner states in the petition that he or she has previously exhausted domestic remedies and has thus fully complied with the requirements of Article 46(1)(a) of the Convention, the State may then lodge an objection claiming that this has not occurred.

It is thus clear that compliance with the rule on prior exhaustion of domestic remedies, or the impossibility of doing so, must be spelled out in the petition, or otherwise, the State would not be able to respond to it; once again, this demonstrates that the requirement needs to have been met previously, before lodging the petition whose relevant parts are forwarded to the State for response.

The stipulations of Article 30(5) and (6) of the Commission's Rules of the Rules of Procedure point in this very direction. More specifically, the article says, *"(p)rior to deciding upon the admissibility of the petition, the Commission may invite the parties to submit additional observations, either in writing or in a hearing, as provided for in Chapter V of these Rules of Procedure"* and *"(t)he considerations on or challenges to the admissibility of the petition shall be submitted as from the time that the relevant parts of the petition are forwarded to the State and prior to the Commission's decision on admissibility."* This does not leave room for doubt about the fact that these additional comments and any considerations or challenges

---

[26] *Idem.*

should address the petition just as it was "*lodged*". They do not create a new or amended petition, unless, as would be expected, the original petition needs to be withdrawn.

It is thus unquestionable that the State's response, logically and necessarily, should address a petition that has been "*lodged"* before the Commission, and it is at this time and not later, that the exhaustion of domestic remedies should be litigated.

For this very reason, this is the time when domestic remedies need to have been exhausted, or explanations need to be given as to the impossibility of doing so. To hold that these remedies could be exhausted after the petition has been "*lodged*" and, consequently, the State has been notified, would undermine the essential procedural balance and would leave the State defenseless, unable to lodge the relevant preliminary objection within the established limits of time and form.

This is the framework in which to understand what the Court "*has consistently maintained[,] that an objection to the exercise of its jurisdiction based on the alleged failure to exhaust domestic remedies should be lodged at the correct stage of the proceedings, that is, during the admissibility stage before the Commission."*[27]

E. Admissibility of the petition

The above premises become equally evident in view of the provision of Article 31(1) of the Rules of Procedure, that says, "*to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law."*

This rule requires the Commission to "*verify*", that is, to confirm or substantiate[28] whether the domestic remedies have been pursued and exhausted, and thus "*decide*" on admissibility. However, it does not require these remedies to have been exhausted in order to adopt an admissibility decision. This makes sense, because the decision could well be to deny the petition because the remedies have not been exhausted. This means that the Commission, to make a decision on admissibility of the petition, must verify whether the rule of prior exhaustion of domestic remedies has been met, and if not, the proper decision would be to hold the petition inadmissible. The necessary requirement if the Commission is to rule on the admissibility of a petition is to verify whether the petition meets the rule on prior exhaustion of domestic remedies, and not whether it has in fact been met.

It should also be said that while it makes sense for the preliminary objection on failure to exhaust domestic remedies to be lodged during the admissibility stage of the petition—which runs from the time the petition is received and processed by the Commission, through the Executive Secretariat, until the time the Commission rules on its admissibility—this does not mean that it should be at this very last minute, at the end of the procedure, that the requirement should be fulfilled. All it means is that this is the time to make the ruling, or

[27] Para. 49 of the judgment.

[28] Merriam-Webster Dictionary, www.Merriam-Webster.com, Merriam-Webster, Incorporated, 2021.

rather, to "*verify*"[29] whether, at the time the petition was lodged, the requirement had been met.

This becomes clear in view of Article 36 of the Commission's Rules of Procedure, that once "*it has considered the positions of the parties, the Commission shall make a decision on the admissibility of the matter*."

There can be no question, then, that the moment when the Commission rules on the admissibility of the petition is different from the moment when the petition is lodged or completed. This is patently evident since the Commission's Rules of Procedure call for an "*initial processing*"[30] of the petition, for it to be "*registered*"[31] and its "*relevant parts*"[32] forwarded to the State; it is only after the State responds that the Commission examines admissibility, and for this purpose, it "*verifies*"[33], that is, confirms, that the requirements have been met, including the requirement for prior exhaustion of domestic remedies.

To summarize, the Rules of Procedure of the Commission do not stipulate that domestic remedies need to have been exhausted at the time it rules on admissibility of the petition. Instead, it says that this is when the Commission "*verifies*" whether remedies were initiated and exhausted beforehand, or whether it was not necessary; that is, it performs a second review of whether the petition is consistent with the Convention, comparing it with the provisions of the Convention regarding the requirements that need to be met for it to be either "*admitted*" or dismissed.

As added emphasis, it is enough to reiterate that if it were not mandatory to have exhausted domestic remedies before formulating the petition, it would therefore be permissible, for a certain amount of time while the petition is being lodged (recognizing that under many circumstances, this can be very lengthy), for a single case to be in process simultaneously before both the domestic courts and the international jurisdiction. Such a situation would clearly render meaningless the provisions of the above-mentioned paragraph two of the preamble and even the overall rule on prior exhaustion of domestic remedies. The inter-American jurisdiction would, in such a case, cease to be reinforcing or complementing the domestic jurisdiction, and instead would replace it, or at least be wielded as a pressure tactic, which was certainly not the intent of the Convention.

Indeed, under this hypothesis, it could become an incentive, even a perverse one, to take submissions to the Commission even when this requirement has not been met, in hopes that it can be met before the Commission rules on its admissibility, which is also inconsistent with the object or purposes of the Convention.

---

[29] Art. 31(1) of the Rules of Procedure of the Commission.

[30] Art. 29 of the Rules of Procedure of the Commission.

[31] *Idem.*

[32] Art. 30(2) of the Rules of Procedure of the Commission.

[33] Art. 31(1) of the Rules of Procedure of the Commission.

It is worth asking whether the "*study and initial processing*" of the petition would make sense at all if it were not necessary for domestic remedies to have been exhausted before it is lodged. If the requirement became mandatory only when the admissibility decision on the petition is made, then one wonders what could be the purpose of the initial study. One could also ask for what practical purpose the Convention distinguishes between the time the petition is lodged and the time it is held admissible. If it is true that this requirement or rule should be fulfilled at the time the admissibility decision is made, rather than when the petition is lodged, the natural question to ask is what purpose the petition even serves.

As an additional cautionary note, if it is not the case that this requirement should be met at the time the petition or its supplement is lodged, but instead, the time period for compliance depends on when the Commission rules on admissibility, the natural result could be clear injustice or arbitrariness. Under such a view, this period would depend, not on the victim or the petitioner, but on the Commission's decision to rule on admissibility or inadmissibility of the petition, a period that would certainly not be the same in all cases, and no one would know far enough in advance.

F. The Court's ruling

Finally, the Court also has a role regarding compliance with the requirements for the petition; it should be recalled that, according to the provisions of Article 61(2) of the Convention, *"(i)n order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed."*

It thus falls to the Court to verify that the petition before the Commission was fully in compliance with the requirement on prior exhaustion of domestic remedies. As the judgment says, "*when the Court examines matters, it has the authority to review the legality of the Commission's action"*[34] or that it "*has the power to review whether the Commission has complied with the provisions of the American Convention, the Statutes and the Rules of Procedure."*[35]

This is as it must be. To hold otherwise would grant the Commission the broadest power to decide, exclusively and autonomously, whether to admit or reject a petition, clearly making such a power discretionary and even arbitrary. This would strip the Court of its own authority, as in such a case, it would be left little choice but to serve as a mere forum to confirm or substantiate, but not even endorse, the work of the Commission. Unquestionably this is not consistent with the letter and spirit of Article 61(2) of the Convention, transcribed above.

II. THE FACTS REGARDING THE OBJECTION FOR FAILURE TO EXHAUST DOMESTIC REMEDIES

[34] Para. 37 of the judgment.

[35] Para. 75 of the Judgment.

Having understood the rules and regulations as examined above, we can now discuss herebelow the relevant facts involving the preliminary objection for failure to exhaust domestic remedies.

A. **The premises in the petition**

The petition is dated February 3, 2003 and was received by the Commission on the following February 19.

The text first outlines the facts that gave rise to the petition, noting that, by judgment of the Supreme Court of Peru, the jurisdictional dispute between the military courts and the ordinary courts had been settled in favor of the military jurisdiction, and therefore, "*… as this was a ruling by the Supreme Court, the remedies of the domestic jurisdiction have been exhausted.*"

It can be inferred from the summary that this statement was made in positive terms, that is, to affirm that the remedies of the domestic jurisdiction in the case at hand had in fact been exhausted, thus meeting the requirements.

It should likewise be emphasized that, as a natural consequence, the petition makes no mention of any situation that, in the instant case, would justify the claim that this compliance was not appropriate or mandatory.

Finally, it should be understood that the case file shows no evidence that either the Commission or the Executive Secretariat on behalf of the Commission raised any objections to the petition.

B. **The content of the State's comments**

The State submitted its observations on the petition on December 1, 2003. It said, *"on August 16, 2003, the Transitory Criminal Law Chamber of the Supreme Court ruled on a jurisdictional dispute in favor of the military courts, holding that they should continue with their preliminary investigations and that the Third Special Criminal Chamber should accordingly send the investigative prosecutor of the Supreme Council of Military Justice a certified copy of all its actions in the investigation against"* the named individuals, *"ORDERING it to continue the investigation of the accused,"* whom it then names. It also lists the judicial processes undertaken in the military jurisdiction on November 3 and December 1, 2003.

The State's brief closes by saying that "*because a criminal process is still pending in the domestic jurisdiction and therefore the relevant remedy has not been previously exhausted, the State of Peru requests the Honorable Commission to find petition 136/2003 inadmissible pursuant to Article 46(1)(a) of the American Convention and Article 31 of the Rules of Procedure of the Commission.*"

C. **Analysis in the Admissibility Report**

The Commission issued its Admissibility Report on the petition on February 27, 2004, including a discussion of the comments made by the State.

The report also addresses the petitioners' December 2003 brief responding to the State's comments, but this document is not in the case files that were forwarded to the State, and it can thus be assumed that the State did not see it until after the Admissibility Report had been issued. It was this brief that first made mention of the fact that "*the processes being pursued cannot be considered effective remedies because of the lack of impartiality and objectivity.*"

It should similarly be emphasized that the Commission acts on its own initiative in the Admissibility Report and raises a point that was not argued in the petition, when it applies "*the exceptions stipulated in Article 46(2)(a) and (c) of the American Convention, such that the exhaustion of domestic remedies is not required in the instant case with respect to the investigation and prosecution of the members of the 'Chavín de Huántar' military command who took part in the events under consideration or regarding the agents of the State who took part in covering up the facts after the alleged extrajudicial executions were committed."*

The report also says, *"the Commission may assume that the State has not tacitly waived its right to claim the [rule of prior exhaustion of domestic remedies], unless the objection was promptly and explicitly posited in the early stages of the procedure before the Commission, and the mere submission of information on progress in the domestic judicial processes is not equivalent to lodging an express objection based on the requirement of prior exhaustion of domestic remedies."*

The Commission's report thus dismisses the State's position, saying that it should have begun earlier in the process to raise its objection on failure to exhaust domestic remedies; in so doing, it disregards the State's unmistakable and direct affirmations in the petition to the effect that *"because a criminal process is still pending in the domestic jurisdiction and therefore the relevant prior remedy has not been exhausted, it ... requests ... that [the] petition [be found] inadmissible pursuant to Article 46(1)(a) of the American Convention and Article 31 of the Rules of Procedure of the Commission."*

The report also says, however, that the trial of Vladimiro Montesinos Torres, Roberto Huaman Ascurra, Nicolás Hermosa Ríos and Jesús Zamudio Aliaga *"could be found to constitute failure to exhaust domestic remedies"* and moreover, it goes on to mention the "*investigation of Juan Francisco Diandera Ottone, Martín Solari de la Fuente and Herbert Danilo Angeles Villanueva*", about which it concludes that there is no "*prospect of effectiveness of the domestic remedy for the purposes of the requirement stipulated in Article 46(2) of the American Convention."*

Thus, the Admissibility Report does not allow the objection claimed by the State as having been submitted expressly and on time; it does recognize, at least regarding one of the trials underway in the regular criminal courts, that the domestic remedies had not been exhausted; and as for the other processes, it holds that they could not be considered suitable remedies under the terms of Article 46(2), although again, this article was not cited in the petition.

III. CONSIDERATIONS ON THE JUDGMENT

Taking into account the above outline concerning the regulatory framework surrounding the rule on prior exhaustion of domestic remedies and the facts of the instant case, the first observation that needs to be made is that the judgment asserts a confirmed fact. It says,

"[t]he Court therefore holds that the State filed its objection at the correct time"[36] *"during the admissibility stage before the Commission"*[37], and more specifically, in its petition.[38] The judgment also says that the petition was lodged *"as provided in Articles 46(1)(a) of the American Convention, in keeping with Article 31 of the [Commission's] Rules of Procedure," and because "the relevant remedy had not been exhausted."*[39]

The second comment about the judgment on this matter is that it offers only two other explanations as grounds for the decision to deny this objection raised by the State. The first is the argument that it would be *"inconsistent to pursue a process before the inter-American system when the criminal proceedings for the same facts were still in progress in the domestic courts. The Court would recall in this regard that the American Convention itself expressly allows for a petition to be declared admissible under certain assumptions, even if the prior exhaustion of domestic remedies has not yet been established at the time the admissibility report is issued. Adopting the position held by the State would mean removing all content and useful effect from the provisions of Article 46(2) of the American Convention."*[40]

Instead of settling the difference between the parties concerning the situation covered in Article 46(1)(a) of the Convention, as was expressly requested, the judgment applies the provisions of Article 46(2)(c), which had not even been cited in the petition and therefore could not be addressed in the State's response, much less considered by the Commission or in the judgment.

As a result, the judgment adheres to the same reasoning as the Commission, that the requirement for prior exhaustion of domestic remedies should have been met as of the time the Commission made its decision on admissibility, and not when the petition was first lodged, thus discarding the notion that the exceptions to the requirement should have been raised or argued concerning the petition as "*lodged*" or in the finalization of the process, and not afterwards, or even less so, by the Commission.

Furthermore, in so doing, the judgment ignores the State's express, direct affirmation and request that "*petition 136/2003 be found inadmissible pursuant to Article 46(1)(a) of the American Convention and Article 31 of the Rules of Procedure of the Commission*", without any explanation as to why, and despite the fact that the request is included in the background information, as was stated earlier.

The judgment's second thesis to justify denial of the State's preliminary objection is the State's earlier recognition during the course of the proceedings. It says, *"[t]he Court would respond to the Commission's decision to apply the exception set forth in [Article 46(2)(c) of the Convention] when it issued the Admissibility Report by noting that at a later date, in 2011,*

---

[36] Para. 50 of the judgment.

[37] Para. 49 of the judgment.

[38] Para. 50 of the judgment.

[39] *Idem.*

[40] Para. 52 of the judgment.

the State itself admitted responsibility for breaching the right to a reasonable period in the trial held in the criminal courts," adding that this constitutes *"a change in the position it adopted previously and is not admissible under the principle of estoppel*."[41]

This statement needs to understood, however, in light of the judgment's own words, that this recognition *"refer[s] only to the infringement of the right to a reasonable period in the judicial proceedings before the criminal courts,"*[42] confirming that the recognition is entirely unrelated to compliance with the Convention's Article 46(1)(a) requirement, *"that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law"*, but exclusively to the idea that this requirement is not applicable when, as stated in Article 46(2)(c) of the Convention, "*there has been unwarranted delay in rendering a final judgment under the aforementioned remedies.*" There is therefore no apparent justification for broadening the State's recognition to cover the petition's express request regarding the stipulations of Article 46(1)(a).

Moreover, the State's decision was first expressed when "*it acknowledged responsibility in report 535-2011-JUS/PPES for the excessive amount of time it took to conduct the criminal proceedings*" and said that "*the delay in processing the criminal trial was not in any sense due to a will to deny justice, but to organizational issues in the courts and the criminal procedural code still in effect in the Lima judicial district.*" Later, in its answering brief and comments on the brief of pleadings, motions and evidence, the State of Peru, on August 17, 2012, asked the Court "*to consider the points discussed in the answering brief, which outline the objective reasons for the delay in processing the criminal case.*"[43]

These assertions, cannot, strictly speaking, constitute recognition per se, despite the terms being used, at least in the sense outlined by Article 62 of the Court's Rules of Procedure,[44] because they were made by the State in response to the charges leveled against it by the Commission, including that it had not complied with the provisions of Article 46(2), but this did not mean that it stepped back from its position that domestic remedies had not been exhausted prior to the lodging of the petition.

Therefore, to insist that the State would be jeopardized any anything it might say after its objection had been dismissed by the Commission means that it would be unable to defend itself before the Commission and, even more, that it would not later be able to avail itself of the objection before the Court, and this would be unreasonable. It would make no sense for the judgment to dismiss the preliminary objection on failure to exhaust domestic remedies on the basis of actions taken by the State long after the petition was lodged and its observations were submitted, and on which the Commission, and ultimately the Court, should have ruled.

---

[41] Para. 53 of the judgment.

[42] Paras. 24 and 53 of the Judgment.

[43] Para. 19 of the judgment.

[44] *"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."*

Along these same lines, and delving in deeper, it is also necessary to consider the work being done by the United Nations International Law Commission on unilateral legal declarations[45] and the doctrine, from this same auxiliary source of international law,[46] holding that a unilateral act is understood as a State's unequivocal affirmation of its will, expressed in clear, specific terms, with the intention of producing legal effects in its relations with one or several states or international organizations. Furthermore, to determine these legal effects, it is necessary to know the content of the declarations that need to be interpreted in good faith, including all the factual circumstances in which they were made, the surrounding context, and the resulting reactions.

It is likewise important to reconsider the rule of estoppel. According to the material quoted and the doctrine, this rule says that the State may not withdraw its own unilateral legal act if another subject of international law has proceeded on the basis of it, that is, it cannot reverse such an act if the subjects to whom compliance with obligations is owed used it as a basis for their own acts.

As discussed above, then, it can be inferred that the State's recognition, as contained in the case files, is not, strictly speaking, a unilateral legal act because it was a response to what the Commission had said. That is, it was clearly developed for the exclusive purpose of explaining a situation, to wit, the delays in the relevant process, but it was not intended to change the meaning of an earlier act, and certainly was not issued such that its terms would become binding. This is why it was improper to apply the rule of estoppel to the State's declaration, because estoppel applies to unilateral legal acts.

As an additional consideration, this writer does not agree with the judgment's argument "*that, having recognized its responsibility before the Commission on a matter associated with one of the objections to the rule on failure to exhaust domestic remedies, the State ... has implicitly accepted the Court's full jurisdiction to hear the instant case.*"[47] While the State did indeed come before the Court with this extensively discussed preliminary objection, thus agreeing that the Court should rule on it, it is equally true that there was nothing to prevent it from lodging the objection, and furthermore, it clearly was brought with the intent of having it admitted, considering, among other things and in the terms of Article 62 of the Court's Rules of Procedure, the "*acceptance*" and the "*juridical effects*" of the recognition in the sense described above. The claim, in other words, was not intended as a means to bypass the Court's jurisdiction to rule on the matter, but instead, to have the Court find in its decision that the Commission did not have jurisdiction to proceed with the petition or even admit it.

CONCLUSION

In summary, and as discussed above, the terms of Article 46(1)(a) of the Convention are clear, and they are consistent with an understanding of Article 26(1) and (2), 28(8), 30(1), (2) and (3), 31 and 32 of the Rules of Procedure of the Commission, which interpret the

---

[45] The ten *Guiding principles* on the subject, adopted in 2006 by the United Nations International Law Commission.

[46] Art. 38(1)(c) of the Statute of the International Court of Justice, infra footnote 50.

[47] Para. 27 of the judgment.

Convention. They all lead to the unavoidable conclusion that compliance with the rule of prior exhaustion of domestic remedies should take place at the time the petition is lodged with the Commission, also including the State's observations in its reply to the case file forwarded to it.

This was not considered in the judgment, which to the contrary, denied the State's objection that the applicant had failed to comply with the rule because it was not verified that the requirement had been fulfilled at the time the admissibility decision on the petition was made. Thus, the judgment breaches this provision of the Convention and the associated operating rules.

Moreover, the background information examined above reveals that the decision to be made on the preliminary objection regarding this rule was to determine whether or not the remedies had been exhausted in keeping with the provisions of Article 46(1)(a) of the Convention, as the petition requested. Despite what the judgment claims, it was not a question of whether it was permissible to apply the exception stipulated in numeral 46(2)(c). As a result, the case clearly entails an error *ultra petita.*

In the third place, this writer disagrees with the judgment because in practice, it inexplicably reverses the stipulations of Article 46, applying as a general rule the exceptions given in subparagraph 46(2)(c) and taking as an exception the general rule given in 46(1)(a).

The writer further disagrees with the judgment because it adopts a standard that sets aside the "*reinforcing or complementing*" nature of the overall inter-American system of human rights and instead encourages the simultaneous adjudication of a case by both the domestic jurisdiction and the inter-American jurisdiction, without having previously exhausted the remedies available in the former.

Proceeding in this way not only strips all content from the rule on prior exhaustion of domestic remedies and makes it inapplicable, but is also inconsistent with the analysis given in the judgment, that the *"Court must preserve a fair balance between the protection of human rights, which is the ultimate purpose of the inter-American system, and the legal certainty and procedural equity that will safeguard the stability and reliability of international protection."*[48]

This writer therefore shares the sentiments that the Court itself has expressed in the past, that "*the tolerance of 'evident violations of the procedural rules established in the Convention* (and, it should be added, in the Court's and the Commission's Rules), *would entail the loss of the essential authority and credibility of the organs responsible for administering the system of human rights protection*"[49]. These are the very rules that guarantee the Court's impartiality and independence when it imparts justice in matters of human rights.

[48] Para. 37 of the judgment.

[49] *Case of Díaz Peña v. Venezuela*, judgment of June 26, 2012 (Preliminary Objection, Merits, Reparations and Costs), para. 43.

Strict adherence to the rule on prior exhaustion of domestic remedies is therefore not a mere formality or a legal nicety; respect for this rule consolidates and bolsters the inter-American system of human rights, because this is the way it guarantees the principles of legal certainty, procedural balance, and complementarity that undergird the system. The Court's judgments must leave no room whatsoever or, in the worst case, as little as possible, for the perception that they do not strictly, exclusively reflect the precepts of justice, even beyond the understandable differences of opinion that the Court's judgments may arouse, particularly by those who are antagonistic to them.

Obviously, the Court's case law is binding only on the State that has undertaken to comply with the "*judgment of the Court*" in cases to which it is a party,[50] and that for the other States Parties to the Convention it is merely an auxiliary source of public international law, that is, "*an auxiliary means to determine the rules of law*"[51]. This dissenting opinion is therefore issued in the hope that it will contribute to a process of reflection on the rule of prior exhaustion of domestic remedies and as a result, in the near future, the Court's case law on the subject would adopt the views elucidated herein.

It is also undeniable that this opinion, much like an earlier one,[52] takes into account that one of the particular imperatives facing a court such as ours is that it acts with full awareness that, as an autonomous, independent institution, it has no higher authority overseeing it. This presupposes that, out of respect for the lofty mission it has been given, it must strictly honor the limits of its role, and it must abide and develop in the sphere proper to a judicial body.

Unquestionably, proceeding in this way would be the best contribution the Court can make to consolidating and developing the inter-American system of human rights, an indispensable requirement if it is to properly safeguard these rights. The Commission's task in this

---

[50] Art. 68 of the Convention: *"1.The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."*

[51] Art. 38 of the Statute of the International Court of Justice: *"1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b. international custom, as evidence of a general practice accepted as law; c. the general principles of law recognized by civilized nations; d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bond, if the parties agree thereto."*

Art. 59 of the same Statute: "*The decision of the Court has no binding force except between the parties and in respect of that particular case"*

Art. 68 of the Convention: "1.*The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. 2. That part of a judgment that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state."*

[52] Record of complaint filed with the Court on August 17, 2011 and dissenting opinion by Judge Eduardo Vio Grossi judgment on merits, reparations and costs, *Case of Barbani Duarte et al. v. Uruguay,* October 13, 2011.

institutional framework is to promote and defend human rights,[53] the Court must apply and interpret the Convention in cases brought before it,[54] and it falls to the States to amend it if they believe necessary.[55] The system will remain strong and continue to develop if each one fulfills the specific duties assigned to it.

Eduardo Vio Grossi
Judge

Pablo Saavedra Alessandri
Registrar

---

[53] Introductory sentence of Article 41 of the Convention: *"The main function of the Commission shall be to promote respect for and defense of human rights."*

Art. 62(3) of the Convention: "*The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement."*

[55] Art. 76 of the Convention: *1. Proposals to amend this Convention may be submitted to the General Assembly for the action it deems appropriate by any State Party directly, and by the Commission or the Court through the Secretary General. 2. Amendments shall enter into force for the States ratifying them on the date when two-thirds of the States Parties to this Convention have deposited their respective instruments of ratification. With respect to the other States Parties, the amendments shall enter into force on the dates on which they deposit their respective instruments of ratification."*
Art. 39 of the Vienna Convention on the Law of Treaties*: "General rule regarding the amendment of treaties. A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except insofar as the treaty may otherwise provide."*

CONCURRING OPINION BY
JUDGE EDUARDO FERRER MAC-GREGOR POISOT

CASE OF CRUZ SANCHEZ ET AL. V. PERU

JUDGMENT OF APRIL 17, 2015
(Preliminary Objections, Merits, Reparations and Costs)

I. INTRODUCTION

1. I would like to reassert my most vehement repudiation of any kind of terrorist violence, which "is harmful to individuals and to society as a whole," as the Inter-American Court of Human Rights (hereinafter "the Court" or "the Inter-American Court") has said in other cases against Peru.[1] Although the States are under obligation to ensure security and maintain public order in their territory,[2] the fight against terrorism must be waged "within limits and according to procedures that preserve both public safety and the fundamental rights of the human person."[3] Accordingly, it is worth recalling that the Court's primary function is to safeguard human rights, regardless of the circumstances.[4]

2. It must be stressed that the purpose of the instant case was not to establish the innocence or guilt of the members of the "Chavín de Huántar" command, of the security forces who took part in the hostage rescue operation, or of the MRTA members. Rather, the case addressed, among other things, whether the acts of the State conformed to the American Convention and whether or not extrajudicial execution had taken place in the process of the hostage rescue operation."[5] The Court is not a criminal tribunal, and therefore, State responsibility under the Convention should not be confused with the criminal responsibility of private individuals."[6] In this sense, the State's international responsibility is based on its acts or omissions that violate the American Convention, and it "is a principle of international law that the State responds for the acts and omissions of any of

---

[1] *Cf.* I/A Court HR. *Case of Castillo Petruzzi et al. v. Peru. Merits, Reparations and Costs.* Judgment of May 30, 1999. Series C No. 52, para. 89; *Case of Lori Berenson Mejía v. Peru. Merits, Reparations and Costs.* Judgment of November 25, 2004. Series C No. 119, para. 91, and *Case of the Miguel Castro Castro Prison v. Peru. Interpretation of the judgment on merits, reparations and costs.* Judgment of August 2, 2008. Series C No. 181, para. 42.

[2] Para. 262 of the judgment.

[3] I/A Court HR. *Case of Castillo Petruzzi et al. v. Peru, supra,* para. 89; *Case of Lori Berenson Mejía v. Peru, supra,* para. 91, and *Case of the Miguel Castro Castro Prison v. Peru. Interpretation of the judgment on merits, reparations and costs, supra*, para. 42.

[4] *Cf.* I/A Court HR. *Case of Castillo Petruzzi et al. v. Peru, supra,* para. 89, and *Case of Lori Berenson Mejía v. Peru*, *supra,* para. 91.

[5] Para. 281 of the judgment.

[6] Para. 280 of the judgment.

its agents carried out in their official capacity, even if they are acting outside the limits of their competence”.[7]

3. The Court found in the instant case that it was not pertinent to order the payment of financial compensation for “nonpecuniary damage” for violation of the right to life against Eduardo Nicolás Cruz Sánchez or for the violations it adjudged against the family members declared victims, as it held that the judgment constituted, per se, sufficient redress and that the other measures of reparation it ordered (obligation to investigate, rehabilitation, and publication of the judgment), given the circumstances of this case, provided sufficient redress under the terms of Article 63(1) of the American Convention on Human Rights.[8]

4. There is no debate about whether the measures ordered for rehabilitation, dissemination of the judgment and pursuit of the investigations on the extrajudicial execution of Eduardo Nicolás Cruz Sánchez are fitting measures to compensate for the damage under discussion. I do believe, nonetheless, that in this case, pursuant to the principle of “comprehensive compensation” and the case law of the Inter-American Court, that it would be right to award a reasonable amount to indemnify “nonpecuniary damage” caused to family members who have been declared victims.

5. Therefore, I am offering this separate opinion with the intent of developing the principles involved in the duty to redress human rights violations and, more particularly, compensation for “nonpecuniary damage,” bearing in mind that the representatives of the victims did not request an amount in pecuniary damages.

II. ON THE DUTY TO REDRESS

6. Pursuant to the provisions of Article 63(1) of the American Convention,[9] the Court has held that “every violation of an international obligation which results in harm creates a duty to make adequate reparation, and that this provision reflects a customary norm that constitutes one of the fundamental principles of contemporary international law on State responsibility.”[10]

7. Based on this provision of the Convention, and in view of the broad powers it assigns to the Inter-American Court, the Court has pioneered the move toward a broad spectrum of measures of reparation for human rights violations, and this has become its landmark feature by comparison with other international courts;[11] the primary purpose of these measures has been full restitution

[7] Para. 281 of the judgment.

[8] Paras. 483, 484 and 485 of the judgment.

[9] Article 63(1) of the Convention says, “[i]f the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.”

[10] Para. 451 of the judgment.

[11] For example, the European Court of Human Rights has understood the concept of *restitutio in integrum* in its reparations as those measures whose purpose is to restore the situation to its previous state as before the violation, and this has led spontaneously to the amendment of domestic laws or measures adopted specifically for the particular complainant. Nonetheless, the practice as described is the exception, as in most cases, the European Court finds that it is not possible to create *restitutio in integrum*, and the European Convention on Human Rights has therefore granted the European Court the power to order measures of *just satisfaction to the injured party.* Article 41 of the European Convention says, in this regard: “*If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party”*, which generally takes the form of pecuniary compensation. Nevertheless, it has been that a literal interpretation of Article 41 of that Convention would lead to a situation in which any evaluation by the European Court concerning a violation of the Convention must be limited narrowly to the individual harmed by the violation, and therefore, the individual measures, particularly those of just satisfaction, would make it impossible to meet the objective of protecting human rights. *Cf.* García Ramírez, Sergio y Zanghi, Claudio, "*Las jurisdicciones regionales de derechos humanos y las*

(*restitutio in integrum*), that is, restoring the situation as it was prior to the harm caused by the breach of an international obligation and redressing the consequences that the breach caused, as well payment of damages.[12]

8. Thus, the concept of "comprehensive redress" has shaped the development of reparation measures. This stems from the recognition that human rights violations have a multitiered impact on victims[13], and redress must therefore be oriented not only toward redressing the rights that were infringed, but also providing comprehensive compensation and repair for the damage caused[14] and thus restoring the individuals' dignity, the quality of their lives, and the well-being and peace of mind they had before the violations. For serious human rights violations, this holds paramount importance.[15]

9. Using this perspective, the Court has found it necessary to order a range of measures, and the specific forms of redress vary according to the injury caused.[16] Thus, in addition to awarding measures of restitution and pecuniary compensation dating back to its first judgment on reparations,[17] a shift began in 2001, and measures of satisfaction and guarantees of non-recurrence took on particular significance as a means to ensure that the acts that constituted human rights violations, so adjudged by the Inter-American Court, not be repeated and to reverse their consequences. Over the years the Court has ordered: (a) investigation of the facts that produced the violations, and when relevant, to identify, prosecute and sanction those responsible;[18] (b) restoration of rights, goods and freedoms;[19] (c) rehabilitation, by means of medical, psychological and/or

---

*reparaciones y efectos de las Sentencias" i*n García Roca, Javier, Fernández, Pablo Antonio, Santolaya, Pablo y Canosa, Raúl (Editors), *El Diálogo entre los Sistemas Europeo y Americano de Derechos Humanos,* Thomson Reuters-Civitas, Pamplona, 2012, pp. 447 and 448.

[12] I/A Court HR. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs.* Judgment of July 21, 1989. Series C No. 7, para. 26.

[13] *Cf.* I/A Court HR. *Case of the Pueblo Bello Massacre v. Colombia. Merits, Reparations and Costs.* Judgment of January 31, 2006. Series C No. 140.

[14] I/A Court HR. *Case of the Río Negro Massacres v. Guatemala. Preliminary Objection, Merits, Reparations and Costs.* Judgment of September 4, 2012. Series C No. 250, para. 248; Case of *the Santo Domingo Massacre v. Colombia. Preliminary Objections, Merits and Reparations.* Judgment of November 30, 2012. Series C No. 259, para. 292, and *Case of the Massacres of El Mozote and surrounding areas v. El Salvador. Merits, Reparations and Costs.* Judgment of October 25, 2012. Series C No. 252, para. 305.

[15] *Cf.*, *inter alia*, I/A Court HR. *Case of the Mapiripán Massacre v. Colombia. Merits, Reparations and Costs.* Judgment of September 15, 2005. Series C No. 134, para. 294; *Case of the Massacres of El Mozote and surrounding areas v. El Salvador.* Merits, Reparations and Costs, *supra*, para. 305; *Case of the Las Dos Erres Massacre v. Guatemala. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 24, 2009. Series C No. 211, para. 226, and *Case of Rochac Hernández et al. v El Salvador. Merits, Reparations and Costs.* Judgment of October 14, 2014. Series C No. 285, para. 177.

[16] I/A Court HR. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs.* Judgment of August 27, 1998. Series C No. 39, para. 41, and *Case of Blake v. Guatemala. Reparations and Costs.* Judgment of January 22, 1999. Series C No. 48, para. 31.

[17] I/A Court HR. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra,* para. 25.

[18] *Cf., inter alia*, I/A Court HR. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, paras. 32 to 35; *Case of El Amparo v. Venezuela. Reparations and Costs*. Judgment of September 14, 1996. Series C No. 28, para. 61 and operative paragraph 4, and *Case of Espinoza Gonzáles v. Peru. Preliminary Objections, Merits, Reparations and Costs.* Judgment of November 20, 2014. Series C No. 289, para. 309 and operative paragraph 10.

[19] *Cf., inter alia*, I/A Court HR. *Case of Loayza Tamayo v. Peru*. *Merits.* Judgment of September 17, 1997. Series C No. 33, operative paragraph 5; *Case of Loayza Tamayo v. Peru. Reparations and Costs*. Judgment of November 27, 1998. Series C No. 42, operative paragraphs 1 to 3, and *Case of expelled Dominicans and Haitians v. Dominican Republic. Preliminary Objections, Merits, Reparations and Costs*. Judgment of August 28, 2014. Series C No. 282, paras. 452 to 457.

psychiatric care, from a psycho-social perspective;[20] (d) satisfaction by means of actions in benefit of the victims or to honor their memory;[21] (e) guarantees of non-repetition of the violations,[22] and (f) compensation for pecuniary and nonpecuniary damage.[23]

10. More recently, in what could be held as a qualitative leap forward in our understanding of reparations for human rights violations in a setting of structural or systemic violations, the Court has held that in such a situation, reparations must serve a transformational purpose "in order to produce both a restorative and a corrective effect."[24]

III. ON COMPENSATORY INDEMNIFICATION FOR NONPECUNIARY DAMAGE

11. In cases of violation of the right to life, as in the instant case, it is patently impossible to satisfy *restitutio in integrum*, and therefore the Court has found alternative ways in its case law to offer the victims' family members a form of restitution, such as material and intangible forms of indemnification.[25]

12. The definition of the scope and content of compensatory indemnification as a measure of reparation was settled in the well-known landmark decision on *Velázquez Rodríguez v. Honduras*. There the Court held that "[i]ndemnification for human rights violations is supported by international instruments of a universal and regional character"[26] and emphasized that indemnification was, in fact, the usual and most common form of redress in international law, awarded both by the Human Rights Committee and the European Court of Human Rights.[27]

13. With respect to nonpecuniary damages specifically, the Court emphasized that they "may be awarded under international law and, in particular, in the case of human rights violations"[28] and that the principle of equity should be used in setting the appropriate amount of indemnity, because these damages cannot be quantified in monetary terms. Thus, the harm is assessed according to the circumstances of each individual case.

---

[20] *Cf., inter alia*, I/A Court HR. *Case of the 19 Tradesmen v. Colombia. Merits, Reparations and Costs.* Judgment of July 5, 2004. Series C No. 109, paras. 277 and 278 and operative paragraph 9, and *Case of the Massacres of El Mozote and surrounding areas v. El Salvador. Merits, Reparations and Costs, supra*, paras. 352 and 353 and operative paragraph 9.

[21] In addition to building monuments, the Court's more recent case law has ordered the production of a documentary video, as it finds that *initiatives of this kind are significant both for the preservation of the memory and the satisfaction of the victims, and also for the recovery and restitution of the historical memory.* I/A Court HR, *Case of Rodríguez Vera et al. (the Disappeared from the Palace of Justice) v. Colombia*. *Preliminary Objections, Merits, Reparations and Costs*. Judgment of November 14, 2014. Series C No. 287, para. 579 and operative paragraph 5.

[22] *Cf., inter alia*, I/A Court HR. *Case of Garrido and Baigorria v. Argentina. Reparations and Costs, supra*, para. 41, and *Case of expelled Dominicans and Haitians v. Dominican Republic, supra,* paras. 465 and 470, as well as operative paragraphs 7 and 20.

[23] *Cf., inter alia*, I/A Court HR. *Case of Velásquez Rodríguez v. Honduras. Repairs, supra*, operative paragraphs 1, 2 and 3, and *Case of Rochac Hernández et al. v. El Salvador. Merits, Reparations and Costs.* Judgment of October 14, 2014. Series C No. 285, paras. 255 and 258 and operative paragraph 6.

[24] I/A Court HR. *Case of González et al. ("Cotton Field") v. Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 16, 2009. Series C No. 205, para. 450, and *Case of Atala Riffo and daughters v. Chile. Merits, Reparations and Costs.* Judgment of February 24, 2012. Series C No. 239, para. 267.

[25] *Cf.* I/A Court HR. *Case of Aloeboetoe et al. v. Suriname. Reparations and Costs.* Judgment of September 10, 1993. Series C No. 15, paras. 46 and 50, and *Case of Neira Alegría et al. v. Peru. Reparations and Costs*. Judgment of September 19, 1996. Series C No. 29, para. 38.

[26] I/A Court HR. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, para. 28.

[27] *Cf.* I/A Court HR. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, para. 25.

[28] I/A Court HR. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra*, para. 27.

14. Nonpecuniary damage "may include both the suffering and distress caused to the direct victims and their next of kin, and the impairment of values that are highly significant to them, as well as other sufferings of a nonpecuniary nature in the living conditions of the victims or their families."[29] Thus, it includes not only moral injury such as psychological trouble, but also physical problems and damage to the life plans of both the direct victims and their family members, given that the victim's suffering extends to the closest members of the family, particularly those who were in close, affective contact with the victims.[30]

15. When the Court made its decision on the means and amount of compensation to indemnify family members of the victims in the case of *Neira Alegría et al. v. Peru*, regarding the events that took place in the "El Frontón" prison, it recognized that "there are numerous cases in which other international tribunals have decided that a condemnatory judgment constitutes per se adequate reparation for moral damages."[31] Nevertheless, in analyzing the peculiarities of that case and bearing in mind that a conviction alone "would not suffice, owing to the particular seriousness of the violation of the right to life and of the moral suffering inflicted on the victims and their families," it found that they also deserved fair compensation.[32]

16. The Court was clearly consistent thereafter, and even though it held that the delivery of a verdict was a form of redress on its own merits, it also recognized and held that human rights violations had been perpetrated by the State, and therefore it has habitually awarded compensation to direct victims and the members of their families[33] based on the circumstances of the individual case, the nature and seriousness of the violations committed, and the suffering of victims.

17. Even if nonpecuniary damage can be redressed with other measures of comprehensive reparation, as in the cases *"The Last Temptation of Christ" (Olmedo Bustos et al. v. Chile)*[34] and *Claude Reyes et al. v. Chile,*[35] the decision not to award monetary reparation continues to be the exception. In only a very few cases, including this one, has the Court refrained from awarding compensatory indemnity for nonpecuniary damage.[36] The Court's usual practice, particularly in cases against Peru, has been to award pecuniary damages even in cases of victims charged with crimes of terrorism.[37]

---

[29] I/A Court HR. *Case of the "Street Children" (Villagrán Morales et al v. Guatemala. Reparations and Costs.* Judgment of May 26, 2001. Series C No. 77, paras. 84 and 88, and *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia, supra,* para. 600.

[30] I/A Court HR. *Case of Las Palmeras v. Colombia. Reparations and Costs*. Judgment of November 26, 2002. Series C No. 96, para. 55.

[31] I/A Court HR. *Case of Neira Alegría et al. v. Peru. Reparations and Costs, supra*, para. 56.

[32] I/A Court HR. *Case of Neira Alegría et al. v. Peru. Reparations and Costs, supra*, para. 56.

[33] *Cf.* I/A Court HR. *Case of the Serrano Cruz Sisters v. El Salvador. Interpretation of the judgment on merits, reparations and costs*. Judgment of September 9, 2005. Series C No. 131, para. 32.

[34] *Cf.* I/A Court HR. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile. Merits, Reparations and Costs.* Judgment of February 5, 2001. Series C No. 73, para. 99.

[35] *Cf.* I/A Court HR. *Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs.* Judgment of September 19, 2006. Series C No. 151, para. 156.

[36] In addition to those cited here, see I/A Court HR. *Case of Castillo Petruzzi et al. v Peru, supra*, paras. 223 and 225; *Case of Fermín Ramírez v. Guatemala. Merits, Reparations and Costs.* Judgment of June 20, 2005. Series C No. 126, para. 130; *Case of Raxcacó Reyes v. Guatemala. Merits, Reparations and Costs.* Judgment of September 15, 2005. Series C No. 133, para. 131. The representatives in the Barbadian death penalty cases expressly stated that they were not seeking pecuniary reparations. *Cf.* I/A Court HR. *Case of Boyce et al. v. Barbados. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 20, 2007. Series C No. 169, paras. 125 to 127, and *Case of Dacosta Cadogan v. Barbados. Preliminary Objections, Merits, Reparations and Costs.* Judgment of September 24, 2009. Series C No. 204, para. 114.

[37] *Cf.* I/A Court HR. *Case of De La Cruz Flores v. Peru. Merits, Reparations and Costs.* Judgment of November 18, 2004. Series C No. 115; *Case of Loayza Tamayo v. Peru. Reparations and Costs, supra*; *Case of Cantoral Benavides v. Peru.*

IV. ON COMPENSATORY INDEMNIFICATION FOR NONPECUNIARY DAMAGE IN THE INSTANT CASE

18. I agree that the judgment is, per se, a form of reparation, as the Court has held since 1989.[38] I further believe, however, that in the instant case, it is not enough, and an amount should have been awarded in equity for the nonpecuniary damage inflicted on family members for the violations that were adjudged and declared in the judgment. The Court's customary rationale has been that damage caused by a human rights violation reaches beyond the direct victim and also touches family members because of the close tie they share.

19. It should be understood that, even though the Court's usual model for comprehensive reparation includes a broad spectrum of measures of reparation, there are certain forms of violation that, by their very nature, preclude *restitutio in integrum*; it thus becomes essential to award compensation as a way to offset the damage caused by the arbitrary taking of life.

20. I would particularly like to emphasize in this case the seriousness of the acts for which the State was found internationally responsible: the extrajudicial execution of a person who was out of combat and who, the last time he was seen alive, was in State custody.[39] Furthermore, serious irregularities were confirmed in the handling of the scene and the removal of the bodies, as well as shortcomings in the performance of the first autopsies.[40]

21. In the case of Meléndez Cueva and Peceros Pedraza, moreover, the bodies had not yet been positively identified when the burials were ordered. Nor were the families notified before they were buried.[41] The Court also recognized the damage inflicted on Edgar Odón Cruz Acuña because of his brother's death, which had personal repercussions and triggered feelings of fear and helplessness, as was stated and confirmed in the judgment.[42]

22. The Court also found that the judicial process before the Peruvian courts did not take place within a reasonable period, and the State cannot demonstrate that it has taken measures necessary to locate one of the accused who is currently a fugitive; as such, the whole truth about the events surrounding the extrajudicial execution of Eduardo Nicolás Cruz Sánchez is still not known, according to the judgment,[43] and also in view of the findings by the Supreme Court of Peru, to the effect that "there are still certain details about the facts, associated with victim Cruz Sánchez, that can and must be clarified through a more intense line of investigation."[44]

Reparations and Costs. Judgment of December 3, 2001. Series C No. 88; *Case of García Asto and Ramírez Rojas v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 25, 2005. Series C No. 137; *Case of J. v. Peru. Preliminary Objection, Merits, Reparations and Costs.* Judgment of November 27, 2013. Series C No. 275, and *Case of Espinoza Gonzáles v. Peru, supra*.

38 I/A Court HR. *Case of Velásquez Rodríguez v. Honduras. Reparations and Costs, supra,* para. 36.

39 Paras. 316 to 319 of the judgment.

40 Para. 431 of the judgment.

41 Paras. 172 and 371 of the judgment.

42 Para. 450 of the judgment.

43 Para. 429 of the judgment. This case is somewhat unlike other cases in which the Court has found that the right to know the truth is "subsumed" in the right of victims or their family members to have the competent bodies of the State clarify violations and attach the pertinent responsibilities; in the instant case, the Court did not subsume the rights in this way, but instead found that there was no need to give a specific ruling on violation of the right to know the truth, given the violations already declared and the particular details of the case (para. 430 of the judgment).

44 Para. 429 of the judgment.

23. Given these circumstances, the Court should have awarded reparations as it has customarily done. The decision not to award compensatory indemnification for nonpecuniary damage to the family members held as victims in the judgment, with the argument that the direct victim was considered a terrorist or the perpetrator of unlawful acts that should be energetically decried, could prove discriminatory in view of the Court's precedents in similar cases, when family members are exposed to reproach for acts they did not commit, and bearing in mind that the families of the direct victims are victims in their own right.[45] Of course, it would be important to evaluate the amount to be awarded based on the standards developed by the Inter-American Court, and in view of the particular features of the case, but the Court should not fail to award compensatory damages when the violations and injury to family members have been proven and established.

Eduardo Ferrer Mac-Gregor Poisot
Judge

Pablo Saavedra Alessandri
Registrar

---

[45] *Cf.* I/A Court HR. *Case of Bueno Alves v. Argentina. Merits, Reparations and Costs.* Judgment of May 11, 2007. Series C No. 164, para. 102; *Case of the Rochela Massacre v. Colombia. Merits, Reparations and Costs.* Judgment of May 11, 2007. Series C No. 163, para. 137, and *Case of the Miguel Castro Castro Prison v. Peru. Merits, Reparations and Costs.* Judgment of November 25, 2006. Series C No. 160, para. 335.